(32)

No. 96-270-CFX Title: Amchem Products, Inc., et al., Petitioners
v.
George Windsor, et al.

Docketed: August 19, 1996 Court: United States Court of Appeals for the Third Circuit

Entry	Date	Proceedings and Orders
	Aug 19 1996	Petition for writ of certiorari filed. (Response due September 30, 1996)
	Aug 19 1996	Appendix of petitioner filed.
	Aug 30 1996	Waiver of right of respondents Gibraltar Casualty Company & Prudential Reinsurance Company to respond filed.
	Sep 9 1996	Order extending time to file response to petition until September 30, 1996.
	Sep 9 1996	This extension is granted for all respondents.
	Sep 13 1996	Waiver of right of respondent Kathryn Toy to respond filed.
	Sep 18 1996	Waiver of right of respondents AIU Insurance Company, et al. to respond filed.
	Sep 18 1996	Brief of respondents Casimir Balonis, et al. in opposition filed.
	Sep 27 1996	Motion of Chamber of Commerce of the United States of America, et al. for leave to file a brief as amici curiae filed.
	Sep 30 1996	Brief of respondents White Lung Association of New Jersey, et al. in opposition filed.
	Sep 30 1996	Motion of National Association of Manufacturers for leave to file a brief as amicus curiae filed.
	Sep 30 1996	Brief of respondents Aileen Cargile, et al. in opposition filed.
	Sep 30 1996	Brief of respondents George Windsor, et al. in opposition filed.
	Oct 11 1996	Reply brief of petitioners Amchem Products, Inc. et al. filed.
	Oct 16 1996	DISTRIBUTED. November 1, 1996
	Nov 1 1996	Motion of Chamber of Commerce of the United States of America, et al. for leave to file a brief as amici curiae GRANTED.
	Nov 1 1996	Motion of National Association of Manufacturers for leave to file a brief as amicus curiae GRANTED.
	Nov 1 1996	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday December 16, 1996. The brief of respondents is to be filed with the Clerk and served uopn opposing counsel on or before 3 p.m., Wednesday, January 15, 1997. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply. SET FOR ARGUMENT February 18, 1997. **********
	Nov 6 1996	CORRECTED ORDER: The motion of Chamber of Commerce of the United States of America, et al. for leave to file a brief as amici curiae is GRANTED. The motion of National Association of Manufacturers for leave to file a brief as amicus curiae is GRANTED. The petition for a writ of

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No. 96-270-CFX

Entry	Date	Proceedings and Orders
		certiorari is GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 16, 1996. The briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 15, 1997. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply. Justice O'Connor took no part in the consideration or decision of these motions and this petition and will take no part in the consideration or decision of this case.
	Dec 10 1996	Motion of respondents Aileen Cargile, et al. to substitute parties filed.
	Dec 16 1996	Joint appendix filed.
	Dec 16 1996	Brief of petitioners Amchem Products, et al. filed.
	Dec 16 1996	Brief of respondents Robert Georgine, et al. and the Plaintiff Class in support of petitioners filed.
	Dec 16 1996	Brief amici curiae of Rhone-Poulenc Rorer Inc., et al. filed.
	Dec 16 1996	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae filed.
	Dec 16 1996	Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae filed.
	Dec 19 1996	CIRCULATED.
	Dec 24 1996	Motion of National Association of Securities and Commercial Lawyers for leave to file a brief as amicus curiae filed.
	Dec 30 1996	REDISTRIBUTED. January 3, 1997
	Jan 6 1997	Motion of respondents Aileen Cargile, et al. to substitute parties GRANTED. Justice O'Connor OUT.
	Jan 13 1997	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae GRANTED. Justice O'Connor OUT.
	Jan 13 1997	Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae GRANTED. Justice O'Connor OUT.
	Jan 13 1997	Motion of National Association of Securities and Commercial Lawyers for leave to file a brief as amicus curiae GRANTED. Justice O'Connor OUT.
	Jan 15 1997	Brief of respondents White Lung Association of New Jersey, et al. filed.
	Jan 15 1997	Brief of respondents George Windsor, et al. filed.
	Jan 15 1997	Brief of respondents Aileen Cargile, Betty Francom, John Wong, et al. filed.
	Jan 15 1997	Brief of respondents Casimir Balonis and Margaret Balonis filed.
	Jan 15 1997	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Jan 15 1997	Brief amici curiae of New York, et al. filed.
	Jan 15 1997	Brief amicus curiae of Owens-Illinois, Inc. filed.
	Jan 15 1997	Brief amicus curiae of Trial Lawyers for Public Justice, P.C. filed.

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Entry	Date	Proceedings and Orders
	Jan 15 1997	Motion of Douglas Laycock, et al. for leave to file a brief as amici curiae filed.
	Jan 15 1997	Motion of Asbestos Victims of America for leave to file a brief as amicus curiae filed.
	Jan 22 1997	Application (A96-525) for leave to file a reply brief in excess of the page limits, submitted to Justice Souter.
	Jan 23 1997	Application (A96-525) granted by Justice Souter, allowing a maximum of 30 pages.
	Jan 24 1997	Motion of respondents Aileen Cargile, et al. for divided argument filed.
	Jan 27 1997	Opposition of respondents White Lung Association of New Jersey, et al. to motion of respondents Aileen Cargile, et al. for divided argument filed.
	Jan 29 1997	Record filed.
	Jan 29 1997	Record filed.
	Feb 7 1997	Motion of Douglas Laycock, et al. for leave to file a brief as amici curiae GRANTED. Justice O'Connor OUT.
	Feb 7 1997	Motion of Asbestos Victims of America for leave to file a brief as amicus curiae GRANTED. Justice O'Connor OUT.
	Feb 7 1997	Motion of respondents Aileen Cargile, et al. for divided argument DENIED. Justice O'Connor OUT.
	Feb 7 1997	Reply brief of petitioners Amchem Products, et al. filed.
	Feb 18 1997	ARGUED.

Supreme Court, U.S.
FILED

No. 96 270 AUG 19 1996

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners

v.

GEORGE WINDSOR, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the parties to a putative class action enter into a settlement, must the district court nevertheless pretend that every legal and factual issue in the case will be contested, and ignore the existence of the settlement, in determining whether class certification is appropriate under Federal Rule of Civil Procedure 23.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioners in this case are Amchem Products, Inc., A.P. Green Industries, Inc., Armstrong World Industries, Inc., Certainteed Corporation, C.E. Thurston & Sons, Inc., Dana Corporation, Ferodo America, Inc., Flexitallic, Inc., GAF Building Materials, Inc., I.U. North America, Inc., Maremont Corporation, Asbestos Claims Management Corporation, National Services Industries, Inc., Nosroc Corporation, Pfizer Inc., Quigley Company, Inc., Shook & Fletcher Insulation Company, T&N, plc, Union Carbide Corporation, and United States Gypsum Company. The other parties to the proceeding and petitioners' parent companies and nonwholly owned subsidiaries are set forth at App. 292a-317a.

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PETITION FOR A WRIT OF CERTIORARI

Amchem Products, Inc., et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-66a) is reported at 83 F.3d 610. The opinion and order of the district court granting the preliminary injunction (App. 67a-87a) are reported at 878 F. Supp. 716. The opinion and order of the district court approving the settlement and certifying the class (App. 88a-276a) are reported at 157 F.R.D. 246.

JURISDICTION

The judgment of the court of appeals (App. 277a-282a) was entered on May 10, 1996, and a timely petition for rehearing was denied on June 27, 1996 (App. 283a-288a). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RULE INVOLVED

Pertinent provisions of Federal Rule of Civil Procedure 23 are set forth at pages 290a-291a of the appendix to this petition.

STATEMENT

This case involves the settlement of a nationwide class action encompassing hundreds of thousands of individual asbestos claims and more than one billion dollars in settlement payments. The court below characterized the settlement as "arguably a brilliant partial solution to the scourge of asbestos that has heretofore defied global management in any venue." App. 18a.

The Third Circuit nonetheless invalidated the settlement, holding that where the parties to a putative class action enter into a settlement, the court must act as if the settlement does not exist and apply the class certification criteria of Federal

Rule of Civil Procedure 23 "as if the case were to be litigated." *Id.* at 19a. In other words, the district court must decide a hypothetical case — not the case actually before it.

The Third Circuit's ruling throws the law governing class action settlements into complete confusion. Only a few weeks ago, the Fifth Circuit, reaffirming prior decisions, upheld an asbestos class action settlement, approving class certification because of the existence of the settlement and expressly disagreeing with the Third Circuit's "ignore-the-settlement" approach. Several other courts of appeals have also relied on the fact of settlement in applying Rule 23's certification criteria. The Third Circuit itself has recognized that its rule conflicts with the standard applied by the other courts of appeals.

This square conflict among the courts of appeals means that, until this Court resolves the issue, courts reviewing class action settlements cannot be sure what criteria to apply in deciding whether to certify a settlement class. Under the Third Circuit's rule, mass tort cases as well as virtually every other type of class action cannot be settled, but must go on through years of grinding litigation.

It is critically important for courts and litigants to know whether the Third Circuit's decision is right or wrong. Among the most important benefits of settlement are certainty and finality. The confusion created by the Third Circuit regarding a key element of the class action settlement equation means that parties will have neither — instead, the only sure consequence of a settlement, as in this case, will be more litigation. If the Third Circuit is wrong but its ruling remains unreviewed, the decision will unjustifiably deter parties from settling and force them unnecessarily to litigate these cases on the merits. If the Third Circuit is right and its approach ultimately prevails nationwide, parties that choose to enter into settlements in reliance on the decisions of other courts of appeals eventually will see those settlements overturned. This Court should grant review to clarify the

governing standard and prevent the enormous waste of both judicial and private resources that is the inevitable real-world result of these conflicting rulings.

Moreover, the issue arises here in a case of paramount importance. Allowing the Third Circuit's decision to stand unreviewed will trigger the filing of tens of thousands of claims against petitioners in the federal and state courts (those filings are stayed under an injunction issued by the district court to implement the settlement). The courts, litigants, and public will again be condemned to an asbestos litigation quagmire. This Court should decide whether the Third Circuit was correct in concluding that Rule 23 mandates that unpalatable result.

1. *Background and Settlement Negotiations.* This lawsuit and its settlement arose out of the nation's asbestos litigation crisis. The nature and extent of that crisis are well documented. Hundreds of thousands of cases have been filed; some 150,000 cases are pending in federal and state courts today; and new cases continue to flood the courts at a staggering and even accelerating pace (in 1995 alone, over 50,000 new claims were filed against some asbestos defendants).[1] The Judicial Conference Ad Hoc Committee on Asbestos Litigation, which was appointed by Chief Justice Rehnquist to examine the asbestos litigation crisis, found in 1991 that "the situation has reached critical dimensions and is getting worse." It summarized the nature of the problem as follows:

> [D]ockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

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[1] See SEC Form 8-K, Owens Corning Corp., June 20, 1996, at 4-5.

Report at 3, quoted in *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 419 (J.P.M.L. 1991). Moreover, as courts have recognized, the "[r]esults of jury verdicts are capricious and uncertain" in asbestos cases — to the point where "[t]he asbestos litigation often resembles the casinos 60 miles east of Philadelphia, more than a courtroom procedure." *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1001 (3d Cir.) (citation omitted), cert. denied, 479 U.S. 851 (1986).[2]

The Judicial Conference Committee further concluded that "[t]he transaction costs associated with asbestos litigation are an unconscionable burden on the victims of asbestos disease," citing a RAND Corporation finding that, "of each asbestos litigation dollar, 61 cents is consumed in transaction costs * * *. Only 39 cents were paid to the asbestos victims." Report at 13 (footnote omitted). These tremendous costs diminish the funds available to compensate future plaintiffs: "[u]nfairness results because of the excessive transaction costs and the finite resources available to pay meritorious claims. This situation demands immediate remedy." *Id.* at 14.

Against this background, the parties to the asbestos litigation were repeatedly urged by the federal judiciary and others to seek an "all-encompassing" settlement. App. 111a, 270a-271a. In 1991, at the request of eight district judges, the Judicial Panel on Multidistrict Litigation ("MDL Panel") transferred all federal asbestos personal injury cases to the Eastern District of Pennsylvania for pretrial proceedings in hopes of fostering settlement of the "asbestos mess" (771 F. Supp. 415, 424). After that transfer, leaders of the plaintiffs' asbestos bar and counsel for all of the major asbestos defendants tried to achieve such a settlement (App. 113a). When those efforts deadlocked, the co-chairs of the plaintiffs' MDL Steering Committee and the 20 defendant companies in this

[2] As the district court found, the tort system's severe problems handling asbestos claims continue unabated today. App. 240a.

case negotiated a settlement of all future claims against these companies. As the district court found, those "difficult, lengthy" negotiations, conducted by sophisticated counsel with many years of experience litigating asbestos personal injury cases in the tort system, were "vigorous" and the settlement terms "changed substantially during the negotiations." *Id.* at 116a. In negotiating the settlement, these experienced parties were able to draw upon their "knowledge of this very mature litigation," as well as a uniquely massive historical record of jury awards and settlements (including confidential data that defendants shared with plaintiffs' counsel), and decades of discovery, medical evidence, and judicial review concerning claims of the kind advanced by the class. *Id.* at 116a, 239a.

2. *The Terms of the Settlement.* The 106-page settlement as finally negotiated covers all persons who have been occupationally exposed to asbestos but had not filed their own asbestos personal injury lawsuits before this case was initiated, a class that includes hundreds of thousands of persons. As the district court held in a detailed fairness decision that was not challenged in this appeal, the settlement establishes medical criteria that properly qualify a claimant for compensation if he or she contracts an asbestos-related condition. App. 112a-136a. The settlement then provides monetary compensation that varies with the severity of the condition and takes into account all of the factors that are taken into account in the tort system. *Id.* at 136a-139a. In the first ten years alone, up to $1.3 billion will be paid out under the agreement. *Id.* at 164a-165a. Claims for compensation will be resolved by a claims resolution system in far less time and with far lower transaction costs than in the tort system. *Id.* at 268a.

Persons who do not currently have an asbestos-related condition, as defined by the medical criteria, will receive compensation if they contract an asbestos-related condition in the future. In addition, such persons receive a set of present

benefits under the settlement that the district court found to have substantial value. Those include (1) the assurance of faster and less expensive resolution in the event of future claims; (2) the opportunity for individuals who have been compensated for non-malignant conditions to obtain further compensation if they later develop cancer or mesothelioma; (3) waiver of defenses to liability; and (4) tolling of statutes of limitations. App. 173a-176a. By contrast, as the district court found, the tort system typically gives such persons only "modest cash settlements" in exchange for giving up "all future rights by general releases." *Id.* at 173a.

As the district court concluded, the settlement terms establish the kind of claims resolution system endorsed by the Ad Hoc Committee appointed by Chief Justice Rehnquist to study the asbestos litigation crisis. App. 111a, 271a. Indeed, the reporter for the Ad Hoc Committee testified that the settlement comports with the Ad Hoc Committee's recommendations. See *id.* at 265. The settlement has been endorsed as fair and reasonable by the AFL-CIO and its Building and Construction Trades Department, which represent a substantial percentage of class members. *Id.* at 247a. The AFL-CIO also has a role in monitoring implementation of the settlement. *Id.* at 158a.

3. *District Court Proceedings*. After the proposed settlement was filed, the district court conditionally certified the class for settlement purposes only. App. 260a. Subsequently, the district court ruled that it had subject matter jurisdiction, 834 F. Supp. 1437, and approved a plan to give notice to the class, 158 F.R.D. 314. That plan was implemented at a cost of over $7 million and included hundreds of thousands of individual notices, a wide-ranging television and print campaign, and significant additional efforts by numerous unions to notify their members. App. 216a-223a. Thus, all class members were afforded a reasonable opportunity to opt out of the class. *Id.* at 216a-223a, 263a-267a.

After extensive pre-hearing discovery, the district court held a five-week hearing on the fairness of the settlement and the adequacy of representation. Five months later, it issued a thorough decision finding that (1) the requirements for class certification are met in light of the parties' settlement, App. 225a; (2) the settlement is fair, *id.* at 115a-176a, 234a-248a; (3) class counsel had no conflict of interest and provided vigorous representation of the entire class, *id.* at 262a; and (4) notice to the class satisfied Fed. R. Civ. P. 23 and due process, *id.* at 267a.

Based on the evidence adduced at the hearing, which included the 25-year record of asbestos litigation — "probably the most mature mass tort litigation in this country" (App. 115a) — the district court found that the settlement agreement's compensation schedule is a "reasonable reflection of [petitioners'] historical settlement averages from the tort system." *Id.* at 95a. In light of that determination, and its other findings regarding the benefits to the plaintiff class, the district court found the settlement fair and reasonable. *Id.* at 115a-176a, 234a-248a. Accordingly, the district court approved the settlement, stating (*id.* at 270a):

> The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease. Indeed, these unimpaired victims have, in many states, been forced to assert their claims prematurely or risk giving up all rights to future compensation for any future lung cancer or mesothelioma. The plan which this Court approves today

will correct that unfair result for the class members and the CCR defendants.

The court subsequently enjoined class members from pursuing claims against the defendants outside of the settlement. *Id.* at 271a.[3] The parties have been operating under the settlement, processing and paying claims, for over two years.

4. *The Court of Appeals' Decision* The persons who objected to the settlement appealed the district court's preliminary injunction barring class members from instituting claims against petitioners. These parties did not challenge the district court's findings regarding the fairness of the settlement, but instead advanced a variety of constitutional contentions, including arguments based on due process, standing, and nonjusticiability doctrines; they also contended that the district court erred in granting the motion for class certification.

The court of appeals reversed, holding that the class certification violated Federal Rule of Civil Procedure 23 and that the settlement therefore had to be invalidated. App. 57a-59a. The basis for that decision was the court of appeal's conclusion that the district court had to determine whether the criteria for class certification, as set out in Rule 23, were "satisfied without taking into account the settlement, and as if the action were going to be litigated." *Id.* at 39a. The court conceded that "the better policy" may be to take the settlement into account, but held that the language of Rule 23 does not permit a court to do so. *Id.* at 19a, 39a.

Applying its new interpretation of Rule 23, the court of appeals then held that the class could not be certified for *litigation* of the asbestos personal injury claims being resolved in the settlement. App. 38a-57a. This meant, according to

[3] Because a third-party insurance claim remained pending, the district court's order took the form of a preliminary (rather than permanent) injunction.

the court, that the class cannot be certified for the purpose of *settling* those claims either.

For example, the court of appeals concluded that the class does not satisfy Rule 23(b)(3)'s requirement that common questions of law or fact predominate over individual questions because class members had different types of exposure to asbestos and "[d]ifferences in amount of exposure and nexus between exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff"; moreover, "because we must apply an individualized choice of law analysis to each plaintiff's claims, the proliferation of disparate factual and legal issues is compounded exponentially." App. 41a (citation omitted). Even though the settlement eliminated the parties' dispute regarding *all* of these issues, the court concluded that those issues nevertheless still prevent the class from being certified.

The court of appeals denied the petitions for rehearing and suggestions for rehearing in banc filed by petitioners and by the named class representatives. Judge Scirica would have granted rehearing in banc. App. 283a-288a. The court of appeals stayed the issuance of its mandate pending the filing of a certiorari petition. *Id.* at 289a.

The result is that, on class certification grounds, the parties' hard-fought, fair, and urgently-needed settlement — a settlement approach that had been urged upon the parties by various federal district judges as well as by the Judicial Conference's Ad Hoc Committee — will be lost, unless this Court intervenes.

REASONS FOR GRANTING THE PETITION

There is a square conflict among the courts of appeals regarding the question presented. That conflict is starkly illuminated by the contrast between the Fifth Circuit's recent decision in *In re Asbestos Litigation*, 1996 WL 421990 (July 26, 1996), and the decision below. Both cases involve

nationwide settlements of asbestos claims; the Third Circuit concluded that the settlement could not be considered in determining whether a class could be certified, while the Fifth Circuit upheld class certification based on a legal standard that *required* consideration of the settlement. In addition, as the Third Circuit itself has acknowledged, other courts of appeals also have rejected its approach. This sharply different treatment of similarly-situated litigants creates an intolerable conflict — and severe unfairness — that this Court should resolve.

This issue does not arise only in connection with mass tort class action settlements. Courts frequently must decide whether to certify a class in the context of a settlement. The differing legal standards adopted by the courts of appeals create confusion regarding the proper rule and, by making settlements chancy propositions, will strongly discourage them. Respondents themselves "agree that this case involves issues of great importance and complexity." Response of Appellants Preston *et al.* to Motion to Third Circuit for Stay of Mandate at 5. Review by this Court is urgently needed.

A. The Third Circuit's Rule Conflicts With The Decisions Of Every Other Court Of Appeals That Has Addressed The Issue.

Every court of appeals that has addressed the question — other than the Third Circuit — has concluded that the existence of a settlement should be taken into account in applying the Rule 23 criteria. Indeed, the Third Circuit in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir.), cert. denied, 116 S. Ct. 88 (1995) (*GM Trucks*) (in an opinion also authored by Judge Becker), acknowledged that other courts of appeals have taken the existence of a settlement into account in upholding class certification. 55 F.3d at 798. It then went on to "disagree with th[at] approach." *Id.* at 799. The decisions of other courts of appeals, and other authorities, confirm the existence of the conflict recognized in *GM Trucks*.

1. The Fifth Circuit recently explicitly rejected the Third Circuit's approach, observing that "[m]ost circuits to decide the issue have held that courts should consider the settlement in determining whether Rule 23 prerequisites are satisfied" and that "[o]nly the Third Circuit has refused to look at settlements before it when deciding class certification issues." *In re Asbestos Litig.*, 1996 WL 421990 at *9. The Fifth Circuit case involved a settlement class action also implementing a global resolution of asbestos-related claims that substitutes an administrative claims process for the tort litigation system. The Fifth Circuit concluded that it was "bound" by prior Circuit precedent to hold "that the district court can and should look at the terms of a settlement in front of it as part of its certification inquiry," and added that it "would adopt this rule even if [it] were not bound by precedent because it enhances the ability of district courts to make informed certification decisions." *Id.* at *9 (citing *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir.), aff'd, 659 F.2d (1981), cert. denied, 456 U.S. 998 & 1012 (1982)). See also *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 178 (5th Cir. 1979) (Wisdom, J.) (upholding a class certification for settlement purposes only and stating that "it is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context") (citation omitted).

Other courts of appeals agree with the Fifth Circuit. *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989), for example, involved the settlement of tort claims of "literally hundreds of thousands of" persons alleging injury from the Dalkon Shield birth control device (*id.* at 740). One issue before the Fourth Circuit was whether "class certification for settlement purposes is permissible under Rule 23." *Id.* at 738. The court discussed several authorities addressing this issue, and reached precisely the opposite conclusion of the Third Circuit in the present case:

> If not a ground for certification per se, certainly settlement should be a factor, and an important factor, to be considered when determining certification. That is all the District Court did in this case. Its action in considering this circumstance would appear to have been appropriate.

Id. at 740. In upholding the district court's certification decision, the Fourth Circuit itself relied repeatedly on the existence of the settlement. See, *e.g.*, *id.* at 742-43, 744.

The Ninth Circuit also upheld class certification based on the existence of a settlement in *Officers for Justice* v. *Civil Serv. Comm'n*, 688 F.2d 615 (1982). The court stated that it had "serious doubts, but no way of knowing, whether all aspects of this cause could have been litigated to a conclusion entirely within the class action mode." *Id.* at 633. Observing that it "[was] not, however, faced with that situation" and that "certification issues raised by class action litigation that is resolved short of a decision on the merits must be viewed in a different light," the court of appeals approved the certification "[f]or purposes of the consent decree." *Ibid.* Other courts have recognized the same rule. See *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1543 (11th Cir. 1987); *Malchman* v. *Davis*, 761 F.2d 893, 900 (2d Cir. 1985) (relying upon the settlement agreement in upholding the district court's certification decision, specifically citing "the interests of the members of the broadened class *in the settlement agreement*") (emphasis added); *Weinberger* v. *Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982) (Friendly, J.) (recognizing that parties may "'compromise * * * class [action] issues'" through use of classes certified for settlement purposes) (citation omitted); see also *White* v. *National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) (finding adequate class representation based upon "the settlement itself"), cert. denied, 115 S. Ct. 2569 (1995).

2. The conflict among the courts of appeals is further confirmed by the numerous district court decisions relying on the existence of a settlement in granting requests for class certification. Thus, trial courts in the First,[4] Second,[5] Fourth,[6] Fifth,[7] Sixth,[8] Seventh,[9] Tenth,[10] and Eleventh[11]

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[4] *In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301, 308-09 (D. Mass. 1987) (even though certifiability of a litigation class would have been a "competitive question" on the facts of the case, that "is an issue that the parties may properly seek to compromise and settle").

[5] *In re Marine Midland Motor Vehicle Leasing Litig.*, 155 F.R.D. 416, 420, 426 (W.D.N.Y. 1994) (certifying settlement class while noting that Second Circuit had denied certification of a similar class for litigation purposes); *In re First Investors Corp. Sec. Litig.*, 1993 U.S. Dist. LEXIS 18044, at *14 (S.D.N.Y. Dec. 22, 1993) (certifying class "for settlement purposes only" while noting that there was "no guarantee" that class could have been certified for trial); *Chatelain* v. *Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) (certifying settlement class and noting that certification would be contested for litigation purposes and that class faced risk of losing); *Smith* v. *Vista Org.*, 1991 U.S. Dist. LEXIS 10484, at *24 (S.D.N.Y. July 30, 1991) (certifying class "purely for the purposes of settlement" and noting that certification for litigation would have been "highly contested"); *In re Cuisinart Food Processor Antitrust Litig.*, 1983-2 Trade Cases ¶ 65,680 at p. 69,472 (D. Conn. 1983) (certifying settlement class even though "plaintiffs' liaison counsel admitted * * * the risk that a [litigation] class would not [have been] certified is a substantial one"); *Desimone* v. *Industrial Bio-Test Labs., Inc.*, 83 F.R.D. 615, 620 (S.D.N.Y. 1979) (certifying settlement class even though the court had "twice denied certification" of a class for litigation purposes and "[w]ere a trial to replace settlement, the chances are very slim that" the class could have been certified); *City of Detroit* v. *Grinnell Corp.*, 356 F. Supp. 1380, 1390 (S.D.N.Y. 1972) (certifying settlement class even though question of certifying a litigation class "is neither easy nor free from doubt").

[6] *South Carolina Nat'l Bank* v. *Stone*, 749 F. Supp. 1419, 1428 (D.S.C. 1990) (noting that, while the court had not determined whether a litigation class could be certified, "it is clear" that court could certify a settlement class); *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp.

1379, 1390-91 (D. Md. 1983) (certifying settlement class even though court had twice denied certification of litigation class).

[7] *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 960-61 (N.D. Ga. 1980) (certifying nationwide settlement class and approving settlement despite "serious doubts" that class could have been certified for litigation), aff'd, 669 F.2d 228 (5th Cir. 1982); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357, 1373 (N.D. Ga. 1979) (certifying nationwide settlement class although there were "great" risks that class could not have been certified for litigation), aff'd in part and rev'd in part on other grounds, 645 F.2d 488 (5th Cir. 1981).

[8] *Bowling* v. *Pfizer, Inc.*, 143 F.R.D. 141, 158-60 (S.D. Ohio 1992) (relying on existence of settlement in certifying nationwide settlement class in heart valve tort litigation and distinguishing case in which certification was denied on ground that it "dealt with a proposed class action for litigation"); *In re Dunn & Bradstreet Credit Serv. Customer Litig.*, 130 F.R.D. 366, 369, 371 (S.D. Ohio 1990) (same) (certifying class solely for settlement purposes while noting that certification for litigation would have been contested); *In re Bendectin Prods. Liab. Litig.*, 102 F.R.D. 239, 240 n.4, 241 (S.D. Ohio) (certifying nationwide settlement class after denying certification of litigation class), rev'd on other grounds, 749 F.2d 300, 305 n.10 (6th Cir. 1984) (noting but not reaching this issue).

[9] *Arenson* v. *Chicago Board of Trade*, 372 F. Supp. 1349, 1353-54 (N.D. Ill. 1974) (certifying settlement class even though, absent the settlement, "it is quite possible that the plaintiffs' class would not have been certified, causing the death of this * * * litigation").

[10] *In re Petro-Lewis Sec. Litig.*, 1984-85 Fed. Sec. L. Rep. ¶ 91,899, at p. 90,470 (D. Colo. 1984) (certifying settlement class even though "there is doubt whether this action could be certified" for purposes other than settlement).

[11] *Woodward* v. *NOR-AM Chem. Co.*, 1996 U.S. Dist. LEXIS 7372, at *41 (S.D. Ala. May 23, 1996) ("it [was] not necessary to decide" whether the case could have been litigated as a class action, since "[i]t is well established that a court may certify a class for settlement purposes even where it could not certify the same class for litigation purposes"); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994) (relying on existence of settlement in

Circuits have certified a settlement class after declining to certify a litigation class or expressing doubt whether a litigation class could be certified.

3. Commentators confirm that the Third Circuit's decision creates a sharp conflict concerning the application of the Rule 23 criteria in the settlement context. For example, the leading treatise in the field, NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS (3d ed. 1992), states that "it is altogether proper * * * for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context" (*id.* § 11.27, at 11-55). That is because "[c]lass action determinations are made in the context of all the circumstances of the case as it is then postured." *Id.* at 11-54 to 11-55; see also *id.* § 11.28 (discussing the "different circumstances involved in the application of class action requirements in a settlement context, in contrast to a litigation mode" in "demonstrat[ing] why it is probably more difficult to satisfy these tests for litigation purposes").

Similarly, the MANUAL FOR COMPLEX LITIGATION (THIRD) (Federal Judicial Center 1995), recognizes that "courts permit the use of settlement classes," which involve the certification of the class "for settlement purposes only" and "permit defendants to settle while preserving the right to contest the propriety and scope of the class allegations if the settlement is not approved" (*id.* at 243). And the Judicial Conference Advisory Committee on Civil Rules observed at its meeting in April 1996 that taking the parties' settlement into account in applying the class certification criteria of Rule 23 "is the law everywhere, with the possible exception of the

certifying nationwide settlement class in breast implant tort litigation); *Sanders* v. *Robinson Humphrey/American Express, Inc.*, 1990 Fed. Sec. L. Rep. ¶ 95,315, at p. 96,492 (N.D. Ga. 1990) (certifying class "for purposes of settlement only" after denying certification of litigation class, see 634 F. Supp. 1048 (N.D. Ga. 1986)).

Third Circuit." Reporter's Draft Minutes p. 198. The Third Circuit's status as the lone exception to the general rule was only "possible" when the Advisory Committee met in April, because the *GM Trucks* decision was not completely clear on this point. The decision below, rendered after the Advisory Committee's April meeting, eliminates any doubt about the Third Circuit's position.[12]

B. The Decision Below Will Have Severe Adverse Consequences Throughout The Federal Judicial System.

Settlement is the principal means of resolving civil litigation in the federal courts. *McDermott, Inc.* v. *Amclyde*, 114 S. Ct. 1461, 1469 n.22 (1994) ("[l]ess than five percent of cases filed in federal court end in trial," and "the bulk of the nontrial terminations reflect settlements"). That is particularly true in class actions. A recent study found that 84% of the cases in which a class was certified ended in settlement; nearly half of those settlements — and 39% of all

[12] This Court's denial of review in *GM Trucks* does not suggest that certiorari should be denied here. There was an express alternative and independent ground for the Third Circuit's decision in *GM Trucks* — the court of appeals' determination that the settlement in that case should have been disapproved under Rule 23(e) as unfair on its merits. See 55 F.3d at 804-19. Indeed, the certiorari petition in *GM Trucks* presented questions concerning both the court of appeals' certification ruling and its fairness determination, and the petitioner would have had to obtain review with respect to both issues — and prevail in this Court on both issues — in order to obtain reversal of the court of appeals' judgment. The respondents in that case urged this Court to deny review because the court of appeals' unfairness findings would be "unaffected by a ruling on the legal issues raised in the petition" and, therefore, "the class certification issues raised in the petition are unlikely ever to affect the class members or petitioner." See 95-2137 Br. in Opp. of Respondents Jack Frend, *et al.* at 14. The Rule 23 class certification issue raised by the present case thus was not squarely presented in *GM Trucks*. Moreover, as the Fifth Circuit's decision in *In re Asbestos Litigation* demonstrates, the conflict in the circuits has only intensified in the past year.

certified class actions — involved classes certified for settlement purposes only. Willging, Hooper & Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Rules 46 & Table 14A2* (Jan. 17, 1996 Draft).

As the foregoing study indicates, and the numerous citations to lower court decisions set forth above (see pages 13-15, *supra*) confirm, the question whether a class may be certified for settlement purposes arises routinely in all types of class actions litigated in the federal courts. Because the Third Circuit's decision creates confusion with respect to an issue that courts face with great frequency, this Court should grant review.

The Third Circuit's interpretation would essentially foreclose the use of class actions to settle mass torts and similarly complex cases. The great majority of courts have ruled that those kinds of cases cannot be certified for classwide *litigation*, given the myriad individualized injury, causation, and damages issues, as well as choice-of-law issues, that arise in trying such claims. See, *e.g.*, *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 747 n.24 (5th Cir. 1996) (decertifying a tobacco litigation class and citing numerous similar decisions involving other mass tort and other complex cases). The Third Circuit's interpretation of Rule 23 means that those kinds of cases cannot be certified for a classwide *settlement* either, because the decision below limits classwide settlements to cases that could be approved for classwide trial. As such, that interpretation eliminates an invaluable procedure for resolving many of the most burdensome kinds of cases confronting the federal courts.

The Administrative Office of the United States Courts recently reported that "the number of personal injury/product liability cases filed nationwide climbed 125 percent from the 12-month period ending March 31, 1995, compared to the corresponding period in 1996." *The Third Branch* at 2 (July 1996). The Third Circuit's decision will discourage parties

from seeking to pursue settlements of those cases, particularly given the enormous investment of time and resources required for such an effort. Moreover, at least two district courts may soon be faced with class settlements with respect to hundreds of thousands of tort claims. One such settlement already has been reached — and a class certified — with respect to breast implant claims. See *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV 94-P-11558-S (N.D. Ala. Dec. 22, 1995) (order approving revised settlement program). Another class action settlement has tentatively been approved with respect to claims of hemophiliacs who allegedly contracted the AIDS virus from blood-clotting medications. *Payments to Hemophiliacs With AIDS Are Cleared*, WALL ST. J., Aug. 15, 1996, at B5. The Third Circuit's decision creates confusion and uncertainty regarding the viability of these and other similar mass tort settlements at the very time that the number of tort filings in the federal courts is skyrocketing.

In addition, the Third Circuit's newly-discovered limit on class action settlements will make it much more difficult to resolve *all* class actions on a consensual basis. Courts routinely consider the effect of the settlement in granting class certification in the settlement context. By requiring a district court also to decide that the class could be certified for purposes of litigation, the Third Circuit's ruling prevents parties from heading off any dispute as to whether the plaintiffs could obtain certification of a litigation class. *Real* settlements will fail because the court is forced to answer a *hypothetical* — and irrelevant — question.[13]

Indeed, under the test established by the Third Circuit the district court will *have to* determine that the case could be *litigated* as a class action — and make specific findings

[13] Requiring the district court in every settlement case to determine whether the case could have been litigated also will impose large additional burdens on the courts and the parties — such as the need to establish the manageability of litigating a case that in fact will never be tried.

justifying that conclusion (App. 19a). The defendant will therefore face a certified litigation class if the settlement ultimately falls apart or is disapproved. In addition, a defendant that did concede the class certification issue in order to settle a case will have to live with that concession in future litigated cases. No rational defendant would agree to settle in these circumstances. And even after that issue is determined, a defendant might continue to refuse to settle so as to preserve its right to appellate review. Because the Third Circuit's rule will thus deter all settlements — a result that is directly contrary to the established public policy favoring settlements — this Court should grant review.[14]

Finally, the instant case presents this major issue in a surpassingly important context — the asbestos litigation crisis. As noted above (at 4-5), the Ad Hoc Committee of the Judicial Conference found that the asbestos litigation problem "has reached critical dimensions and is getting worse" (Report at 2), and the court below recognized that, until this case, the problem had "defied global management in any venue" (App. 18a). The settlement at issue here thus represents a unique opportunity to unburden the federal and state courts of the "scourge" of asbestos litigation. Moreover, as the district court found, the terms of the settlement largely mirror the recommendations of the Ad Hoc Committee. *Id.* at 111a, 271a. The Third Circuit's ruling invalidates that settlement and requires burdensome case-by-case adjudication of these claims. Unless certiorari is granted, therefore, federal and state courts will be flooded with tens of thousands of new asbestos claims against petitioners over the next twelve months alone. See *Id.* at 108a (district court found new claims were filed against

[14] Ironically, the Third Circuit itself has recognized the importance of class certification for settlement purposes only as a means for resolving these disputes, *GM Trucks*, 55 F.3d at 778, 784, 790-792, but its legal standard effectively precludes that approach.

petitioners at the rate of 24,000 per year). That is particularly so because there is a two-year backlog of potential filings against petitioners built up over the period covered by the district court's injunction.

Respondents will likely argue before this Court, as they did in opposing rehearing in the court of appeals, that further review of this case is unwarranted because of a pending proposal to amend Rule 23. That argument is insubstantial.

Earlier this year, the Judicial Conference's Advisory Committee on Civil Rules recommended that Rule 23 be amended to make it clear beyond question that courts may certify a Rule 23(b)(3) class for the purpose of settlement even if such a class could not be certified for the purpose of litigation. The Committee did so specifically in order to confirm what already "is the law everywhere, with the possible exception of the Third Circuit," and to dispel any "uncertainties engendered by some readings of the [Third Circuit's *GM Trucks*] opinion." Reporter's Draft Minutes p. 198. The rules process thus was triggered by the Third Circuit's erroneous approach; intervention by this Court to correct the court of appeal's error therefore will avoid the necessity for a cumbersome and time-consuming use of the rule's amendment mechanism.

In addition, the proposed amendment is not a satisfactory cure for the problem caused by the Third Circuit's approach. Just recently, the Standing Committee on Rules of Practice and Procedure voted to send out the Advisory Committee's proposal for public comment. The Advisory Committee's proposal may not become law for any number of reasons, including the fact that it has sparked substantial controversy. But even if it were to be approved under the most expeditious of circumstances, it could not take effect until 1999 at the very earliest. This is so because the proposal must first be formally released, then await public comment (generally a six-month process), then be considered and approved by the Advisory Committee, the Standing Committee, the full

Judicial Conference, and this Court, and then placed before Congress for a seven-month period. See generally 28 U.S.C. §§ 2072-2074.

At minimum, the Third Circuit's decision will create inconsistency and confusion in the courts on a very important issue for years to come, as demonstrated by the striking contrast between the decision below and the Fifth Circuit's opposite conclusion just a few weeks ago in *In re Asbestos Litigation*; will have an immediate fatal impact on the extraordinarily important settlement at issue in this case; and will affect tens — or hundreds — of thousands of cases. Thus, it is essential that this Court intervene now to provide a definitive interpretation of the current version of Rule 23. See *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504 (1989) (interpreting Fed. R. Evid. 609(a)(1) despite pendency of Advisory Committee's proposed amendment addressing issue presented in that case); *Marek* v. *Chesny*, 473 U.S. 1 (1985) (same for Fed. R. Civ. P. 68).

Because of the general importance of the issue presented, and the specific importance of the settlement at issue in this case, certiorari should be granted.

C. The Third Circuit's Decision Distorts Rule 23.

Given the inconsistency of the holding below with the uniform decisions of the other courts of appeals, it comes as no surprise that the Third Circuit's analysis of the merits is insupportable. Under the Third Circuit's reasoning, "settlement class certification is not permissible unless the case would have been 'triable in class form.'" App. 36a (citation omitted). The court of appeals' approach thus makes certification turn on a wholly artificial inquiry — whether the requirements of Rule 23 would be satisfied in the imaginary circumstance that the case were litigated — and entirely disregards the actual situation presented to the district court by the settlement. It "require[s] a court to ignore important and relevant information that sits squarely in front of it when

deciding whether to certify a settlement class." *In re Asbestos Litig.*, 1996 WL 421990, at *9. This peculiar approach is flatly inconsistent with the language, history, and purposes of Rule 23.

1. The court of appeals' holding finds no support in the language of the Rule, which nowhere suggests that the existence of a settlement must be ignored, or that the district judge must apply the certification criteria to hypothetical litigation that assuredly *never* will occur. To the contrary, Rule 23 makes clear that the certification inquiry must be directed to the *actual* status of the proceeding.

Rule 23(b)(3), for example — the provision at issue in this case — provides that "matters pertinent to the [court's certification] findings include" such things as "the difficulties *likely to be encountered* in the management of the class action" (Rule 23(b)(3)(D) (emphasis added)) and "the extent and nature of any litigation *already commenced* by or against members of the class" (Rule 23(b)(3)(B) (emphasis added)). These factors "describe in practical and functional terms the occasions for maintaining class actions" (1 NEWBERG ON CLASS ACTIONS, §1.10 at 1-26), and plainly require consideration both of the actual status of the case and of the *real* manageability problems that will be confronted by the district court.

Indeed, this Court itself has observed that the commonality and typicality requirements of Rule 23 "serve as guideposts for determining whether *under the particular circumstances* maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Tel. Co. of the Southwest* v. *Falcon*, 457 U.S. 147, 157 n.13 (1982) (emphasis added). Similarly, under Rule 23(c)(1) a district court's view on certification may be "altered or amended" as the case progresses, which indicates that the court must evaluate certification in the light of *actual*

"developments in the litigation." *Id.* at 160. And needless to say, analysis of the "particular circumstances" of the case must involve a consideration of whether the parties have settled.[15]

The history of Rule 23 confirms this conclusion. The Third Circuit's rule, which applies the certification criteria to an abstract construct of hypothetical litigation while ignoring the real-world case before the court, closely resembles pre-1966 class action procedures, under which the propriety of a class action was determined by looking to "the abstract nature of the rights involved." *Amendments to Rules of Civil Procedure, Rules Advisory Committee Notes to Amended Rule 23*, 39 F.R.D. 69, 98 (1966). But this analysis — which sought to categorize class actions as "true," "hybrid," or "spurious" — "proved obscure and uncertain" (*ibid.*), and it was replaced in 1966 by a rule that "substitute[s] functional tests for the conceptualisms that characterized practice under

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[15] Commentators agree that the language of the Rule permits certification of classes for settlement when certification for litigation would be inappropriate:

> Although the common question class action is generally not desirable for *trying* mass tort cases involving substantial claims, its use as a pretrial joinder device to facilitate group settlements is both proper and desirable. Its use is proper because Federal Rule of Civil Procedure 23 provides that the court may certify a common question class action when it will prove "superior to other available methods for the fair and efficient adjudication of the controversy." A judicially supervised and approved class action settlement, like a judicially supervised trial, is a means of hearing and determining judicially, in other words "adjudicating," the value of claims arising from a mass tort. As a result, if conditional certification of the case as a common question class action for settlement purposes would enhance the prospects for group settlement, then [R]ule 23 authorizes certification.

Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 835 (1985) (emphasis in original; footnote omitted).

the former rule." 7A WRIGHT, MILLER, & KANE, FEDERAL PRACTICE & PROCEDURE, § 1753, at 42 (1986).

The Advisory Committee therefore stressed that "[t]he *amended rule* describes in more practical terms the occasions for maintaining class actions." 39 F.R.D. at 99 (emphasis in original). Addressing Rule 23(b)(3), for example, the Committee explained that certification is appropriate where "convenient and desirable *depending upon the particular facts*." *Id.* at 102 (emphasis added). The Committee added that courts, in resolving certification requests, should disregard "interests that may be theoretic rather than practical." *Id.* at 104. This commentary, which "stress[es the] judicial economy objective of class actions" (1 NEWBERG ON CLASS ACTIONS, § 1.06, at 1-17), manifestly requires that the district court make the certification decision in light of the actual status of the case.

Indeed, contradicting the premise of its holding in this case, the Third Circuit itself recognized that the Rule 23 criteria ought to be applied in light of the actual circumstances before a court. Thus, interpreting the "commonality" requirement, the Third Circuit wrote (App. 43a):

> We proceed cautiously here because establishing a high threshold for commonality might have repercussions for class actions very different from this case, such as a Rule 23(b)(1)(B) limited fund class action, in which the action presented claimants with their only chance at recovery.

2. The Third Circuit's holding also cannot be squared with the more general principles used to apply the Rules. Rule 1 provides that the Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." And so far as class actions in particular are concerned, there is a consensus that "the proper standard under Rule 23(b)(3) is a pragmatic

one." 7A WRIGHT, MILLER, & KANE, *supra*, § 1778, at 528. Thus, as Judge Wisdom wrote for the Fifth Circuit:

> The hallmark of Rule 23 is the flexibility it affords to the courts to utilize the class device in a particular case to best serve the ends of justice for the affected parties and to promote judicial efficiencies. * * * Accordingly, it is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context.

Beef Antitrust Litig., 607 F.2d at 177 (citation omitted); accord *A.H. Robins*, 880 F.2d at 740. In this case, of course, that rule of pragmatism is reinforced by what Judge Friendly termed "the general policy favoring the settlement of litigation." *Weinberger*, 698 F.2d at 73. See Burger, *Isn't There a Better Way*, 68 A.B.A.J. 274 (1982); Will, Merhige, & Rubin, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1976).

The benefits of class settlement in cases like this one are obvious: it vastly reduces transaction costs, provides comparable treatment to similarly situated individuals, and provides great benefits in judicial economy. See Edley & Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. LEGIS. 383, 401-406 (1993).[16] And it does so in a setting

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[16] The contrast with individual actions is particularly striking in the asbestos context. The Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation observed (at 13) that "[t]he transaction costs associated with asbestos litigation are an unconscionable burden on the victims of asbestos disease." The Committee also observed that "[t]he local trial of an individual asbestos claim takes so long that trying each claim separately would require all the civil trial time for the foreseeable future to the exclusion of all other cases in districts with heavy asbestos dockets." *Id.* at 19. The Committee accordingly found that "[c]lass action proceedings have the advantage of promoting efficiency and consistency and prevent whipsawing by defendants of plaintiffs' claims as well as scrambles for the assets of limited funds." *Id.* at 21-22.

where class members are *better off* than persons in litigated class actions, because in a settlement class case, class members are aware of the terms of the settlement at the time of certification and may opt out if they are dissatisfied. See *Beef Antitrust Litig.*, 607 F.2d at 175; *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 223 (5th Cir. 1981).

Yet the court of appeals — even while acknowledging that it may be "better policy * * * to take settlement into account" in the certification decision (App. 19a) — adopted an approach that is certain both to *preclude* the "speedy and inexpensive" determination of cases and to render settlement virtually impossible. As we have explained, the Third Circuit's rule effectively will prevent the settlement of *any* set of mass tort claims. That will deny both plaintiffs and defendants "a convenient and economical means for disposing of [repetitive] lawsuits." *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 402-403 (1980). The result is sure to accentuate the worst aspects of the existing tort system: "expense, delay, resulting crowding of dockets, divergent decisions on identical factual questions, and sometimes the insolvency of the defendants who are being sued." Rehnquist, *Opening Remarks: National Mass Tort Conference*, 73 TEX. L. REV. 1523, 1524 (1995). Cf. Transgrud, *supra*, 70 CORNELL L. REV. at 831-832 ("The total litigation costs of most mass tort cases is enormous.").

3. In nevertheless adopting its rule, the Third Circuit, relying on its prior decision in *GM Trucks*, opined that "'[t]here is no language in [Rule 23] that can be read to authorize separate, liberalized criteria for settlement classes.'" App. 37a, quoting *GM Trucks*, 55 F.3d at 799. This observation, however, rests on a fundamental misunderstanding of the argument in support of certification here. As the leading commentator in this area has explained,

> courts, in approving class settlements * * * have observed that the class might not have been certified were it not for the proposed class settlement. *This observation does not mean that Rule 23 criteria were not applied strictly in these circumstances.* On the contrary, these tests were applied, and the observation that a different ruling might have resulted in the absence of the settlement offer refers to the fact that Rule 23 criteria would have been applied in a different context and thus may have led to a different result. Class action determinations are made in the context of all the circumstances of the case as it is then postured.

NEWBERG ON CLASS ACTIONS § 11.27, at 11-54 to 11-55 (emphasis added).

The Third Circuit also — and perhaps most fundamentally — was moved by its belief that certifying a class for settlement that could not be certified for litigation "perverts the class action process and converts a federal court into a mediation forum for cases that belong elsewhere." *GM Trucks*, 55 F.3d at 799. But the court failed to provide any justification for this ipse dixit. After all, Rule 23(b)(3) is concerned with the practicalities of managing a class action, and it is difficult to see how that interest is advanced in any respect by denying certification to concededly manageable settlement classes.

Similarly, there is no reason why the inquiry into adequacy of representation pursuant to Rule 23(a) must be conducted from the perspective of a hypothetical litigation class. The court of appeals' underlying concern — the danger that class counsel will feel pressure to enter into inequitable settlements (see *GM Trucks*, 55 F.3d at 796-797) — is addressed in a settlement class action by the searching review of the fairness of settlements that courts routinely undertake pursuant to Rule 23(e). See, *e.g.*, *Weinberger*, 698 F.2d at 73; *Beef Antitrust Litig.*, 607 F.2d at 173-74. Asking whether the class would have been certified for litigation adds nothing to this inquiry. Indeed, as a general matter, "in a settlement context, adequate representation for the class is presumptively present when the court finds that the settlement

is fair and adequate for the class and was negotiated at arm's length." 2 NEWBERG ON CLASS ACTIONS § 11.28, at 11-59.

> The courts of appeals thus have long understood that
>
> [i]t is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance.

Corrugated Container, 643 F.2d at 212. See *White* v. *National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) ("adequacy of class representation * * * is ultimately determined by the settlement itself"), cert. denied, 115 S. Ct. 2569 (1995); *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1543 (11th Cir. 1987) ("in assessing the propriety of class certification, the courts evaluate the negotiation process and the settlement itself").

Such a fairness inquiry is eminently manageable, particularly in cases involving "mature mass tort litigation" where "claim values can be established within a relatively narrow range of uncertainty." Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 949, 950 (1995). And that consideration has obvious relevance here, for the "leading example of mature mass tort litigation involves asbestos." *Id.* at 949. In fact, writing specifically of the settlement in this case, Professor Schuck observed:

> Here, a properly advised asbestos claimant can draw on a twenty-five-year history of jury awards and settlements in a wide variety of litigation contexts before deciding at the front end whether or not to remain in the class and, if so, whether to accept a particular settlement offer at

> the back end. Moreover, * * * the judge will be able to draw on this experience in determining whether to certify a class and whether to approve a settlement under Rule 23.

Id. at 966. See Edley & Weiler, *supra*, 30 HARV. J. LEGIS. at 402-403.

4. If the certification inquiry may take settlement into account, certification in this case assuredly was proper. The court of appeals did not suggest otherwise. Instead, the Third Circuit expressly indicated that it applied the Rule 23 factors "without taking into account the settlement." App. 39a. The court's finding that the requirements of Rule 23(b)(3) were not met thus turned entirely on its conclusion that litigation of the action would be unmanageable. See App. 42a-47a, 53a-55a. But viewed from the perspective of the settlement, the common issues (the fairness of the claims resolution system, of the medical criteria, and of the compensation payments) plainly predominate, as the district court found (App. 226a). See generally 2 NEWBERG ON CLASS ACTIONS § 11.28, at 11-58.

By the same token, the Third Circuit's insistence on applying all of the Rule 23 factors "without taking into account the settlement" (App. 48a-51a) equally infected its conclusion that class members hypothetically had different interests in pursuing their claims, thereby rendering class counsel inadequate. The district court, properly taking the settlement into account, made unchallenged factual findings that — in the real world rather than the world of theory — "there is no antagonism of interest" between class members (*id.* 230a) and the settlement is fair to the class as a whole. See *id.* at 115a-176a, 234a-248a. Indeed, commentators (including the chief reporter for the American Law Institute's tort reform project) have praised the settlement in this case as one that "addressed the major pathologies of the present system and adopted a significantly improved method for delivering compensation to future victims of asbestos

exposure," while "secur[ing] important gains for both sides." Edley & Weiler, *supra*, 30 Harv. J. Legis. at 405. See *id.* at 407 ("we firmly endorse the fairness and adequacy of this settlement of future asbestos claims"). In these circumstances, the decision below should not stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners

v.

GEORGE WINDSOR, ET AL.,
Respondents

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 94-1925, 94-1927, 94-1928, 94-1929, 94-1930, 94-1931, 94-1932, 94-1960, 94-1968, 94-2009, 94-2010, 94-2011, 94-2012, 94-2013, 94-2066, 94-2067, 94-2068, 94-2085, 95-1705

ROBERT A. GEORGINE; LAVERNE WINBUN, EXECUTRIX OF THE ESTATE OF JOSEPH E. WINBUN, DECEASED, AND IN HER OWN RIGHT; AMBROSE VOGT, JR.; JOANNE VOGT, HIS WIFE; CARLOS RAVER; DOROTHY M. RAVER, HIS WIFE; TIMOTHY MURPHY; GAY MURPHY, HIS WIFE; TY T. ANNAS; ANNA MARIE BAUMGARTNER, EXECUTRIX OF THE ESTATE OF JOHN A. BAUMGARTNER, DECEASED; NAFSSICA KEKRIDES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF PAVLOS KEKRIDES, DECEASED; WILLIAM H. SYLVESTER, EXECUTOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF FRED A. SYLVESTER, DECEASED

v.

AMCHEM PRODUCTS, INC.; A.P. GREEN INDUSTRIES, INC.; ARMSTRONG WORLD INDUSTRIES, INC.; CERTAINTEED CORPORATION; C.E. THURSTON & SONS, INC.; DANA CORPORATION; FERODO AMERICA, INC.; FLEXITALLIC, INC.; GAF BUILDING MATERIALS, INC.; I.U. NORTH AMERICA, INC.; MAREMONT CORPORATION; **ASBESTOS CLAIMS MANAGEMENT CORP; NATIONAL SERVICES INDUSTRIES, INC.; NOSROC CORPORATION; PFIZER, INC.; QUIGLEY COMPANY, INC.; SHOOK & FLETCHER INSULATION COMPANY; T&N, PLC; **UNION CARBIDE CORPORATION; UNITED STATES GYPSUM COMPANY

v.

ADMIRAL INSURANCE COMPANY; AFFILIATED FM INSURANCE COMPANY; AIU INSURANCE COMPANY; ALLIANZ INSURANCE COMPANY; ALLIANZ UNDERWRITERS INSURANCE COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO ALLIANZ UNDERWRITERS, INC.; ALLSTATE INSURANCE COMPANY, AS SUCCESSOR TO NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY; AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA; AMERICAN CENTENNIAL INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; AMERICAN MOTORISTS INSURANCE COMPANY; AMERICAN RE-INSURANCE COMPANY; APPALACHIAN INSURANCE COMPANY OF PROVIDENCE; ARGONAUT INSURANCE COMPANY; ATLANTA INTERNATIONAL INSURANCE COMPANY; CAISSE INDUSTRIELLE D'ASSURANCE MUTUELLE; C.E. HEATH COMPENSATION AND LIABILITY INSURANCE COMPANY AS SUCCESSOR TO EMPLOYERS' SURPLUS LINE INSURANCE COMPANY; CENTENNIAL INSURANCE COMPANY; CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA; CHICAGO INSURANCE COMPANY; CITY INSURANCE COMPANY; COLONIA VERSICHERUNG, AKTIENGESELLSCHAFT; COLUMBIA CASUALTY COMPANY; COMMERCIAL UNION INSURANCE COMPANY, AS SUCCESSOR TO COLUMBIA CASUALTY COMPANY, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY OF AMERICA, AND EMPLOYERS' LIABILITY ASSURANCE CORPORATION LIMITED; COMPAGNIE EUROPEENNE DE REASSURANCES; THE CONSTITUTION STATE INSURANCE COMPANY; CONTINENTAL CASUALTY COMPANY; EMPLOYERS MUTUAL CASUALTY COMPANY; EVANSTON INSURANCE COMPANY; EXECUTIVE RE INDEMNITY INC., AS SUCCESSOR TO AMERICAN EXCESS INSURANCE COMPANY; FEDERAL INSURANCE COMPANY; GENERAL REINSURANCE CORPORATION; GIBRALTAR CASUALTY COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY; GRANITE STATE INSURANCE COMPANY; HIGHLANDS INSURANCE COMPANY; THE HOME INDEMNITY COMPANY; THE HOME INSURANCE COMPANY; HOUSTON GENERAL INSURANCE

COMPANY; HUDSON INSURANCE COMPANY; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; INTERSTATE FIRE & CASUALTY COMPANY; JEFFERSON INSURANCE COMPANY OF NEW YORK; LANDMARK INSURANCE COMPANY; LA PRESERVATRICE FONCIERE TIARD, INDIVIDUALLY AND AS SUCCESSOR TO LA FONCIERE ASSURANCES TRANSPORTS ACCIDENTS AND LA PRESERVATRICE; LE SECOURS; LEXINGTON INSURANCE COMPANY; LILLOISE D'ASSURANCES, AS SUCESSOR TO LILLOISE D'ASSURANCES ET DE REASSURANCES; LUMBERMENS MUTUAL CASUALTY COMPANY; MARYLAND CASUALTY COMPANY; MICHIGAN MUTUAL INSURANCE COMPANY; MUTUELLE GENERALE FRANCAISE; NATIONAL AMERICAN INSURANCE COMPANY OF CALIFORNIA, AS SUCCESSOR TO THE STUYVESANT INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; NORTHBROOK INDEMNITY COMPANY; NORTH STAR REINSURANCE CORPORATION; OLD REPUBLIC INSURANCE COMPANY; PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY; THE PROTECTIVE NATIONAL INSURANCE COMPANY OF OMAHA; PRUDENTIAL REINSURANCE COMPANY; PURITAN INSURANCE COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO THE MANHATTAN FIRE AND MARINE INSURANCE COMPANY; RANGER INSURANCE COMPANY; REPUBLIC INSURANCE COMPANY; SAFECO INSURANCE COMPANY OF AMERICA; SAFETY NATIONAL CASUALTY CORPORATION, AS SUCCESSOR TO SAFETY MUTUAL CASUALTY CORPORATION; ST. PAUL FIRE AND MARINE INSURANCE COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO BIRMINGHAM FIRE INSURANCE COMPANY; ST. PAUL GUARDIAN INSURANCE COMPANY; STONEWALL INSURANCE COMPANY; STEONEWALL SURPLUS LINES INSURANCE COMPANY; SUN ALLIANCE AND LONDON INSURANCE PLC; TOKIO MARINE & FIRE INSURANCE COMPANY, LIMITED; THE TRAVELERS INDEMNITY COMPANY; THE TRAVELERS INSURANCE COMPANY; UNIGARD SECURITY INSURANCE COMPANY, AS SUCCESSOR TO UNIGARD MUTUAL

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*William J. Golt, Sr. and Phyllis Golt,

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*Casimir Balonis, Margaret Balonis and Shepard A. Hoffman,

Appellants in No. 95-1705

*(Pursuant to F.R.A.P. Rule 12(a))

**(Pursuant to Clerk's Order dated 11/9/94)

On Appeal From the United States District Court
For the Eastern District of Pennsylvania

D.C. Civ. No. 93-cv-00215

Argued: November 21, 1995

Before: BECKER, GREENBERG, and
WELLFORD, Circuit Judges.*

(Filed May 10, 1996)

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OPINION OF THE COURT

BECKER, Circuit Judge.

Every decade presents a few great cases that force the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other. This is such a case. It is a class action that seeks to settle the claims of between 250,000 and 2,000,000 individuals who have been exposed to asbestos products against the twenty companies known as the Center for Claims Resolution (CCR).[1] Most notably, the settlement would extinguish asbestos-related causes of action of exposed individuals who currently suffer no physical ailments, but who may, in the future, develop possibly fatal

[1] The CCR Companies are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims Management Corp. (formerly known as National Gypsum Co.); CertainTeed Corp.; C.E. Thurston and Sons, Inc.; Dana Corp.; Ferodo America, Inc.; Flexitallic Inc.; GAF Building Materials Corp.; I.U. North America, Inc.; Maremont Corp.; National Services Industries, Inc.; Nosroc Corp.; Pfizer Inc.; Quigley Co., Inc.; Shook & Fletcher Insulation Co.; T&N, plc; Union Carbide Corp.; and United States Gypsum Co.

All of the CCR defendants stopped manufacturing asbestos products circa 1975. The assets of the CCR companies, together with their insurance coverage, represent a significant portion of the funds that will ever be available to pay asbestos-related claims.

asbestos-related disease. These "futures claims" of "exposure-only" plaintiffs would be extinguished even though they have not yet accrued.

The settlement, memorialized in a 106 page document, was not crafted overnight. Indeed, more than a case, this is a saga, reflecting the efforts of creative lawyers and an extremely able district judge to deal with the asbestos litigation explosion. Asbestos litigation has burdened the dockets of many state and federal courts, and has particularly challenged the capacity of the federal judicial system. The resolution posed in this settlement is arguably a brilliant partial solution to the scourge of asbestos that has heretofore defied global management in any venue.

However, against the need for effective resolution of the asbestos crisis, we must balance the integrity of the judicial system. Scholars have complained that the use of class actions to resolve mass toxic torts, particularly those involving futures claims, improperly involves the judiciary in the crafting of legislative solutions to vexing social problems. These criticisms are not merely abstract; they are levied in terms of the fundaments of the federal judicial polity: jurisdiction, justiciability, notice, and the requirements of Federal Rule of Civil Procedure 23.

This opinion addresses appeals of the district court's September 22, 1994, preliminary injunction, which prohibits members of the so-called *Georgine* class from pursuing asbestos-related personal injury claims in any other court pending the issuance of a final order in this case. The appellants ("objectors") are three groups of individuals with aligned interests who challenge the district court's injunction: the "Windsor Group"; the New Jersey "White Lung Group"; and the "Cargile Group" (mesothelioma victims from California). The objectors challenge the district court's jurisdiction (both personal and subject matter) over the underlying class action, the justiciability of the case, the

adequacy of class notice, and the propriety of class certification under Federal Rule of Civil Procedure 23.

Although we have serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction over absent class members, we will, for reasons explained below, pass over these difficult issues and limit our discussion to the class certification issues. We conclude that this class meets neither the 23(a) requirements of typicality and adequacy of representation, nor the 23(b)(3) requirements of predominance and superiority. In *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir.) [Hereinafter *GM Trucks*], *cert. denied sub nom. General Motors Corp.* v. *French*, 116 S. Ct. 88 (1995), we held that, for settlement classes, the 23(a) requirements must be applied as if the case were going to be litigated. We now hold that, because the 23(b)(3) requirements protect the same interests in fairness and efficiency as the 23(a) requirements, and because "there is no language in [Rule 23] that can be read to authorize separate, liberalized criteria for settlement classes," *id.* at 799, the 23(b)(3) criteria must also be applied as if the case were to be litigated. While the better policy may be to alter the class certification inquiry to take settlement into account, the current Rule 23 does not permit such an exception.

Examined as a litigation class, this case is so much larger and more complex than all other class actions on record that it cannot conceivably satisfy Rule 23. Initially, each individual plaintiff's claim raises radically different factual and legal issues from those of other plaintiffs. These differences, when exponentially magnified by choice of law considerations, eclipse any common issues in this case. In such circumstances, the predominance requirement of Rule 23(b) cannot be met. Furthermore, this amalgamation of factually and legally different plaintiffs creates problematic conflicts of interest, which thwart fulfillment of the typicality and adequacy of representation requirements of Rule 23(a).

Primarily, the interests of the exposure only plaintiffs are at odds with those of the presently injured: the former have an interest in preserving as large a fund as possible while the latter seek to maximize front-end benefits.

This class also fails Rule 23(b)'s superiority prong. Even utilizing the management techniques pioneered by the Federal Judicial Center, we do not see how an action of this magnitude and complexity could practically be tried as a litigation class. This problem, when combined with the serious fairness concerns caused by the inclusion of futures claims, make it impossible to conclude that this class action is superior to alternative means of adjudication.

For the reasons we have preliminarily outlined, and which we will now explain in depth, we will vacate the district court's order certifying the plaintiff class and remand with directions to decertify the class and vacate the injunction. We recognize that our decision undermines the partial solution to the asbestos litigation crisis. However, in doing so, we avoid a serious rend in the garment of the federal judiciary that would result from the Court, even with the noblest motives, exercising power that it lacks. We thus leave legislative solutions to legislative channels.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Reciting the background facts and procedural history of this case could consume pages by the dozen. This history is, however, already well known. It has been chronicled in the opinion of the district court, *see Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 254-67 (E.D. Pa. 1994); in the Cornell Law Review, *see* Symposium, *Mass Tortes: Serving Up Just Desserts*, 80 Cornell L. Rev. 811 (1995); and has even surfaced on the Continuing Legal Education (CLE) circuit, *see* Legal Intelligencer (Philadelphia), Jan. 31, 1996, at 34 (announcing a CLE Course on the "Lessons of

Georgine").[2] In short, the asbestos law world knows this case backwards and forwards. We shall, therefore, set forth only the essentials.

A. The Genesis of the Case

This case arises against the background of an asbestos litigation crisis:

> [This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.
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> The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and

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[2] In addition to the Cornell Law Review Symposium, numerous articles have addressed the issues raised in this case. *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343 (1995) (arguing for prudential limits on mass tort class actions and using this class action as a case study); Richard A. Nagareda, *Turning From Tort to Administration*, 94 Mich. L. Rev. 899 (1996) (discussing judicial review of mass tort settlements and focusing in part on this case); Note, *And Justiciability for All?: Future Injury Plaintiffs and the Separation of Powers*, 109 Harv. L. Rev. 1066 (1996) (addressing the justiciability of futures claims).

> over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

In re Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 418-19 (J.P.M.L. 1991) (quoting *Report of The Judicial Conference Ad Hoc Committee on Asbestos*, 1-3 (1991)) (footnote omitted).

Seeking solutions to the asbestos litigation crisis, eight federal judges with significant asbestos experience wrote to the Judicial Panel on Multidistrict Litigation ("MDL Panel"), urging it to consolidate all the federal asbestos litigation in a single district. These judges argued that consolidation would "facilitate global settlements, and allow the transferee court to fully explore . . . national disposition techniques such as classes and sub-classes under Rule 23." *Georgine*, 157 F.R.D. at 265 (citation and internal quotations omitted). The MDL Panel agreed, transferring all pending federal court asbestos cases that were not yet on trial to the Eastern District of Pennsylvania, and assigning them to Judge Charles R. Weiner for consolidated pretrial proceedings. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. at 424.

After the MDL Panel transfer, steering committees for the plaintiffs and defendants were formed and commenced global settlement negotiations. Judge Weiner appointed two of the class counsel in this case, Ronald Motley and Gene Locks, as co-chairs of the Plaintiffs' Steering Committee. Counsel for CCR were active participants on the Defendants' Steering Committee.

When these negotiations reached an impasse, class counsel and CCR began negotiations to resolve CCR's asbestos liability. After a year of discussions, the two sides reached a settlement agreement, and then filed this class action.

B. Proceedings in the District Court

On January 15, 1993, the named plaintiffs filed a complaint on behalf of a class consisting of (1) all persons exposed occupationally or through the occupational exposure of a spouse or household member to asbestos-containing products or asbestos supplied by any CCR defendant, and (2) the spouses and family members of such persons, who had not filed an asbestos-related lawsuit against a CCR defendant as of the date the class action was commenced.[3] Five of the

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[3] The complaint defines the class as follows:

> (a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant, or passenger ships), either
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> occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the Defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or death in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability).
>
> (b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph (a) above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) above in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability).

named plaintiffs allege that they have sustained physical injuries as a result of exposure to the defendants' asbestos products. Four named plaintiffs allege that they have been exposed to the CCR defendants' asbestos-containing products but have not yet sustained any asbestos-related condition. On December 22, 1993, the settling parties stipulated to the substitution of Robert A. Georgine for Edward J. Carlough as the lead plaintiff, and the caption of the case has been changed accordingly. *See Georgine*, 157 F.R.D. at 257 n.1. We thus refer to the plaintiff class as the Georgine class.

The complaint asserts various legal theories, including (1) negligent failure to warn, (2) strict liability, (3) breach of express and implied warranty, (4) negligent infliction of emotional distress, (5) enhanced risk of disease, (6) medical monitoring, and (7) civil conspiracy. Each plaintiff seeks unspecified damages in excess of $100,000.

On the same day, the CCR defendants filed an answer, denying the allegations of the plaintiffs' class action complaint and asserting eleven affirmative defenses. Also on the same day, the plaintiffs and defendants ("the settling parties") jointly filed a motion seeking conditional class certification for purposes of settlement accompanied by a stipulation of settlement.[4] Simultaneously, the settling parties concluded another agreement: class counsel agreed to settle their inventories of pending asbestos claims — claims that were expressly excluded from the class action — against the CCR defendants for over $200 million.

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[4] Additionally, on January 15, the CCR defendants filed a third party action against their insurers, seeking a declaratory judgment that the insurers are liable for the costs of the settlement. The insurance litigation is still pending in the district court. *See, e.g.*, *Georgine* v. *Amchem Prods., Inc.*, No. 93-0215, 1994 WL 502475 (E.D. Pa. Sept. 2, 1994).

The stipulation of settlement purports to settle all present and future claims of class members for asbestos-related personal injury or wrongful death against the CCR members that were not filed before January 15, 1993. The stipulation establishes an administrative procedure that provides compensation for claimants meeting specified exposure and medical criteria. If the exposure criteria are met, the stipulation provides compensation for four categories of disease: mesothelioma, lung cancer, certain "other cancers" (including colon-rectal, laryngeal, esophageal, and stomach cancer), and "non-malignant conditions" (asbestosis and bilateral pleural thickening). The stipulation provides objective criteria for medical diagnoses. For those claimants that qualify, the stipulation fixes a range of damages that CCR will award for each disease, and places caps both on the amount that a particular victim may recover and on the number of qualifying claims that may be paid in any given year.

Claimants found to have "extraordinary" claims can be awarded more than the cap allows, but only a limited number of claims (three percent of the total number of qualified mesothelioma, lung cancer and "other cancer" claims, and up to one percent of the total number of qualified "non-malignant conditions" claims) can be found to be "extraordinary." Furthermore, the total amount of compensation available to victims with such claims is itself capped. Payment under the settlement is not adjusted for inflation.

The stipulation does allow some claimants who qualify for payment but are dissatisfied with the settlement offered by CCR to pursue their claims in court. However, the stipulation severely limits the number of claimants who can take advantage of this option. Only two percent of the total number of mesothelioma and lung cancer claims, one percent of "other cancer" claims, and one-half of a percent of "non-malignant conditions" claims from the previous year may sue in the tort system. Although the plaintiffs are

generally bound to the settlement in perpetuity, the defendants are not so limited. Each defendant may choose to withdraw from the settlement after ten years.

The claims asserted by the exposure only plaintiffs — claims for increased risk of cancer, fear of future asbestos-related injury, and medical monitoring — receive no payment under the stipulation of settlement. In addition, "pleural" claims, which involve asbestos-related plaques on the lungs but no physical impairment, receive no cash compensation, even though such claims regularly receive substantial monetary payments in the tort system.

On the other hand, the settlement does provide exposure-only and pleural claimants with significant benefits. First, the stipulation tolls all statutes of limitations, so that any claim that was not time-barred when the class action was commenced may be filed at any time in the future. Thus, unlike in the tort system, where pleural claimants may have to rush to file suit on discovery of changes in the lining surrounding their lungs (before their full injuries are known), under the stipulation claimants do not submit their claims until they develop an impairing illness. Second, the stipulation provides certain "comeback" rights, so that claimants who have been compensated for a non-malignant condition may file a second claim and receive further compensation if they later develop an asbestos-related cancer. It is estimated that almost 100,000 claims will be paid under the settlement over the course of the next ten years.[5]

On January 29, 1993, Judge Weiner conditionally certified this opt-out class. He then referred the matter to Judge Lowell A. Reed for the establishment of settlement procedures and the resolution of objections to the settlement. Judge Reed held hearings on a number of aspects of the case

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[5] The terms of the Stipulation are discussed in greater detail in *Georgine*, 157 F.R.D. at 267-86.

and issued several comprehensive opinions. On October 6, 1993, he ruled that the court had subject matter jurisdiction and that the action presented a justiciable case or controversy. *See Carlough* v. *Amchem Prods., Inc.*, 834 F. Supp. 1437 (E.D. Pa. 1993). On October 27, 1993, he concluded that the proposed settlement satisfied a threshold level of fairness sufficient to warrant class notice and approved a notice plan. *See Carlough* v. *Amchem Prods., Inc.*, 158 F.R.D. 314 (E.D. Pa. 1993). We summarize the highlights of these decisions

in the margin.[6]

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[6] First, Judge Reed rejected the objectors' contentions that exposure-only plaintiffs, who may not presently have sufficient physical harm to state a valid cause of action, lack standing to pursue this litigation. *Carlough*, 834 F. Supp. at 1446-56. He reasoned that Article III standing is not dependent upon the plaintiffs' ability to state a valid cause of action, but that it depends upon whether these plaintiffs have "suffered an injury in fact which is concrete and particularized, and actual or imminent rather than merely conjectural or hypothetical." *Id.* at 1450 (citing *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992)). He concluded that "exposure to a toxic substance constitutes sufficient injury in fact to give a plaintiff standing to sue in federal court." *Id.* at 1454.

Second, with respect to amount-in-controversy, Judge Reed noted that "the sum claimed by the plaintiff controls if the claim is apparently made in good faith," and the case will not be dismissed unless it appears to a "legal certainty" that the $50,000 amount cannot be satisfied. *Id.* at 1456 (citations and internal quotations omitted). He then rejected the objectors' argument that exposure-only plaintiffs did not meet this standard. Judge Reed held first that "it is enough that the kind of factual injuries alleged by the exposure-only plaintiffs — physical, monetary and emotional injuries — plainly support a claim to more than $50,000." *Id.* at 1459 (citation omitted). He also ruled that, even if he were required to do a claim-by-claim analysis of the exposure-only plaintiffs' claims, it could not be said to a legal certainty that a jury might not award $50,000 to any plaintiff. *See id.* at 1462.

Third, Judge Reed rejected the objectors' claim that the litigation was "collusive" — and therefore did not present a case or controversy — because the Stipulation of Settlement was negotiated before class counsel formally filed the

On February 22, 1994, after several months of pre-trial proceedings, discovery, and motions, Judge Reed commenced a hearing to assess the fairness of the settlement. The hearing took eighteen days and involved the testimony of some twenty-nine witnesses. On August 16, 1994, Judge Reed filed an opinion approving the Stipulation of Settlement and finally certifying the *Georgine* settlement class. In the course of his opinion, he held that the class met the requirements of

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complaint. *Id.* at 1462-66. He held that this case "is one involving genuinely adverse interests, but, because of the settlement, it lacks a dispute as to the remedy." *Id.* at 1465.

On October 27, 1993, Judge Reed ruled that "the proposed settlement is fair for the preliminary purpose of deciding whether to send notice to the class in that it appears to be the product of serious, informed, non-collusive negotiations, it has no obvious deficiencies, it does not improperly grant preferential treatment to class representatives or segments of the class, and it clearly falls within the range of possible approval." *Carlough* v. *Amchem Prods., Inc.*, 158 F.R.D. 314, 320 (E.D. Pa. 1993) (footnotes omitted). He then analyzed the notice plan, concluding that the proposed notice (with certain specified modifications) "satisf[ied] the requirements of Rules 23(c)(2) and (e) and the due process clause of the Constitution." *Carlough*, 158 F.R.D. at 333.

Finally, Judge Reed rejected the objectors' contention that, regardless of the content or form of the notice plan, notice regarding potential future personal injury claims for past toxic exposure is *per se* unconstitutional, either because such claimants may not understand that they are members of the class or because they cannot make an informed opt-out decision without knowing what disease, if any, they may suffer in the future. *Id.* at 334-36.

Federal Rule of Civil Procedure 23, that the settlement was fair and reasonable, and that notice to the class met the requirements of Rule 23 and the Due Process Clause. *See Georgine* v. *Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994).[7]

The settling parties then moved for a preliminary injunction barring class members from initiating claims against any CCR defendant pending a final judgment in this case. On September 21, 1994, he granted the motion, explaining that the injunction is necessary because "the cost and time expended defending claims in multiple jurisdictions would likely result in the disintegration of the *Georgine* settlement." *Georgine* v. *Amchem Prods., Inc.*, 878 F. Supp. 716, 723 (E.D. Pa. 1994). These appeals followed.

C. The Contentions on Appeal

Although this opinion will address only the class certification issues, these appeals have not been so circumscribed. Indeed, far from acceding to any of Judge Reed's rulings, *see supra* note 6, the objectors have also vigorously pressed challenges to justiciability, subject matter jurisdiction, personal jurisdiction over absent class members, and the adequacy of class notice.

First, the objectors argue that this is a feigned suit — and thus is not a justiciable case or controversy under Article III of the Constitution — because neither plaintiffs nor plaintiffs' counsel had any intention of litigating their "futures" claims, but merely seek approval of a result that plaintiffs and defendants have jointly pursued. This contention is supported by the fact that class counsel presented the suit and settlement

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[7] Judge Reed later established a new notice and opt-out period, voiding a prior notice and opt-out period, to remedy alleged improper communications made by counsel opposing the settlement. *See Georgine* v. *Amchem Prods., Inc.*, 160 F.R.D. 478 (E.D. Pa. 1995).

together with counsel for the CCR defendants in one package, after having negotiated with CCR a side-settlement of over $200 million for cases in their "inventory." Second, the objectors contend that the exposure only plaintiffs lack standing to bring their claims because they currently suffer no actual injuries. Third, they assert that the court lacks subject matter jurisdiction over the exposure-only plaintiffs' claims because such claims cannot exceed the $50,000 minimum required by the diversity statute. Fourth, they argue that the court cannot assert personal jurisdiction over class members lacking minimum contacts with the forum, because such class members have not had a meaningful opportunity to opt out and thus have not consented to jurisdiction. *See Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-12 (1985).

Finally, the objectors have martialed a powerful three-pronged argument that, in this futures class action with virtually no delayed opt-out rights, notice to absent class members cannot meet the requirements of Rule 23 or the Constitution. *See Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The objectors argue that notice is problematic for futures plaintiffs because (1) such plaintiffs may not know that they have been exposed to asbestos within the terms of this class action; (2) even if aware of their exposure, these plaintiffs, who suffer no physical injuries, have little reason to pay attention to class action announcements; and (3) even if class members find out about the class action and realize they fall within the class definition, they lack adequate information to properly evaluate whether to opt out of the settlement.

The settling parties counter these contentions, arguing that the jurisdiction of the district court is secure and that the strictures of due process have been satisfied. First, to rebut the objectors' argument that this suit is feigned, the settling parties point out that the district court's resolution of that issue in their favor rested largely on fact findings, and that this appeal does not challenge any factual determinations of

the district court. The settling parties also allege that, against the background of bitter adversarial litigation that has gone on for many years between plaintiffs and asbestos companies (and between counsel in this case), this suit was no more or less "collusive" than other similar actions brought and settled. Second, regarding the existence of the requisite amount in controversy, the settling parties cite to precedent (within a checkered body of caselaw) holding that claims for future injury and medical monitoring with accompanying emotional distress meet the jurisdictional threshold.[8]

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[8] The settling parties also contend that a prior decision in this case, *Carlough* v. *Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir. 1993) [Hereinafter *Gore*], decided the jurisdictional challenges raised in this appeal. We are unpersuaded. After the *Georgine* class action had commenced but prior to the establishment of an opt-out period, the *Gore* plaintiffs (several absent members of the *Georgine* class) filed a class action complaint in West Virginia state court. The *Gore* plaintiffs sought a declaration that they were authorized to "opt out" of the *Georgine* action on behalf of a West Virginia class and to initiate their own asbestos class action. The district court granted a preliminary injunction as "necessary in aid of [its] jurisdiction" under the All-Writs and Anti-Injunction Acts, enjoining the *Gore* plaintiffs from prosecuting their separate class action. On appeal to this Court, the *Gore* plaintiffs argued that the district court lacked jurisdiction to enjoin them because the district court had issued the injunction before providing absent plaintiffs an opportunity to opt out of the *Georgine* class, which is necessary to establish personal jurisdiction over plaintiffs lacking minimum contacts with the forum, and before the district court found that it had subject matter jurisdiction over the *Georgine* action. The panel upheld the district court's injunction because, after issuing its injunction, the district court established an opt-out period and found that it had subject matter jurisdiction. *Id.* at 200-01.

Third, as to the adequacy of class notice, the settling parties submit that the class members, having the terms of the settlement before them, were in a better position to exercise a choice than the usual notice recipient who has no idea how the case will come out. Finally, they assert, though far less convincingly in the wake of *GM Trucks*, that the requisites of Rule 23 are met as well.

Although the existence of justiciability and subject matter jurisdiction are not free from doubt, and although we have serious concerns as to the constitutional adequacy of class notice, we decline to reach these issues, and pass on to the class certification issues. The class certification issues are dispositive, and we believe it prudent not to decide issues unnecessary to the disposition of the case, especially when

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Although the district court should have inquired into its jurisdiction before issuing the injunction, we held that the district court's subsequent orders constituted an "initial jurisdictional inquiry" necessary to support its preliminary injunction. *Id.* at 201.

Given its unique posture, we read *Gore* very narrowly. *Gore* held that a district court may issue a preliminary injunction against an attempt to opt out *en masse* — which threatens to completely undermine the federal class action — without a full-scale determination of its jurisdiction. Where a federal class action is threatened with destruction before the notice and opt-out period even commences, an "initial jurisdictional inquiry" — which "may be based on the information reasonably and immediately available to the court," *id.* — is sufficient to support the court's jurisdiction to issue a protective preliminary injunction. *Gore* did not reach the question raised in this case: the propriety of the district court's assertion of jurisdiction, after completion of the notice and opt-out period, to enjoin individual plaintiffs from pursuing collateral litigation.

many of these issues implicate constitutional questions. *See, e.g., Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944) (expressing the rule that courts will avoid constitutional questions when possible). In doing so, we offend no principle of constitutional law, for the jurisdictional issues in this case would not exist but for the certification of this class action. Absent the class certification, there is no need for a determination of jurisdiction over futures claims, the justiciability of such claims, the adequacy of notice, or the propriety of a nationwide protective injunction. Moreover, a court need not reach difficult questions of jurisdiction when the case can be resolved on some other ground in favor of the same party. *See Norton* v. *Mathews*, 427 U.S. 524, 528-33 (1976); *Elkin* v. *Fauver*, 969 F.2d 48, 52 n.1 (3d Cir.), *cert. denied*, 506 U.S. 977 (1992); *United States* v. *Weathersby*, 958 F.2d 65, 66 (5th Cir. 1992); *Wolder* v. *United States*, 807 F.2d 1506, 1507 (9th Cir. 1987).

II. APPELLATE JURISDICTION

Although we deem it wise not to decide most of the jurisdictional issues posed by this case, we are obliged to consider the threshold question whether we have appellate jurisdiction to review the propriety, under Federal Rule of Civil Procedure 23, of the district court's class certification.

Although the district court has approved the stipulation of settlement and certified the *Georgine* settlement class, it has not entered a final judgment because the stipulation of settlement is expressly conditioned on the CCR's insurers assuming liability for the settlement. *See supra* note 4. This is an appeal of the district court's September 22, 1994, preliminary injunction, which prohibits *Georgine* class members from pursuing claims for asbestos-related personal injury in any other court pending the issuance of a final order. The district court issued the preliminary injunction pursuant to the All-Writs Act, 28 U.S.C. § 1651, and the Anti-Injunction Act, 28 U.S.C. § 2283, which provide

authority to enjoin collateral litigation if "necessary in aid" of the court's jurisdiction. *See Gore*, 10 F.3d 189, 201-04 (3d Cir. 1993). The district court found that the injunction is necessary because collateral litigation would undermine implementation of the settlement.

An order granting or denying class certification is generally not appealable until a final order has been issued. *See Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978) (class certification not appealable under 28 U.S.C. § 1291); *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) (class certification not appealable under 28 U.S.C. § 1292(a)(1)). This Court has jurisdiction, of course, under 28 U.S.C. § 1292(a)(1) to review the preliminary injunction issued by the district court. We further conclude that we have pendent appellate jurisdiction to review class certification.

In *Kershner* v. *Mazurkiewicz*, 670 F.2d 440 (3d Cir. 1982) (in banc), we held that class certification is reviewable on appeal from issuance of a preliminary injunction if "the preliminary injunction cannot properly be decided without reference to the class certification question." *Id.* at 449. We reasoned that if the propriety of class certification "directly controls disposition of the [injunction], or [if] the issues are, in some way, inextricably bound[,] then both issues must be addressed in order to resolve properly the section 1292(a)(1) preliminary injunction." *Id.* (emphasis in original) (footnote omitted); accord *Hoxworth* v. *Blinder, Robinson & Co.*, 903 F.2d 186, 208-09 (3d Cir. 1990). To do otherwise would impinge on the right to a 1292(a)(1) appeal. *See Kershner*, 670 F.2d at 449.

In this case, class certification "directly controls disposition of the [injunction]." The entire basis for the district court's injunction is to protect the underlying class action. If the class was not properly certified, the district court was without authority to issue its preliminary injunction. To give full effect to the appellants' right to review of the

injunction, we must reach class certification. We also note that concerns that might militate against review are not present in this case. Most notably, there is no indication that the district court might alter its class certification order. *Compare Kershner*, 670 F.2d at 449 (expressing this concern).

III. CLASS CERTIFICATION

To obtain class certification, plaintiffs must satisfy all of the requirements of Rule 23(a) and come within one provision of Rule 23(b). *See Wetzel* v. *Liberty Mutual Ins. Co.*, 508 F.2d 239, 248 (3d Cir.), *cert. denied*, 421 U.S. 1011. Rule 23(a) mandates a showing of (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

We held in *GM Trucks* that, although class actions may be certified for settlement purposes only, Rule 23(a)'s requirements must be satisfied as if the case were going to be litigated. *See* 55 F.3d 768, 799-800 (3d Cir.), *cert. denied sub nom. General Motors Corp.* v. *French*, 133 L. Ed. 2d 45, 116 S. Ct. 88 (1995). Strict application of the criteria is mandated, even when the parties have reached a proposed settlement, because

> Rule 23 is designed to assure that courts will identify the common interests of class members and evaluate the named plaintiff's and counsel's ability to fairly and

> adequately protect class interests . . . . To allow lower standards for the requisites of the rule in the face of the hydraulic pressures confronted by courts adjudicating very large and complex actions would erode the protection afforded by the rule almost entirely.

Id. at 799 (citation omitted). Therefore, despite the possibility that settlement-only class actions might serve the "useful purpose of ridding the courts" of the "albatross[]" represented by mass tort actions, the rule in this circuit is that settlement class certification is not permissible unless the case would have been "triable in class form." *Id.*

In addition to satisfying the Rule 23(a) requirements, a putative class must meet the conditions of one of the parts of subsection (b). In this case, the settling parties seek certification pursuant to 23(b)(3), which requires findings of predominance and superiority — *i.e.*, "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).

In *GM Trucks* we reserved the question whether, in the case of settlement classes,[9] the fact of settlement may be

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[9] A settlement class is a device whereby the court postpones formal class certification until the parties have successfully concluded a settlement. If settlement negotiations succeed, the court certifies the class for settlement purposes only and sends a combined notice of the commencement of the class action and the settlement to the class members. By conditionally certifying the class for settlement purposes only, the court allows the defendant to challenge class certification in the event that the settlement falls apart. For a more detailed description of settlement classes and their costs and benefits, *see GM Trucks*, 55 F.3d

considered in applying the 23(b)(3) requirements. 55 F.3d at 796. The settling parties assert that in contrast to the 23(a) factors, which protect absent class members' rights, the 23(b)(3) factors promote the "fair and efficient resolution of justice." The fact of settlement, they argue, goes to the heart of Rule 23(b)(3)'s "manageability concerns" and thus must be considered.

We disagree. The 23(b)(3) requirements protect the same interests in fairness and efficiency as the 23(a) requirements. More importantly, we based our pronouncement in *GM Trucks* that "a class is a class is a class" in large part on the fact that "[t]here is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes." *Id.* at 799. Whatever the Advisory Committee on Civil Rules (and, of course, Congress) may ultimately determine the better rule to be, we do not believe that the drafters of the present rule included a more liberal standard for 23(b)(3).[10]

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at 786-92.

[10] The settling parties argue that *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.), *cert. denied sub nom. Celotex Corp.* v. *School Dist. of Lancaster*, 479 U.S. 852, *and National Gypsum Co.* v. *School Dist. of Lancaster*, 479 U.S. 915 (1986), requires the Court to take the possibility of settlement into account in applying Rule 23(b)(3). We reject this contention. *In re School Asbestos Litig.* stated, in relevant part:

> Concentration of individual damage suits in one forum can lead to formidable problems, but the realities of litigation should not be overlooked in theoretical musings. Most tort cases settle, and the preliminary maneuverings in litigation today are designed as much, if not more, for settlement purposes than for trial.

The district court did not have the benefit of *GM Trucks* when it decided the Rule 23 issues, and it applied an incorrect standard. First, it took the view that Rule 23 requirements are lower for settlement classes. *See, e.g., Georgine* v. *Amchem Prods.*, 157 F.R.D. 246, 315 (E.D. Pa. 1994) ("The Rule 23 requirements for class certification . . . are often more readily satisfied in the settlement context because the issues for resolution by the Court are more limited than in the litigation context."). Second, the district court erred by relying in significant part on the presence of the settlement to satisfy the Rule 23(a) requirements of commonality, typicality, and adequacy of representation, and the Rule 23(b)(3) requirements of predominance and superiority. *See Georgine*, 157 F.R.D. at 314-19. But each of these requirements must be satisfied without taking into account the settlement, and as if the action were going to be litigated. *See GM Trucks*, 55 F.3d at 799.

With a proper understanding of the Rule 23 factors, we turn now to their application. For the reasons explained below, we conclude that this class, considered as a litigation class, cannot meet the 23(a) requirements of typicality and adequacy of representation, nor the 23(b) requirements of

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> Settlements of class actions often result in savings for all concerned.

Id. at 1009. This statement, whatever its import, does not constitute a holding. Its language is broad, general, and grammatically permissive. Moreover, this statement appears in a section in which the Court does both a Rule 23(a) and 23(b) analysis. Thus, insofar as *In re School Asbetos Litig.* requires a consideration of settlement, this requirement would apply to Rule 23(a) as well as 23(b). But *GM Trucks* held that Rule 23(a) must be applied without reference to settlement, thereby rejecting the settling parties' argument.

predominance and superiority.[11] We will discuss each of these requirements. Instead of addressing them in the conventional sequence, we will use a functional arrangement, linking related provisions.

A. Commonality & Predominance

Rule 23(a)(2) requires that "there are questions of law or fact common to the class," and Rule 23(b)(3) requires "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." FED. R. CIV. P. 23. Because 23(b)(3)'s predominance requirement incorporates the commonality requirement, we will treat them together.

All of the putative class members assert claims based on exposure to the asbestos sold by the CCR defendants. The capacity of asbestos fibers to cause physical injury is surely a common question, though that issue was settled long ago. *See, e.g., In re School Asbestos Litig.*, 789 F.2d 996, 1000 (3d Cir.), *cert. denied sub nom. Celotex Corp.* v. *School Dist. of Lancaster*, 479 U.S. 852, *and National Gypsum Co.* v. *School Dist. of Lancaster*, 479 U.S. 915 (1986). Although not identified by the district court, there may be several other common questions, such as whether the defendants had knowledge of the hazards of asbestos, whether the defendants adequately tested their asbestos products, and whether the warnings accompanying their products were adequate. *See id.* at 1009.[12]

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[11] This class, which may stretch into the millions, easily satisfies the numerosity requirement.

[12] The only common questions identified by the district court are (1) the fairness of the settlement — an impermissible consideration — and (2) the harmfulness of asbestos exposure. *See Georgine*, 157 F.R.D. at 316.

However, beyond these broad issues, the class members' claims vary widely in character. Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma — a disease which, despite a latency period of approximately fifteen to forty years, generally kills its victims within two years after they become symptomatic. Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.

The futures plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.

These factual differences translate into significant legal differences. Differences in amount of exposure and nexus between exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff.

Furthermore, because we must apply an individualized choice of law analysis to each plaintiff's claims, *see Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 823 (1985) (constitutional limitations on choice of law apply even in nationwide class actions), the proliferation of disparate factual and legal issues is compounded exponentially. The states have different rules governing the whole range of issues raised by the plaintiffs' claims: viability of futures claims; availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury; causation; the type of proof necessary to prove asbestos exposure; statutes of limitations; joint and several liability; and

comparative/contributory negligence. In short, the number of uncommon issues in this humongous class action, with perhaps as many as a million class members, is colossal.

The settling parties point out that our cases have sometimes stated a very low threshold for commonality. In *Neal* v. *Casey*, 43 F.3d 48, 56 (3d Cir. 1994), for example, we stated that "[t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." And, in *In re School Asbestos Litigation*, 789 F.2d at 1010, we stated that "the 'threshold of commonality is not high.'" (citation omitted). But those cases are quite different from this one. *Neal* involved a class action for injunctive relief, and thus raised infinitely fewer individualized issues than are posed here. And *In re School Asbestos Litigation* upheld the certification of a nationwide class action for damages associated with asbestos removal explicitly on the ground that case involved only *property* damages. *See*, *e.g.*, 789 F.2d at 1009 ("[T]he claims are limited to property damage, and school districts are unlikely to have strong emotional ties to the litigation.").[13] We believe that the commonality barrier is higher in a personal injury damages class action, like this

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[13] Moreover, *In re School Asbestos Litigation* involved vastly fewer individualized questions than this one. *Cf. id.* at 1010 (noting that the complexity of causation questions in personal injury suits is much greater than for property damage suits). And, choice of law arguably did not greatly magnify the number of disparate issues. Class counsel had made a credible argument that the applicable law of the different states could be broken into approximately four patterns, *see id.*, and we noted that the district court could decertify the class if this prediction proved to be faulty. Of course, this case could not be broken into anywhere near that small a number of patterns.

one, that seeks to resolve *all* issues, including noncommon issues, of liability and damages.

Nevertheless, we do not hold that this class fails the commonality requirement because the test of commonality is subsumed by the predominance requirement, which this class cannot conceivably meet. We proceed cautiously here because establishing a high threshold for commonality might have repercussions for class actions very different from this case, such as a Rule 23(b)(1)(B) limited fund class action, in which the action presented claimants with their only chance at recovery.

Turning to predominance, we hold that the limited common issues identified, primarily the single question of the harmfulness of asbestos, cannot satisfy the predominance requirement in this case. Indeed, it does not even come close. We start by noting the Advisory Committee's well-known caution against certifying class actions involving mass torts:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

FED. R. CIV. P. 23(b)(3) Advisory Notes to 1966 Amendment.

While, notwithstanding this cautionary note, mass torts involving a single accident are sometimes susceptible to Rule 23(b)(3) class action treatment, the individualized issues can become overwhelming in actions involving long-term mass torts (*i.e.*, those which do not arise out of a single accident). As the Ninth Circuit stated in *In re N.D. Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert.*

denied sub nom. A.H. Robins Co., Inc. v. *Abed*, 459 U.S. 1171 (1983):

> In the typical mass tort situation, such as an airplane crash or a cruise ship food poisoning, proximate cause can be determined on a class-wide basis because the cause of the common disaster is the same for each of the plaintiffs.
>
> In products liability actions, however, individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case. *Id.* at 853 (citations omitted).

Other cases are in accord. *See, e.g., Sterling* v. *Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) ("In complex, mass, toxic tort accidents, where no one set of operative facts establishes liability, no single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber common issues, the district court should properly question the appropriateness of a class action for resolving the controversy."); cf. *Watson* v. *Shell Oil Co.*, 979 F.2d 1014, 1023 (5th Cir. 1992) (approving a class of some 18,000 plaintiffs injured in an oil refinery explosion but noting that "[t]his litigation differs markedly from toxic tort cases such as *Jenkins*, *Fibreboard*, and *Tetracycline*, in which numerous plaintiffs suffer varying types of injury at different times and through different causal mechanisms, thereby creating many separate issues"), *reh'g granted*, 990 F.2d 805 (5th Cir. 1993), *appeal dismissed*, 53 F.3d 663 (5th Cir. 1994). These concerns recently led the Sixth Circuit to decertify a nationwide class action for injuries

caused by penile prostheses. *See In re American Medical Sys., Inc.*, 75 F.3d 1069, 1081 (6th Cir. 1996) ("Proofs as to strict liability, negligence, failure to warn, breach of express and implied warranties will also vary from plaintiff to plaintiff because complications with an AMS device may be due to a variety of factors . . . .").

Although some courts have approved class certification of long-term mass torts, these cases have generally involved the centrality of a single issue. *See In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 166-67 (2d Cir. 1987) (expressing concern over the difficulties of managing mass tort suits but finding that class certification was justified because of the centrality of the military contractor defense), *cert. denied sub nom. Pinkney* v. *Dow Chem. Co.*, 484 U.S. 1004 (1988); *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 747 (4th Cir.) ("Just as the military [contractor] defense was central to the case in *Agent Orange*, so the question whether Aetna was a joint tortfeasor here was the critical issue common to all the cases against Aetna, and one which, if not established, would dispose of the entire litigation."), *cert. denied sub nom. Anderson* v. *Aetna Casualty and Sur. Co.*, 493 U.S. 959 (1989). This case, of course, lacks any single central issue.

The lack of predominant common issues has been a particular problem in asbestos-related class actions. For example, in *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990), the Fifth Circuit stated:

> The 2,990 [asbestos personal injury] class members cannot be certified for trial as proposed under Rule 23(b)(3). Rule 23(b)(3) requires that "the questions of law or fact common to the members of the class predominate over any questions affecting individual members." There are too many disparities among the various plaintiffs for their common concerns to predominate. The plaintiffs suffer from different diseases, some of which are more likely to have been

> caused by asbestos than others. The plaintiffs were exposed to asbestos in various manners and to varying degrees. The plaintiffs' lifestyles differed in material respects. To create the requisite commonality for trial, the discrete components of the class members' claims and the asbestos manufacturers' defenses must be submerged.

Id. at 712 (citations omitted). In *In re Temple*, 851 F.2d 1269 (11th Cir. 1988), the Eleventh Circuit expressed similar concerns:

> Although the record on commonality and typicality of the class is sparse, the district court's order on its face encompasses a potentially wide variety of different conditions caused by numerous different types of exposures. We have no indication that claimants' experiences share any factors other than asbestos and Raymark in common.

Id. at 1273 (footnote and citations omitted).

We also draw instruction from *Yandle* v. *PPG Indus., Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974), where the district court refused to certify a much more narrowly circumscribed asbestos class action — one brought by former employees of an asbestos plant. The court stated:

> [T]he Pittsburgh Corning plant was in operation in Tyler for a ten year period, during which some 570 persons were employed for different periods of time. These employees worked in various positions at the plant, and some were exposed to greater concentrations of asbestos dust than were others. Of these employees it is only natural that some may have had occupational diseases when they entered their employment for Pittsburgh Corning. There are other issues that will be peculiar to each plaintiff and will predominate in this case, such as: The employee's knowledge and appreciation of the danger of breathing asbestos dust and

> further, whether the employee was given a respirator and whether he used it or refused to use it. . . .
>
> Additionally, the plaintiffs have asserted various theories of recovery against the defendants, and the nine defendants have alleged differing affirmative defenses against the plaintiffs. For example, the statute of limitations may bar some plaintiffs, but not others. During the ten year period the state of medical knowledge was changing, which has a significant bearing on the defendants' duty to warn of dangers. Taking all these factors into consideration, the Court is convinced that the number of uncommon questions of law and fact would predominate over the common questions, and the case would therefore 'degenerate . . . into multiple lawsuits separately tried.'

Id. at 570-71.

Many of the cases cited by the settling parties in support of class certification are distinguishable because they involved only partial certification of *common* issues. *See Central Wesleyan College* v. *W.R. Grace & Co.*, 6 F.3d 177, 184 (4th Cir. 1993) ("[T]he district court exercised its discretion under Fed. R. Civ. P. 23(c)(1) and 23(c)(4)(A) to certify the class conditionally . . . on eight common issues."); *Jenkins* v. *Raymark Indus., Inc.*, 782 F.2d 468, 471 (5th Cir.) ("Accordingly, [the district court] certified the class as to the common questions, ordering them resolved for the class by a class action jury."), *reh'g denied*, 785 F.2d 1034 (5th Cir. 1986); *Payton* v. *Abbott Labs*, 83 F.R.D. 382, 386 (D. Mass. 1979) (certifying class as to limited common issues), *vacated*, 100 F.R.D. 336 (D. Mass. 1983). Other cases relied on by the settling parties are mass tort cases where it appeared possible to try a number of common issues and leave the individual issues to trials of small groups of plaintiffs. *See, e.g.*, *Sterling* v. *Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) ("[I]ndividual members of the class still will be required to submit evidence concerning their particularized

damage claims in subsequent proceedings."). These cases did not seek to resolve anywhere near the number of individual issues presented in this case.

In view of the factors set forth at pages 35-36, and for the reasons stated on pages 36-42, we conclude that this class fails the test of predominance. Even if we were to assume that some issues common to the class beyond the essentially settled question of the harmfulness of asbestos exposure remain, the huge number of important individualized issues overwhelm any common questions. Given the multiplicity of individualized factual and legal issues, magnified by choice of law considerations, we can by no means conclude "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members."

B. Adequacy of Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). The adequacy of representation inquiry has two components designed to ensure that absentees' interests are fully pursued. First, the interests of the named plaintiffs must be sufficiently aligned with those of the absentees. *GM Trucks*, 55 F.3d at 800. This component includes an inquiry into potential conflicts among various members of the class, *see Id.* at 800-01, because the named plaintiffs' interests cannot align with those of absent class members if the interests of different class members are not themselves in alignment. Second, class counsel must be qualified and must serve the interests of the entire class. *Id.* at 801.

Although questions have been raised concerning the second prong of the inquiry, we do not resolve them here. As we have briefly noted above, the objectors have forcefully argued that class counsel cannot adequately represent the class because of a conflict of interest. In the eyes of the objectors,

class counsel have brought a collusive action on behalf of the CCR defendants after having been paid over $200 million to settle their inventory of previously filed cases. The objectors also adduce evidence that class counsel, as part of the settlement, have abjured any intention to litigate the claims of any futures plaintiffs. These allegations are, of course, rife with ethical overtones, which have been vigorously debated in the academy. *See* Symposium, *Mass Tortes: Serving Up Just Desserts*, 80 Cornell L. Rev. 811 (1995). However, Judge Reed resolved this issue in favor of class counsel largely on the basis of fact findings that the objectors have not challenged. *See Georgine*, 157 F.R.D. at 326-330.

As to the first prong of the inquiry, however, we conclude that serious intra-class conflicts preclude this class from meeting the adequacy of representation requirement. The district court is certainly correct that "the members of the class are united in seeking the maximum possible recovery for their asbestos-related claims." *Georgine*, 157 F.R.D. at 317 (citation omitted). But the settlement does more than simply provide a general recovery fund. Rather, it makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others. For example, under the settlement many kinds of claimants (e.g., those with asymptomatic pleural thickening) get no monetary award at all. The settlement makes no provision for medical monitoring or for payment for loss of consortium. The back-end opt out is limited to a few persons per year. The settlement relegates those who are unlucky enough to contract mesothelioma in ten or fifteen years to a modest recovery, whereas the average recovery of mesothelioma plaintiffs in the tort system runs into the millions of dollars. In short, the settlement makes numerous decisions on which the interests of different types of class members are at odds.

The most salient conflict in this class action is between the presently injured and futures plaintiffs. As rational

actors, those who are not yet injured would want reduced current payouts (through caps on compensation awards and limits on the number of claims that can be paid each year). The futures plaintiffs should also be interested in protection against inflation, in not having preset limits on how many cases can be handled, and in limiting the ability of defendant companies to exit the settlement. Moreover, in terms of the structure of the alternative dispute resolution mechanism established by the settlement, they should desire causation provisions that can keep pace with changing science and medicine, rather than freezing in place the science of 1993. Finally, because of the difficulty in forecasting what their futures hold, they would probably desire a delayed opt out like the one employed in *Bowling* v. *Pfizer, Inc.*, 143 F.R.D. 141, 150 (S.D. Ohio 1992) (heart valve settlement allows claimants who ultimately experience heart valve fracture to reject guaranteed compensation and sue for damages at that time).

In contrast, those who are currently injured would rationally want to maximize current payouts. Furthermore, currently injured plaintiffs would care little about inflation-protection. The delayed opt out desired by futures plaintiffs would also be of little interest to the presently injured; indeed, their interests are against such an opt out as the more people locked into the settlement, the more likely it is to survive.[14] In sum, presently injured class

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[14] The conflict between futures and presently injured plaintiffs is obvious. Consider, for example, the deposition testimony of representative plaintiff Anna Baumgartner, whose husband died of mesothelioma. She testified that the "pleurals," *i.e.*, people who suffer only pleural thickening, and who remain uncompensated under the settlement, "don't deserve to be compensated by anyone," despite the fact that such plaintiffs currently win large awards in the tort system.

representatives cannot adequately represent the futures plaintiffs' interests and vice versa.

This conflict (as well as other conflicts among different types of claimants) precludes a finding of adequacy of representation. The class is not unlike the one in *GM Trucks*, where a conflict between individual and fleet truck owners prevented a finding of adequacy of representation. *See GM Trucks*, 55 F.3d at 801 ("[W]e must be concerned that the individual owners had no incentive to maximize the recovery of the government entities; they could skew the terms of the settlement to their own benefit.").

Absent structural protections to assure that differently situated plaintiffs negotiate for their own unique interests, the fact that plaintiffs of different types were among the named plaintiffs does not rectify the conflict. This principle was explained by the Second Circuit in *In re Joint Eastern & Southern District Asbestos Litigation*, 982 F.2d 721 (2d Cir. 1992), *modified sub nom. In re Findley*, 993 F.2d 7 (2d Cir. 1993), a case arising out of the Manville Bankruptcy reorganization. In addressing a conflict created by placing both asbestos victims and co-defendant manufacturers in the same subclass, the court observed, "Their interests are profoundly adverse to each other. The health claimants wish to receive as much as possible from the co-defendant manufacturers, and the latter wish to hold their payment obligations to a minimum." *Id.* at 739. The court concluded,

> The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.

Id. at 743. The lack of any structural protections in this case thwarted the adequate representation of the disparate groups of plaintiffs.

C. Typicality

Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23. The typicality requirement is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees. *See Neal* v. *Casey*, 43 F.3d 48, 57 (3d Cir. 1994); *Eisenberg* v. *Gagnon*, 766 F.2d 770, 786 (3d Cir.), *cert. denied sub nom. Weinstein* v. *Eisenberg*, 474 U.S. 946 *and Wasserstrom* v. *Eisenberg*, 474 U.S. 946, *and Pelino, Wasserstrom, Chucas and Monteverde, P.C.* v. *Eisenberg*, 474 U.S. 946 (1985). The inquiry assesses whether the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented. *See Neal*, 43 F.3d at 57.

Some commentators believe that the concepts of commonality and typicality merge. *See* 7A Charles A. Wright, et al., *Federal Practice and Procedure* § 1764, at 243-47 (1986). Both criteria, to be sure, seek to assure that the action can be practically and efficiently maintained and that the interests of the absentees will be fairly and adequately represented. *See General Tel. Co. of Southwest* v. *Falcon*, 457 U.S. 147, 157 n.13 (1982). But despite their similarity, commonality and typicality are distinct requirements under Rule 23. *See Hassine* v. *Jeffes*, 846 F.2d 169, 176 n.4 (3d Cir. 1988) ("'Commonality' like 'numerosity' evaluates the sufficiency of the class itself, and 'typicality' like 'adequacy of representation' evaluates the sufficiency of the named plaintiff . . . ."); *Weiss* v. *York Hosp.*, 745 F.2d 786, 810 n.36 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 *and cert. denied sub nom. Medical and Dental Staff of York Hospital* v. *Weiss*, 470 U.S. 1060 (1985). We think that typicality is

more akin to adequacy of representation: both look to the potential for conflicts in the class.

As our discussion of commonality and predominance make clear, this class is a hodgepodge of factually as well as legally different plaintiffs. Moreover, as our discussion of adequacy of representation shows, these differences create problematic conflicts of interest among different members of the class. These problems lead us to hold that no set of representatives can be "typical" of this class. Even though the named plaintiffs include a fairly representative mix of futures and injured plaintiffs, the underlying lack of commonality and attendant conflicts necessarily destroy the possibility of typicality. *See In re American Medical Systems, Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996) ("[W]e know from the amended complaint that each plaintiff used a different model, and each experienced a distinct difficulty. . . . These allegations fail to establish a claim typical to each other, let alone a class."). The claims of the named futures plaintiffs are not typical of the injured class members, and, conversely, the claims of the named injured plaintiffs are not typical of the futures class members.

Even if this class included only futures plaintiffs, we would be skeptical that any representative could be deemed typical of the class. In addition to the problems created by differences in medical monitoring costs, the course of each plaintiff's future is completely uncertain. As we pointed out in our discussion of commonality, some plaintiffs may ultimately contract mesothelioma, some may get asbestosis, some will suffer less serious diseases, and some will incur little or no physical impairments. Given these uncertainties, which will ultimately turn into vastly different outcomes, the futures plaintiffs share too little in common to generate a typical representative. It is simply impossible to say that the legal theories of named plaintiffs are not in conflict with those of the absentees, *see Neal*, 43 F.3d at 57; *Eisenberg* v. *Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985), or that the

named plaintiffs have incentives that align with those of absent class members, *see Neal*, 43 F.3d at 57.

D. Superiority

Rule 23(b)(3) requires, in addition to predominance, "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3). The rule asks us to balance, in terms of fairness and efficiency, the merits of a class action against those of "alternative available methods" of adjudication. *See Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 757 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974). We conclude that in this case a class action has serious problems, which, when compared to other means of adjudication, are not outweighed by its advantages.

The proposed class action suffers serious problems in both efficiency and fairness. In terms of efficiency, a class of this magnitude and complexity could not be tried. There are simply too many uncommon issues, and the number of class members is surely too large. Considered as a litigation class, then, the difficulties likely to be encountered in the management of this action are insurmountable. *See* FED. R. CIV. P. 23(b)(3)(D).[15]

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[15] Rule 23(b)(3) specifically directs the court to consider:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)(3).

This class action also suffers from serious problems in the fairness it accords to the plaintiffs. Each plaintiff has a significant interest in individually controlling the prosecution of separate actions. *See supra* note 15 (FED. R. CIV. P. 23(b)(3)(A)). This is not a case where "the amounts at stake for individuals [are] so small that separate suits would be impracticable." FED. R. CIV. P. 23(b)(3) Advisory Notes to 1966 Amendment. Rather, this action involves claims for personal injury and death — claims that have a significant impact on the lives of the plaintiffs and that frequently receive huge awards in the tort system. *See Yandle* v. *PPG Indus., Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974) ("[T]he court finds that the members of the purported class have a vital interest in controlling their own litigation because it involves serious personal injuries and death in some cases."). Plaintiffs have a substantial stake in making individual decisions on whether and when to settle.

Furthermore, in this class action, plaintiffs may become bound to the settlement even if they are unaware of the class action or lack sufficient information to evaluate it. Problems in adequately notifying and informing exposure-only plaintiffs of what is at stake in this class action may be insurmountable. First, exposure-only plaintiffs may not know that they have been exposed to asbestos within the terms of this class action. Many, especially the spouses of the occupationally exposed, may have no knowledge of the exposure. For example, class representatives LaVerne Winbun and Nafssica Kekrides did not learn that their husbands had been occupationally exposed to asbestos until the men contracted mesothelioma. Second, class members who know of their exposure but manifest no physical disease may pay little attention to class action announcements. Without physical injuries, people are unlikely to be on notice that they can give up causes of action that have not yet accrued. Third, even if class members find out about the class action and realize they fall within the class

definition, they may lack adequate information to properly evaluate whether to opt out of the settlement.[16]

To amplify, the fairness concerns created by the difficulties in providing adequate notice are especially serious because exposure-only plaintiffs may eventually contract a fatal disease, mesothelioma, from only incidental exposure to asbestos. Although only a small fraction of exposure-only plaintiffs will develop mesothelioma, the disease is presently always fatal, generally within two years of diagnosis. Prior to death, mesothelioma victims invariably suffer great pain and disability. Mesothelioma can be caused by slight and incidental exposure to asbestos fibers. The disease has been known to occur in persons who lived with an asbestos-exposed parent, or in household members who washed the clothes of people who worked with asbestos. Unlike other asbestos-related cancers, mesothelioma has only one medically established cause: asbestos exposure. The unpredictability of mesothelioma is further exacerbated by the long latency period between exposure to asbestos and the onset of the disease, typically between fifteen to forty years. As a result, persons contracting the disease today may have little or no knowledge or memory of being exposed. It is unrealistic to expect every individual with incidental exposure to asbestos to realize that he or she could someday contract a deadly disease and make a reasoned decision about whether to stay in this class action.

We make no decision on whether the Constitution or Rule 23 prohibits binding futures plaintiffs to a 23(b)(3) opt-out

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[16] Of course, these concerns would be alleviated to the extent the class action provided for an opt-in rather than opt-out procedure, or allowed plaintiffs to opt-out after they contract a disease. But this case, encompassing a huge number of futures plaintiffs, is an opt-out class action in which back-ended opt outs are greatly limited.

class action. However, it is obvious that if this class action settlement were approved, some plaintiffs would be bound despite a complete lack of knowledge of the existence or terms of the class action. It is equally obvious that this situation raises serious fairness concerns. Thus, a class action would need significant advantages over alternative means of adjudication before it could become a "superior" way to resolve this case. *See Yandle*, 65 F.R.D. at 572 (stating, as a reason the superiority requirement was not satisfied, that "because of the nature of the injuries claimed, there may be persons that might neglect to 'opt-out' of the class, and then discover some years in the future that they have contracted asbestosis, lung cancer or other pulmonary disease").

These advantages are lacking here. Although individual trials for all claimants may be wholly inefficient, that is not the only alternative. A series of statewide or more narrowly defined adjudications, either through consolidation under Rule 42(a) or as class actions under Rule 23, would seem preferable. *See also* William W. Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revised?*, 94 Mich. L. Rev. 1250, 1264 (1996) ("These alternatives 'are hardly confined to the class action, on the one side, and individual uncoordinated lawsuits, on the other.'") (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 386 (1967)).

E. Summary and Observations

We have concluded that the class certified by the district court cannot pass muster under Rule 23 because it fails the typicality and adequacy of representation requirements of Rule 23(a), as well as the predominance and superiority requirements of Rule 23(b). Indeed, *GM Trucks* requires an order of vacatur on these facts. Moreover, we cannot conceive of how any class of this magnitude could be certified.

The desirability of innovation in the management of mass tort litigation does not escape the collective judicial experience of the panel. But reform must come from the policy-makers, not the courts. Such reform efforts are not, needless to say, without problems, and it is unclear through what mechanism such reform might best be effected. The most direct and encompassing solution would be legislative action. The Congress, after appropriate study and hearings, might authorize the kind of class action that would facilitate the global settlement sought here. Although we have not adjudicated the due process issues raised, we trust that Congress would deal with futures claims in a way that would maximize opt-out rights and minimize due process concerns that could undermine its work. On the other hand, congressional inhospitability to class actions, as reflected in the recently enacted Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995), and by its recently expressed concern about the workload of the federal courts, might not bode well for such a prospect.

In a different vein, Congress might enact compensation-like statutes dealing with particular mass torts.[17] Alternatively, Congress might enact a statute that would deal with choice of law in mass tort cases, and provide that one set of laws would apply to all cases within a class, at least on issues of liability. Such legislation could do more to simplify (and facilitate) mass tort litigation than anything else we can imagine.

Another route would be an amendment to the Federal Rule of Civil Procedure 23. We are aware that the Judicial Conference Advisory Committee on Civil Rules is in fact

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[17] For example, Judge Weinstein calls for a broad compensatory legal framework to give mass tort victims a means of recovery independent of tort law. *See* Jack B. Weinstein, *Individual Justice in Mass Tort Litigation* (1995).

studying Rule 23, including the matter of settlement classes. One approach the Rules Committee might pursue would be to amend Rule 23 to provide that settlement classes need not meet the requirements of litigation classes. The Rules Committee, of course, should minimize due process concerns, but it might address them via opt-in classes, or by classes with greater opt-out rights, so as to avoid possible due process problems.

The Rules Committee might also consider incorporating, as an element of certification, a test, akin to preliminary injunction analysis, that balances the probable outcome on the merits against the burdens imposed by class certification. This kind of balancing might engender confidence in the integrity of classes thus developed. But this approach has problems too, not only in terms of the potential for satellite litigation, but also in terms of the impact of the threshold decision on the outcome of the case.

Perhaps this case, with its rich matrix of factual and legal issues, will serve as a calipers by which the various proposals before the Rules Committee might be measured. While we hope that these observations are useful, we express doubts that anything less than statutory revisions effecting wholesale changes in the law of mass torts could justify certification of *this* humongous class. In short, we think that what the district court did here might be ordered by a legislature, but should not have been ordered by a court.

The order of the district court certifying the plaintiff class will be vacated and the case remanded to the district court with directions to decertify the class. The injunction granted by the district court will also be vacated. The parties will bear their own costs.

HARRY W. WELLFORD, Circuit Judge, concurring:

I fully subscribe to the decision of Judge Becker that the plaintiffs in this case have not met the requirements of Rule 23. I have some reservations, however, about any intimation that Congress might or should enact compensation-like statutes to deal with mass torts or that we approve any suggestion of Judge Weinstein "for a broad compensatory legal framework to give mass tort victims a means of recovery independent of tort law." *See* n.17. I concur in the observation, however, that Rule 23 might be amended to aid in the process of mass settlement in the class action context.

I am of the view, moreover, that the "futures claims" presented by certain plaintiffs, as described in the court's opinion, do not confer standing to these exposure only plaintiffs. Plaintiffs of this type do not claim presently to suffer from any clinically diagnosable asbestos-related condition; they merely assert that they were exposed to asbestos fibers at some time in the past. In *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), we were reminded that federal courts under the Constitution have jurisdiction to consider only real cases and controversies. *Id.* at 559. At a minimum, standing requires:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, *see id.*, at 756; *Warth* v. *Seldin*, 422 U.S. 490 (1975); *Sierra Club* v. *Morton*, 405 U.S. 727, 740-741, n.16 (1972); and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" *Whitmore, supra*, at 155 (quoting *Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983)). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-61 (footnote omitted).

Plaintiffs bear the burden of establishing federal jurisdiction and their standing to proceed. *Lujan*, 504 U.S. at 561; *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 231 (1990); *Warth* v. *Seldin*, 422 U.S. 490, 518 (1975). I do not believe exposure only plaintiffs have demonstrated any "injury in fact" as of the time of filing. Furthermore, I would conclude that such plaintiffs have not presented a "likely" as opposed to a mere "speculative," current injury that could be redressed at trial. The court's decision in such a case would necessarily be conjectural at best. Fear and apprehension about a possible future physical or medical consequence of exposure to asbestos is not enough to establish an injury *in fact*. I do not believe that *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), a case involving actual nuclear power emissions, supports the plaintiffs' position. The case, moreover, did not contain claims for money damages. Nor does *Helling* v. *McKinney*, 509 U.S. 25 (1993), constitute precedent on which these plaintiffs can rely to support standing. *Helling* involved a plaintiff who was continuously exposed to tobacco smoke in limited quarters and claimed that he had certain health problems caused by exposure to cigarette smoke and that he feared further injury if he continued to be exposed involuntarily to this hazard. *Id.* at 2478. Standing was not discussed by the Supreme Court, nor by the court of appeals (*see Helling*, 924 F.2d 1500 (9th Cir. 1991)), presumably because the plaintiff claimed present injury.

In re "Agent Orange" Products Liability Litigation (*Ivy* v. *Diamond Shamrock Chemicals Co.*), 996 F.2d 1425, 1434

(2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994), may suggest to the contrary, but I would adopt here a prudential limitation on standing, under these particular circumstances, as to exposure only plaintiffs who have not yet manifested a distinct and palpable injury-in-fact. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Col. Law Rev. 1343, 1422-1433 (1995). I do not intimate that prudence would always preclude any and all suits by "future claimants" who have been exposed to some calamitous occurrence or substance. This view in this case is supported by the testimony of the plaintiffs themselves. The exposure only class representatives admitted under oath that they would not have continued with the litigation in the absence of a settlement. Robert Georgine responded to questioning:

> Q. Have you ever gone to a lawyer for your own personal reasons to file a claim for yourself?
>
> A. No.
>
> Q. —for asbestos related injury?
>
> A. No.
>
> Q. And why is that?
>
> A. *I haven't had a problem.*
>
> Q. Is that still true today? That you haven't had a problem?
>
> A. Well, I don't—I breathe normal—*I don't have any problems that I'm aware of.* That's not to say that one can't develop.
>
> Q. Oh, I understand that.
>
> A. Okay.
>
> Q. And God forbid, I hope nothing ever does develop, but until you develop an asbestos-related problem, you have no intention of filing a lawsuit for damages, do you?

> A. Other than the present—present case?
>
> Q. Well, in the present case, do you believe that the asbestos companies owe you money? M-O-N-E-Y.
>
> A. Owe me personally?
>
> Q. Yes.
>
> A. *I believe that if there was anything that happened to my lungs that was asbestos-related, that they would owe me money, yes.*
>
> Q. But as of today, nothing has happened to your lungs that's asbestos-related that you know of?
>
> . . . .
>
> A. For myself, that's right.
>
> . . . .
>
> Q. As you sit here today, you are not suffering any emotional distress because you might come down with an asbestos—
>
> A. No, I am not. I am not.

J/A 1204-06 (emphasis added). At the fairness hearing, Ambrose Vogt testified similarly:

> Q. Now, prior to your participation in this class action, you had never consulted with a lawyer for the purpose of filing a claim as a result of your asbestos exposure, isn't that right?
>
> A. Yes.
>
> Q. You testified under oath on January 12th, 1994, that you were not seeking money damages at the time that you agreed to be a class representative in this case, and at the time that the lawsuit was filed? You testified that way under oath then, isn't that correct?
>
> A. Yes.
>
> Q. And that was true then, is that right?

A. Yes.

Q. And it is true today, it is not, you are not seeking money damages today?

A. Not today, no.

Id. at 1280-81. At his deposition, class representative Ty Annas also made clear that he would not have brought suit had it not been for the settlement. *Id.* at 1179. On cross-examination, Annas stated:

Q. As of today, can you think of any out-of-pocket loss that you've had as a result of your exposure to asbestos?

A. Not from mine.

Q. So, Mr. Annas, would it be fair to say that you don't believe you've lost any money at all as a result of your exposure to asbestos?

A. No, sir.

. . . .

Q. So you, on January 15, 1993, had no interest in recovering money for yourself from the asbestos companies; is that right?

A. Yes.

Id. at 1178-79. At the fairness hearing, Mr. Annas reiterated even more clearly that he did not seek damages of any kind from the CCR defendants:

Q At deposition you testified that as of January 15th, 1993 that you hadn't authorized anybody to sue for money for yourself because of your asbestos exposure, is that right?

A. That's right.

Q. And that is correct today?

A. Yes, sir.

Q. And when you appeared at deposition, you testified I believe that you got involved in this case in order to help to get the case resolved and to help people before the money runs out, is that correct?

A. That's my statement.

Q. If they're [people exposed to asbestos] not impaired they should receive no compensation whatsoever?

A. That's my feelings.

Id. at 1269-72. Representative plaintiffs Timothy Murphy and Carlos Raver also stated emphatically that they were not seeking damages of any kind at the time the complaint was filed. At his deposition, Murphy testified as follows:

Q. Let's go back, let's say, a month in time, prior to the communication that you had with Mr. Weingarten [counsel for Greitzer & Locks] three or four weeks ago. Before that communication, did you know what it was that you were claiming in this lawsuit?

A. I know what I—that I claimed that I was occupationally exposed to asbestos over a long period of time.

Q. Did you know that you were claiming money damages?

A. No.

Q. To this day, do you believe you are claiming money damages in this case?

A. No.

Q. *So you are not seeking any recovery in terms of money damages in this case; is that right?*

A. *No. Not at this time.*

Id. at 1124 (emphasis added). Raver testified to the same effect:

Q. Did you conclude in 1991, sir, that based on your physical condition at that time that you, in your words, didn't deserve any money and didn't need any money? Was that a decision that you made?

A. Yes, sir.

Q. When you filed this lawsuit, the one that was filed in January of 1993, at the time that you filed the lawsuit, had you decided that based on your condition at that time that you didn't deserve any money and didn't want any money at that time?

A. That's true, sir. I didn't want any money at that time. Still don't want any money.

Id. at 1147-49. These representative plaintiffs clearly conceded at the fairness hearing that, absent the settlement, they did not intend to pursue the claims in the class complaint. They claimed no damages and no present injury. I would hold, accordingly, that the exposure only plaintiffs had no standing to pursue this class action suit.

I concur in the court's decision to reverse the district court, vacate the order certifying the plaintiff class, and remand with instructions to vacate the injunction. I would also hold further that exposure only plaintiffs have no standing to pursue their claims.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civ. A. No. 93-0215

ROBERT A. GEORGINE, et al.,
on behalf of themselves and
others similarly situated, *Plaintiffs,*

- *v.*

AMCHEM PRODUCTS, INC., et al.,
Defendants, and Third Party Plaintiffs,

v.

ADMIRAL INSURANCE COMPANY, et al.,
Third Party Defendants.

MEMORANDUM

September 21, 1994

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF ISSUANCE OF PRELIMINARY INJUNCTION

I. INTRODUCTION

Currently before me is the motion of the Center for Claims Resolution ("CCR") defendants for an order confirming the court's issuance of a preliminary injunction restraining class members from initiating or prosecuting asbestos-related claims against the CCR defendants pending a final order in this proceeding (Document No. 1140), and

the responses of various "objectors" thereto,[1] having found that notice of the CCR defendants' motion was duly served upon counsel of record, the Court makes the following:

[1] The following individuals oppose the motion of CCR through a brief filed by the Baron & Budd firm: the Wiese Objectors, the White Lung Association of New Jersey Objectors, the Hertler Objectors, the Windsor Objectors, and California Objectors Iona Cunningham, as representative of the estate of Charles Cunningham, and Twila Sneed. An additional brief was filed by the Baron & Budd firm on behalf of Richard R. Preston, Sr. and Louis C. Andersen. Moreover, Steven Kazan of Kazan, McClain, Edises & Simon, and Brad Seligman filed a brief in opposition to the motion of the CCR defendants on behalf of Aileen Cargile, Betty Francom, John Wong, John Soteriou, Harold Hans Emerich, and Thomas Corey. The law offices of Peter G. Angelos also filed an opposition on behalf of numerous class members that the law firm claims it represents.

II. FINDINGS OF FACT[2]

1. On January 15, 1993, the complaint was filed in this action seeking damages for personal injury resulting from asbestos-exposure on behalf of a putative class defined as:

> (a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant or passenger ships), either occupationally or through occupational exposure of a spouse or household member, to asbestos or to asbestos containing products for which one or more of the defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury or damage, or death in any state or federal court

[2] Despite the objectors' argument that I cannot issue an injunction in this case because Judge Weiner's Order of January 29, 1993 expressly limits my "jurisdictional authority," because Judge Weiner and I are Article III district judges and therefore have equal authority, *see United States* v. *Stone*, 411 F.2d 597, 598-99 (5th Cir. 1969), and because it is permissible for two district judges to divide responsibilities to achieve an efficient management of a case, *see* 28 U.S.C. § 137, and because I have decided ancillary matters in the past without written order from Judge Weiner, *see Carlough* v. *Amchem Products, Inc.*, 834 F. Supp. 1437 (E.D. Pa. 1993) (subject matter jurisdiction) and *Carlough* v. *Amchem Products, Inc.*, 1993 WL 472812 (E.D. Pa. Oct. 28, 1993) (approving notice plan), and because the parties have not been taken by surprise that I will rule on this motion, *see* Order of August 26, 1994, I have exercised my authority to resolve the present motion.

against the defendant(s) (or against entities for whose actions or omissions the defendant(s) bear legal liability).

(b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph 1 above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph 1 above in any state or federal court against the defendant(s) (or against entities for whose actions or omissions the defendant(s) bear legal liability).

2. Simultaneously with the filing of the complaint, the CCR defendants[3] filed an answer and the plaintiffs and defendants jointly filed a proposed stipulation of settlement ("Stipulation") and motion for conditional class certification.

3. On January 29, 1993, the Honorable Charles R. Weiner of this Court conditionally certified the opt-out class.

4. On October 6, 1993, this Court ruled that it had subject matter jurisdiction over this action. *Carlough* v. *Amchem Products, Inc.*, 834 F. Supp. 1437 (E.D. Pa. 1993).

5. On October 27, 1993, this Court ruled that the notice plan submitted to the Court by the settling parties was

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[3] The CCR defendants are: Amchem Products, Inc., A.P. Green Industries, Inc., Armstrong World Industries, Inc., Asbestos Claims Management Corp. (formerly National Gypsum Company), Certainteed Corporation, C.E. Thurston and Sons, Inc., Dana Corp., Ferodo America, Inc., Flexitallic, Inc., GAF Corp., I.U. North America, Inc., Maremont Corp., National Service Industries, Inc., Nosroc Corp., Pfizer Inc., Quigley Company, Inc., Shook & Fletcher Insulation Company, T&N plc, Union Carbide Chemicals and Plastics Corp., United States Gypsum Company.

adequate and comported with due process and ordered the dissemination of the notice pursuant to the plan. *Carlough* v. *Amchem Products, Inc.*, 1993 WL 472812 (E.D. Pa. Oct. 28, 1993).

6. Notice in accordance with the approved plan was disseminated commencing on November 1, 1993. Class members were given the opportunity to exclude themselves from the class by filing an appropriate exclusion form on or before January 24, 1994, at which time the opt-out period closed.

7. On March 17, 1993, several absent members of the *Carlough* class brought a putative state-wide class action in state court in West Virginia seeking a declaratory judgment that the Stipulation was unenforceable against West Virginia class members and not entitled to full faith and credit. *See Gore, et al.* v. *Amchem Products, Inc.*, C.A. No. 93-C-195. The CCR defendants sought, and were granted on May 5, 1993, a preliminary injunction by this Court, pursuant to the All-Writs Act, 28 U.S.C. § 1651 (1988) and the Anti-Injunction Act, 28 U.S.C. § 2283 (1970), barring further prosecution of the *Gore* action. I found that because "[n]o action can be further along than one already settled," the existence of the *Gore* action would be disruptive to the plaintiffs, defendants and this Court in the attempt to manage this callosal settlement. *See Carlough* v. *Amchem Products, Inc.*, 1993 WL 144901 (E.D. Pa. May 5, 1993). The injunction was affirmed by the Court of Appeals for the Third Circuit on December 1, 1993. *Carlough* v. *Amchem Products, Inc.*, 10 F.3d 189 (3d Cir. 1993).

8. On August 16, 1994, after discovery and a full evidentiary hearing on the issue of fairness, this Court ruled that the Stipulation was fair to the class as a whole; that the class had been adequately and ethically represented by class counsel throughout the negotiations and the subsequent proceedings; and that notice to the class complied with Fed. R. Civ. P. 23 and the Due Process Clause. Accordingly, this

Court approved the Stipulation as fair and finally certified the opt-out settlement class. The August 16, 1994 Order also provided that the "provisions of the Stipulation of Settlement, as amended, are hereby made part of the record in this case and as such shall have the full force and effect of an Order of this Court."

9. Section II of the Stipulation provides that:

> each Settlement Class Member, upon the Court's entry of an order approving the Stipulation as a good faith, ethical, fair, adequate, and reasonable settlement, and concluding that the Class of Claimants has received adequate notice and has been adequately and ethically represented by Class Counsel, shall be enjoined by that order from instituting or maintaining any claim or action for asbestos-related personal injury or damage against the CCR Defendant(s) or Additional Releasee(s) in any state or federal court, other than as set forth in this Stipulation.

Stipulation, Section II, at 10.

10. Since the expiration of the opt-out period, over 2,500 claims have been filed against one or more CCR defendants by individuals who did not file timely exclusion requests.[4] Without the relief sought here, class members will likely

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[4] For example, on or about February 25, 1994, Vincent and Georgia Betty Greco, members of the *Georgine* class who did not file exclusion requests nor did they file suit prior to January 24, 1994, filed a lawsuit in the California Superior Court for Alameda County, Docket No. 731387-9, alleging that Mr. Greco had asbestos-related mesothelioma caused by occupational exposure to asbestos or asbestos-containing products manufactured or supplied by five CCR member companies, specifically, GAF Corp., Armstrong World Industries, Inc., Turner & Newall PLC, Flexitallic, Inc., and Quigley Company, Inc.

continue to pursue claims in other courts[5] and for the reasons discussed *infra*, I find that this continued litigation will immediately undermine and defeat the purpose and effect of the Stipulation now approved by this Court.

11. A timely exclusion request is a request, signed by an individual class member, postmarked on or before January 24, 1994, which provides a reasonable indication of the individual's desire to opt out. The CCR defendants have agreed to treat lawsuits filed prior to January 24, 1994, which is the date when the opt-out period terminated, as timely exclusion requests and this Court accepts that determination.

12. On August 24, 1994, the CCR defendants moved for an order preliminarily enjoining class members from initiating or further prosecuting asbestos-related personal injury or death claims in duplicative proceedings.[6] The CCR defendants' motion was served on all *pro se* litigants herein and approximately three hundred counsel of record either by Federal Express or United States mail. Counsel of record have stated, in their various filings during this litigation, that

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[5] Neither the submissions of the CCR defendants nor the objectors give any bases to demonstrate that the number of individual class members filing suit against CCR defendants will not continue to rise.

[6] While the pendency of duplicative *in personam* actions in state court would not usually justify enjoining litigants from pursuing the state court actions, a federal court can enjoin the state proceedings where a federal court is on the verge of settling a complex matter, and the state court proceedings may undermine the federal court's ability to achieve that objective. *Standard Microsystems Corp.* v. *Texas Instruments*, 916 F.2d 58, 60 (2d Cir. 1990); *In re Baldwin-United Corp.*, 770 F.2d at 337.

they represent substantially in excess of ten thousand putative class members.

13. I find that suits relating to the same asbestos-related personal injury and death claims that are subject to the *Georgine* complaint that have been and are to be filed after January 24, 1994, by class members who failed to opt out of this class action, and the supporting actions of their attorneys and other people acting in concert with them, have and would disrupt, undermine, and otherwise defeat the implementation of the Stipulation now approved by this Court. Moreover, the existence of these types of actions "substantially increase the cost of litigation, would create a risk of conflicting results, and would prevent the plaintiffs from benefitting from [the] settlement already negotiated . . . ." *See Carlough*, 10 F.3d at 203 (quoting *In re Baldwin-United Corp.*, 770 F.2d 328, 333 (2d Cir. 1985)). While it is impossible to determine with certainty the exact number of class members who will pursue such litigation, I find that the existence of over 2,500 claims filed against one or more of the CCR defendants by individuals who did not opt out of the class demonstrates a strong likelihood that these state court proceedings would seriously impair this Court's authority to preside over the *Georgine* settlement. Here, because the settlement was negotiated over a lengthy period and is now approved, and because numerous evidentiary hearings have been held regarding the settlement, the existence of these actions by class members as described above would serve only to impair this Court's jurisdiction by frustrating the implementation of the *Georgine* settlement, and the receipt of benefits to the class as a whole, the defendants and the public.

14. If the injunction requested here is not issued, the CCR defendants will encounter claims by class members filed or pursued in multiple jurisdictions. As a result, the CCR defendants would be forced to defend the settled claims of class members in multiple jurisdictions and thus may be compelled to litigate the merits of the individual claims in

courts all over the country. One result of which will be to undercut the financial planning and claims procedures provided in the Stipulation and, therefore, jeopardize the security of the existence of a fund to compensate class members for their injuries.

15. Because the August 16, 1994 Order of this Court finally certified the opt-out settlement class pursuant to Fed. R. Civ. P. 23(b)(3) and approved the Stipulation as fair to the class as a whole pursuant to Fed. R. Civ. P. 23(e), it is probable that the CCR defendants will prevail on the merits.[7]

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[7] Certain objectors argue that because the implementation of the settlement depends on the resolution of claims in Count One of CCR's third party complaint which Judge Weiner will resolve, I cannot find that a likelihood of success on the merits exists in the present case. I find, however, that because the major hurdle to the implementation of this settlement was the approval as fair of the settlement agreement, and because to the extent that Rule 65 is applicable, all I must find is that the CCR defendants have shown a likelihood of success on the merits, I find that it is likely that the CCR defendants will succeed on the merits. *See S & R Corp.* v. *Jiffy Lube Intern., Inc.*, 968 F.2d 371, 375 (3d Cir. 1992) ("All four factors should favor preliminary relief before the injunction will issue"); *Hoxworth* v. *Blinder, Robinson & Co.*, 903 F.2d 186, 197 (3d Cir. 1990) (must show likelihood of success on merits *and* probability of irreparable harm it relief is not granted). *See also Hunt* v. *Commodity Futures Trading Comm.*, 93 B.R. 484, 492 (N.D. Tex. Bankr. Ct. 1988) (applying Fifth Circuit's "sliding scale test, 'balancing the hardships associated with the issuance or denial of a preliminary injunction with the degree of likelihood of success on the merits'" and noting Second Circuit's relaxed standard which includes a demonstration of irreparable harm and *either* (1) likelihood of success on the merits or (2) a question necessary

16. If an injunction is not issued, the CCR defendants would suffer immediate and irreparable harm because the cost and time expended defending claims in multiple jurisdictions would likely result in the disintegration of the *Georgine* settlement and costs incurred by the CCR defendants from years of negotiation and court proceedings would be lost. Simply, forcing the CCR defendants to defend themselves in multiple actions would unduly burden the CCR defendants and the fund CCR administers for the benefit of all class members.

17. Although some members of the class who file claims in other courts, who have not opted out of this action, could possibly theoretically suffer some harm due to the issuance of this injunction, in the form of (1) a decreased measure of potential damage awards, and (2) a possible delay in receipt of those awards, those injuries would be mitigated by the ability to settle or try their claims against other asbestos manufacturers who are not members of CCR for substantial sums of money, and by the benefits provided by the *Georgine* settlement, which are presently available to class members.[8] Some benefits that these class members would acquire from the *Georgine* settlement are the elimination of the risk of having to prove liability as they would under the applicable law, a negotiated settlement for cash sums due under the claims procedure or extraordinary claims procedure, security that funds will be available to compensate them for future

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for resolution through litigation and a balance of the hardships tipping decidedly toward the moving party); *Ahern* v. *Fibreboard Corp.*, C.A. No. 6:93cv526, ¶ 12, (E.D. Tex., Tyler Civ. Sept. 28, 1993) (same).

[8] The CCR began receiving and processing claims under the terms of the Stipulation immediately upon the close of the opt-out period.

illnesses due to exposure to asbestos, and the availability of damages for pain and suffering after a claimant suffering from mesothelioma dies. *See* Stipulation, Section VIII, at 57-57a. Because the Stipulation has been approved as fair, and because class members would be fairly compensated for injuries caused by asbestos manufactured or distributed by CCR defendants under the terms of the Stipulation, and because of the other benefits provided by the *Georgine* settlement, I find that the harm incurred by class members from the issuance of this injunction would neither be irreparable nor substantial.[9]

18. Any harm to the interests of class members by the issuance of this preliminary injunction also will be mitigated because the filing of the complaint in this action has operated to toll any statute of limitation that otherwise might be running in favor of the CCR defendants. *See Crown, Cork & Seal Company* v. *Parker*, 462 U.S. 345, 350, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983); *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 550-53, 94 S.Ct. 756, 38 L.Ed.2d 713, *reh'g denied*, 415 U.S. 952, 94 S.Ct. 1477, 39 L.Ed.2d 568, (1974); *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 43 F.R.D. 452, 460-61 (E.D. Pa. 1968). *See also Ahern*, C.A. No. 6:93cv526, at ¶ 40.[10]

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[9] In addition, as aforementioned, because class members can presumably make a full recovery for all damages suffered from other defendants who are not members of CCR, the harm to class members from the issuance of an injunction is mitigated.

[10] The harm to class members from the issuance of this injunction also is significantly mitigated by the fact that this is an "opt out" class action. If class members desired to bring their claims in state court, they simply could have excluded themselves from the class. *See Carlough*, 10 F.3d at 203-04 ("we agree with the district court findings that

19. Based on Findings of Fact ¶¶ 13, 14, and 16-18, I find that the benefits to the CCR defendants from an injunction are not outweighed by any concerned irreparable injury to absent class members.

20. I find that the public would benefit from the issuance of an injunction. The public interest would not be served by permitting the burdensome and costly asbestos litigation to continue to proceed against the CCR defendants in multiple proceedings across the United States. As discussed in detail in this Court's August 16, 1994 memorandum opinion, resolution of asbestos claims under the *Georgine* Stipulation will *inter alia*, lower costs, shorten delays, produce consistent results, and provide assurance that compensation will be available to class members who suffer from asbestos related ailments in the future while not burdening the system unless and until that future date arrives.

III. CONCLUSIONS OF LAW

21. This Court has previously concluded that it has subject matter jurisdiction over this case pursuant to 28 U. .C. § 1332 as the named parties are of diverse citizenship and the amount in controversy for each member exceeds $50,000. *Carlough*, 834 F. Supp. 1437.

22. Because class members received reasonable notice, see Findings of Fact ¶¶ 5, 6, 8, 12, had an opportunity to be heard, to meaningfully partake in the litigation and were adequately represented, see Finding of Fact ¶ 8, and had an opportunity to opt out from the class, see Findings of Fact ¶¶ 5, 6, this Court has jurisdiction over class members for the

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judicial precedent as well as the preemptive cast of the *Gore* suit and *the recent establishment of the opt out period* overcome the reluctant disposition of the courts to issue a necessary in aid injunction.") (emphasis added).

purposes of this injunction. *See Carlough*, 10 F.3d at 199-200.[11]

23. I conclude that the efforts made by the CCR defendants to provide notice to class members of the present motion of the CCR defendants were effective and adequate.

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[11] The arguments of the objectors relating to the ability of class members to opt out has been decided by this Court on October 27, 1993 and on August 16, 1994. Simply, the objectors have not provided any new substantive grounds to demonstrate that notice to the class in this case was not reasonable or that their ability to opt out was impaired. *See Carlough*, 10 F.3d at 201 ("Nevertheless, once the district court approved the dissemination of notice and commenced the opt out period pursuant to its October 27, 1993 order, the [personal] jurisdictional problem was resolved.").

Furthermore, certain class members argue that because their counsel filed a motion to certify an opt out class of California residents, they have "squarely raise[d] issues of personal jurisdiction for a large number of California class members." This argument has no merit. These class members were provided with a method to individually opt out of this class action. They chose to utilize their own improper method and hence, did not effectively exclude themselves from the class. As well, Judge Weiner in his Order of September 2, 1994 (Document No. 1156) denied the motion to certify a so-called opt-out class. In any case, the failure of these class members to comply with the reasonable procedures for exclusion has no bearing on whether the exercise of jurisdiction over them offends traditional notions of fair play and substantial justice. *Carlough*, 10 F.3d at 199. For the reasons stated in Conclusions of Law ¶¶ 22 and 23, this Court has personal jurisdiction over those class members.

24. This Court has authority pursuant to the All-Writs Act, 28 U.S.C. § 1651 (1988)[12] and the Anti-Injunction Act, 28 U.S.C. § 2283 (1970)[13] to issue an injunction if the relief is necessary in aid of this Court's jurisdiction over the class action.

25. For the reasons stated in Findings of Fact ¶¶ 13, 14, 16, 19, and 20, the issuance of an injunction restraining class members who have not excluded themselves from the class, their attorneys, and all other persons acting in concert with them, from initiating or pursuing their asbestos-related personal injury or death claims against any CCR defendant in any court other than this Court is necessary in aid of this Court's jurisdiction.[14] *See In re Baldwin-United Corp.*, 770

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[12] The All-Writs Act provides in part that:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651.

[13] The Anti-Injunction Act provides that:

> A Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283.

[14] The citation by certain objectors of *In re Temple*, 851 F.2d 1269, 1272 n.4 (11th Cir. 1988), and their argument for the need for an identifiable "res" in order to stay a state court litigation under the Anti-injunction Act is meritless. First, as both this Court and the Court of Appeals for the

F.2d at 337 ("[T]he potential for an onslaught of state action posed more than a risk of inconvenience or duplicative litigation, rather, such a development threatened to 'seriously impair the federal court's flexibility and authority' to approve settlements in the multi-district litigation."); *Carlough*, 10 F.3d at 202 (same); *In re Asbestos School Litigation*, 1991 WL 61156 at *1 (E.D. Pa. Apr. 16, 1991), *aff'd mem.*, 950 F.2d 723 (3d Cir. 1991) ("At this juncture, where the potential for resolution is gaining momentum in anticipation of trial, this court's ability to oversee a possible settlement would be 'seriously impaired' by the continuing litigation of

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Third Circuit stated when this issue was raised relating to the *Gore* action, mandatory class actions have more jurisdictional hurdles to overcome than an *opt-out* class action. Second, the *footnote* in *In re Temple* merely suggested that one basis for the district court's authority in that case to issue an injunction in aid of its jurisdiction would be if monies representing the limited fund were tendered to the district court. As a result, the depletion of the fund by state courts would destroy the district court's jurisdiction.

Here, this Court has previously determined that it has jurisdiction both over the subject matter and, primarily because of the ability of class members to opt out, jurisdiction over the person. Because this Court has independent grounds for jurisdiction, the lack of a transfer to this Court of the funds involved in this case does not preclude the issuance of an order to preserve this Court's jurisdiction. In fact, courts have found that the jurisdiction of a multidistrict court is analogous to a court in rem because where a class action is far advanced, the proceeding is the virtual equivalent of a res over which the district judge requires full control. *See In re Baldwin-United Corp.*, 770 F.2d at 337.

parallel state actions such as [that of the nonmoving party's]."').

26. The issuance of an injunction in this case under the All-Writs Act and the Anti-Injunction Act is supported by authority both in and out of this jurisdiction. *See Carlough*, 10 F.3d 189 at 199-200; *In re Asbestos School Litigation*, 1991 WL 61156; *Ahern*, C.A. No. 6:93cv526; *In re Baldwin-United Corp.*, 770 F.2d 328; *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1332 (5th Cir. Unit A Oct. 1981), *cert. denied*, *Three J Farms, Inc.* v. *Plaintiffs' Steering Comm.*, 456 U.S. 936, 102 S.Ct. 1993, 72 L.Ed.2d 456 (1982); *Battle* v. *Liberty Nat'l Life Ins. Co.*, 877 F.2d 877 (11th Cir.), *reh'g denied, en banc*, 887 F.2d 1093 (11th Cir. 1989); *Standard Microsystems Corp.*, 916 F.2d 58; *James* v. *Bellotti*, 733 F.2d 989 (1st Cir. 1984).[15]

27. In addition, based on Findings of Fact ¶¶ 5, 6, 8, and 9, the issuance of an injunction restraining class members who have not opted out, their attorneys, and all other persons acting in concert with them, from initiating or pursuing their asbestos-related personal injury or death claims against any CCR defendant in any court other than this Court is appropriate because the August 16, 1994 Order of this Court incorporating therein the Stipulation of Settlement forms a basis for prohibiting them from pursuing an action against the CCR defendants in any other court.

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[15] In regards to the argument by certain objectors that this Court may not enjoin collateral proceedings in other forums because such an injunction would allow the court to effectively predetermine the *res judicata* effect of its own judgments, I adopt the reasoning expressed by the Court of Appeals for the Second Circuit in *In re "Agent Orange" Product Liability*, 996 F.2d 1425, 1432 (2d Cir. 1993), and, therefore, I find the objectors' argument to be unavailing.

28. When ruling on a motion for a preliminary injunction, a district court should, in applying Fed. R. Civ. P. 65,[16] consider the following four factors: (1) the likelihood that the moving party will prevail on the merits at final hearing; (2) the extent to which the moving party is being irreparably harmed by the conduct complained of; (3) the extent to which the nonmoving parties will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest. *S & R Corp.*, 968 F.2d at 374. All four factors should favor the requested relief before an injunction is issued. *Id.*

29. Because I have found that, (1) there is a fair probability of eventual success on the merits, see Finding of Fact ¶ 15 and *supra* note 7; (2) the CCR defendants will be irreparably harmed if they are forced to defend the claims of class members in multiple jurisdictions, see Findings of Fact ¶¶ 13, 14, 16; (3) the benefits to the CCR defendants from an injunction are not outweighed by any irreparable injury to absent class members who have not excluded themselves from

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[16] Although I have previously determined in my May 5, 1993 memorandum that "the prerequisites for equitable relief under Rule 65 do not apply to [a] preliminary injunction [grounded on the All-Writs Act]," because the Court of Appeals for the Third Circuit has expressly declined to decide whether Rule 65 in fact applies, *see Carlough*, 10 F.3d at 198 n.6, I will conduct the appropriate analysis under Rule 65. *See Carlough*, 1993 U.S. Dist. LEXIS 6027, 1993 WL 144901 at *8. *See also In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775, 778 (3d Cir. 1975) ("The order of the district court as applied to class members, therefore, may be viewed not as an injunction restraining class members from prosecution of other actions, but as a directive facilitating the orderly and efficient management of the class actions"); *In re Asbestos School Litigation*, 1991 WL 61156 at *3 (same).

the class, *see* Findings of Fact ¶¶ 13-18; and (4) the public interest will be served by prohibiting class members from pursuing their action against the CCR defendants in the state courts, *see* Finding of Fact ¶ 20, I conclude that the issuance of an injunction is warranted. *See Baldwin-United Corp.*, 770 F.2d at 337 ("If states or others could derivatively assert the same claims on behalf of the same class or members of it there could be no certaintly [sic] about the finality of any federal settlement.").

30. As a general rule, the timely filing of a notice of appeal immediately confers jurisdiction on a Court of Appeals and divests a district court of its control over those aspects of the case involved in the appeal. *Venen* v. *Sweet*, 758 F.2d 117, 120 (3d Cir. 1985); *H. Brad Kerr* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1987 WL 14515 at *2 n.1 (E.D. Pa. 1987). However, during the pendency of an appeal, a district court is not divested of jurisdiction to modify, restore or grant injunctions. *Mary Ann Pensiero, Inc.* v. *Lingle*, 847 F.2d 90, 97 (3d Cir. 1988); *H. Brad Kerr*, 1987 WL 14515 at *2 n.1 (enjoining defendant from commencing any action in state or federal court based on Anti-Injunction Act, 28 U.S.C. § 2283, despite the filing of a notice of appeal). Here, notices of appeal have been filed some of which state that they relate to the injunctive effect of my August 16, 1994 Order (Document No. 1134). I conclude that the bases for the instant injunction, *i.e.*, "necessary in aid of this Court's jurisdiction," Conclusion of Law ¶ 25, are not the grounds for the injunction issued on August 16, 1994. Accordingly, because the filing of notices of appeal does not divest this Court of jurisdiction to grant injunctions, and because the issue relating to the present injunction is different from that presently on appeal, I conclude that this Court has jurisdiction to issue the instant injunction.

An appropriate Order for preliminary injunction follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civ. A. No. 93-0215

ROBERT A. GEORGINE, et al.,
on behalf of themselves and
others similarly situated, *Plaintiffs,*

v.

AMCHEM PRODUCTS, INC., et al.,
Defendants and Third Party Plaintiffs,

v.

ADMIRAL INSURANCE COMPANY, et al.,
Third Party Defendants.

PRELIMINARY INJUNCTION

AND NOW, this 21st day of September, 1994, upon consideration of the motion of the Center for Claims Resolution ("CCR") defendants for an order confirming the court's issuance of a preliminary injunction restraining class members from initiating or prosecuting asbestos-related claims against the CCR defendants pending a final order in this proceeding (Document No. 1140), and the responses of various "objectors" thereto, having found that notice of the CCR defendants' motion was sent to almost three hundred counsel of record either by Federal Express or the United States mail, and based upon the attached Findings of Fact and Conclusions of Law, it is hereby ORDERED that the motion is GRANTED and, therefore, all members of the class certified by the Court by Order dated August 16, 1994, and each of them, who have not individually filed timely

Exclusion Requests,[1] their respective attorneys and all persons acting in concert with them and who receive a copy of this injunction or notice of the existence of this injunction, are hereupon PRELIMINARILY ENJOINED AND PROHIBITED from initiating or maintaining any asbestos-related personal injury or death claim(s) or lawsuit(s) against any CCR defendant[2] in any court, either by way of commencing litigation, intervening in existing litigation, joining a CCR defendant in any existing litigation, or in any other manner asserting such a claim, or further prosecuting any claim filed after January 24, 1994, except to arrange for deferral of an action filed on or before the date of this Order until the issuance of final judgment on the merits of this case.

IT IS FURTHER ORDERED that service of this Order (a) by Federal Express, by regular United States mail, or by

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[1] A timely exclusion request is a request, signed by an individual class member, postmarked on or before January 24, 1994, which provides a reasonable indication of the individual's desire to opt out. The CCR defendants have agreed to treat lawsuits filed prior to January 24, 1994, which is the date when the opt-out period terminated, as timely exclusion requests and this Court accepts that determination.

[2] The CCR defendants are: Amchem Products, Inc., A.P. Green Industries, Inc., Armstrong World Industries, Inc., Asbestos Claims Management Corp. (formerly National Gypsum Company). Certainteed Corporation, C.E. Thurston and Sons, Inc., Dana Corp., Ferodo America, Inc., Flexitallic, Inc., GAF Corp., I.U. North America, Inc., Maremont Corp., National Service Industries, Inc., Nosroc Corp., Pfizer Inc., Quigley Company, Inc., Shook & Fletcher Insulation Company, T&N plc, Union Carbide Chemicals and Plastics Corp., United States Gypsum Company.

facsimile upon *pro se* persons and counsel who have entered an appearance in this case and upon counsel who have filed cases in court on behalf of class members that are now subject to this injunction; (b) by Federal Express, by regular United States mail, or by facsimile to all of the following asbestos litigation reporting services: Asbestos Litigation Reporting Service, P.O. Box 248, Chalfont, PA 18914; Andrews Publications, P.O. Box 1000, Westtown, PA 19395; or Mealeys Publications, Inc., P.O. Box 446, Wayne PA 19087-0446; and (c) by facsimile to *USA Today*, the *National Law Journal*, and the *Legal Times*, no later than the 1st day of October, 1994 shall at this time constitute reasonable and sufficient notice to the class of the existence of this preliminary injunction.

IT IS FURTHER ORDERED that the CCR defendants shall post a five hundred dollar ($500.00) cash bond or a form of security that is satisfactory to the Clerk of Court, upon which the injunction issued here shall become effective.

IT IS FURTHER ORDERED that this Order shall remain in effect until further Order of this Court. Any request for a permanent injunction shall be directed to Judge Weiner for his consideration in issuing a final Order in this action.

/s/ Lowell A. Reed, Jr.
LOWELL A. REED, JR., J.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civ. A. No. 93-0215

ROBERT A. GEORGINE, et al.,
on behalf of themselves and others
similarly situated,
Plaintiffs,

v.

AMCHEM PRODUCTS, INC., et al.,
Defendants and Third Party
Plaintiffs,

v.

ADMIRAL INSURANCE COMPANY, et al.,
Third Party Defendants.

August 16, 1994
As Modified Sept. 2, 1994

Gene Locks, Greitzer & Locks, Philadelphia, PA, for plaintiffs.

John D. Aldock, Shea & Gardner, Washington, DC, for defendants.

MEMORANDUM OPINION INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

LOWELL A. REED, Jr., District Judge

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CLOSING DISCUSSION

INTRODUCTION

This is a class action claiming damages for asbestos-related personal injuries or wrongful death. Currently before the Court is the determination of whether the proposed settlement of the class action is fair to the class.

This Court has previously concluded that it has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 as the named parties are of diverse citizenship and the amount in controversy for each class member exceeds $50,000. *Carlough* v. *Amchem Products*, 834 F. Supp. 1437 (E.D. Pa. 1993).[1] Although certain Objectors to the proposed settlement have continued to press their claims that this Court lacks subject matter jurisdiction over this action, nothing has been brought to the Court or introduced into the evidentiary record of this case to change the Court's conclusion in its memorandum opinion. Therefore, the pending motion to dismiss for lack of subject matter jurisdiction (Document No. 1059) will be denied.[2]

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[1] On December 22, 1993, the settling parties stipulated to the substitution of Robert A. Georgine for Edward J. Carlough as a representative plaintiff in this class action. *See* Stipulation to Amend Complaint To Add a Class Rep. and to Provide for the Withdrawal of a Class Rep., Dkt. No. 589 (Dec. 22, 1993) at 1.

[2] Certain Objectors claim that testimony of those representative plaintiffs without any presently manifested asbestos-related disease to the effect that they support the deferral of compensation to themselves and other

Based upon the evidence of record and the Court's findings of fact and conclusions of law, and for the reasons discussed below, this Court concludes that all of the requirements of Fed. R. Civ. P. 23 have been met and that the settlement of this class action is fair to the class and should be approved pursuant to Fed. R. Civ. P. 23(e) as fair to the class.

HISTORY OF THIS LITIGATION

This proceeding was instituted on January 15, 1993, with the filing of the complaint, an answer, and a stipulation of settlement setting forth the terms of a proposed settlement between plaintiffs and twenty defendant companies represented by the Center for Claims Resolution ("CCR" or

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non-impaired class members demonstrates that the $50,000 amount-in-controversy requirement for diversity jurisdiction has not been met. As this Court explained in its October 6, 1993 opinion, however, the fact that a plaintiff settles his or her claim for less than the jurisdictional amount, or chooses to defer receipt of cash compensation, does not deprive a federal court of diversity jurisdiction. *See also In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 734 (2d Cir. 1992); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 157-58, 163 (2d Cir. 1987); *In re A.H. Robins Co.*, 88 B.R. 742 (E.D. Va. 1988); *Bowling* v. *Pfizer*, Inc., 143 F.R.D. 141, 167 (S.D. Ohio 1992).

Moreover, as to whether exposure to asbestos constitutes injury in fact, the Court of Appeals for the Sixth Circuit has, since this Court's October 6, 1993 opinion, addressed the issue and adopted the same view as this Court. *See In re UNR Indus., Inc.*, 20 F.3d 766, 770 (7th Cir. 1994) (Court held that persons exposed to asbestos had constitutionally justiciable claims).

the "CCR defendants").[3] Concurrent with the filing of the action, plaintiffs and defendants filed a joint motion for conditional class certification seeking temporary certification under Rule 23(b)(3) of an opt-out class only for the purposes of seeking approval of the proposed settlement. The parties also filed a joint motion for appointment of a special master to assist the Court during the discovery process, and to review sensitive and confidential information relevant to these proceedings.

In this action, the plaintiff class is seeking compensation related to claimed injury or death of its members due to alleged occupational exposure to asbestos or asbestos products supplied by the CCR defendants. The complaint seeks compensatory and punitive damages on the following legal theories: (1) negligent failure to warn, (2) strict liability, (3) breach of express and implied warranty, (4) negligent infliction of emotional distress, (5) enhanced risk of disease, (6) medical monitoring, and (7) civil conspiracy. Complaint, Dkt. No. 1 (Jan. 15, 1993) at 18-27.

On January 29, 1993, the Honorable Charles R. Weiner of this Court conditionally certified an opt-out class consisting of:

1. All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant or passenger ships), either occupationally or through occupational exposure of a spouse or household member, to asbestos or to asbestos containing products for which one or more of the defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for

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[3] CCR is a not-for-profit corporation maintained by the defendant companies for the processing of asbestos-related claims.

asbestos-related personal injury or damage, or death in any state or federal court against the defendant(s) (or against entities for whose actions or omissions the defendant(s) bear legal liability).

2. All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph 1 above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph 1 above in any state or federal court against the defendant(s) (or against entities for whose actions or omissions the defendant(s) bear legal liability).

Order, Dkt. No. 11 (Jan. 29, 1993) at 3. Occupational exposure for purposes of class membership is defined as follows in the Stipulation of Settlement (as amended September 24, 1993) ("Stipulation"):

> An Exposed Person has been occupationally exposed to asbestos when that individual's job responsibility involved working with or around asbestos or asbestos-containing products. These exposures usually occurred in industrial settings or during construction activities. "Occupational exposure" to asbestos does not include "environmental exposure," such as that potentially experienced by office workers in buildings where asbestos products were present.

Amendment to the Stipulation at 1 (Exhibit SP-301).[4] Judge Weiner's Order of January 29, 1993 conditionally certifying the class also appointed as plaintiffs' class counsel Ronald L. Motley and Joseph F. Rice (of Ness, Motley, Loadholt, Richardson & Poole in Charleston, South Carolina) and Gene

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[4] An exhibit identified at the fairness hearing is referenced herein as Settling Parties' Exhibit (abbreviated "SP") or Objectors' Exhibit (abbreviated "O"), followed by a sequential number, such as "Exhibit SP-301."

Locks (of Greitzer and Locks in Philadelphia, Pennsylvania) (hereinafter "Class Counsel").[5]

Also on January 29, 1993, Judge Weiner assigned to me (hereinafter "this Court" or "the Court") the task of conducting fairness proceedings and of determining whether the proposed settlement is fair to the class pursuant to Fed. R. Civ. P. 23(e). Order, Dkt. No. 12 (Jan. 29, 1993).[6] Judge Weiner granted the joint motion of plaintiffs and defendants (the "Settling Parties") for appointment of a special master, and appointed Professor Stephen Burbank of the University of Pennsylvania Law School to act as special master. Order, Dkt. No. 13 (Jan. 29, 1993).

Early in these proceedings, three individual class members ("the Wiese Objectors") moved to intervene as plaintiffs in order to object to the proposed settlement. Judge Weiner ultimately denied formal intervention but granted *all* objecting class members full rights to participate in all aspects of these proceedings, including "the right to appear through counsel, participate in the fairness hearing and conduct discovery." Mem. Op. and Order, Dkt. No. 292 (Apr. 15, 1993) at 25-26.

On March 9, 1993, Owens-Illinois, Inc. and several other former suppliers or manufacturers of asbestos-containing products who are not named as defendants in this class action

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[5] At the same time he appointed Messrs. Motley, Rice and Locks as class counsel, Judge Weiner also held that "[t]he Court may in the future appoint additional counsel if it is deemed necessary and advisable." Order, Dkt. No. 11 (Jan. 29, 1993) at 3.

[6] *See also* Mem. Op. and Order, Dkt. No. 292 (April 15, 1993 (Weiner, J.) at 18 n.12 (stating that this Court shall pass upon the fairness to the class of the proposed settlement).

also moved to intervene, in order to address issues related to future contribution and indemnity rights of these companies in this underlying multi-jurisdictional asbestos litigation. Pursuant to a stipulation reached between the CCR defendants and the non-party asbestos companies, the motions to intervene were withdrawn and Owens-Illinois, Pittsburgh Corning Corporation and W.R. Grace & Co.-Conn. were granted *amicus curiae* status.

Based on the pleadings, motions and memoranda filed by the Settling Parties, and various Objectors and *Amici*, this Court issued an Order setting forth a schedule for presentation of the issues to be resolved in this action. Order, Dkt. No. 346 (May 13, 1993). The Scheduling Order established a two-step process. First, the Court would consider objections relating to the exercise of subject matter jurisdiction over the action, and would also consider whether the proposed settlement satisfied a threshold standard of fairness justifying the issuance of notice to the class. The Order provided that if the Court found the exercise of jurisdiction to be proper and that preliminarily the settlement was fair for purposes of issuing notice to the class, the second step of the process would involve a period of discovery followed by a formal fairness hearing.

The first part of the two-part fairness inquiry began when the Court ordered Class Counsel and the CCR defendants to submit to the Court written proffers, accompanied by affidavits or declarations, setting forth the Settling Parties' contentions as to the fairness of the settlement and a description of what the Settling Parties intended to establish at the final fairness hearing and by what means. Order, Dkt. No. 379 (June 2, 1993). Thereafter, the Court received extensive briefs from the Objectors, *Amici*, and the Settling Parties on the issues of whether the exercise of subject matter jurisdiction by the Court was proper and whether the proposed settlement was fair for the preliminary purpose of issuing notice to the class. After due notice, oral argument

was held on these issues on August 23, 1993, in which counsel for the Settling Parties, Objectors and *Amici* participated.

Pending the decision regarding subject matter jurisdiction and preliminary fairness, in August 1993, the Settling Parties filed their joint motion for approval of notice to the class detailing the proposed program for notifying the class of the pendency of this action and of the terms of the proposed settlement. *See* Joint Motion, Dkt. No. 445 (August 16, 1993). After receiving extensive briefs from the Settling Parties, Objectors, and *Amici*, the Court held a hearing on matters relating to class notice on October 5, 1993, in which the Settling Parties, Objectors and *Amici* again participated.

On October 6, 1993, this Court issued a memorandum opinion addressing objections related to the subject matter jurisdiction of the Court, finding that the Court's exercise of jurisdiction over this action is proper. *Carlough* v. *Amchem Products*, 834 F. Supp. 1437 (E.D. Pa. 1993). On October 27, 1993, this Court issued another memorandum opinion finding that "[the settlement] appears to be the product of serious, informed, non-collusive negotiations, it has no obvious deficiencies, it does not improperly grant preferential treatment to class representatives or segments of the class, and it clearly falls within the range of possible approval." *Carlough* v. *Amchem Products*, 1993 WL 472812, *2, 1993 U.S. Dist. LEXIS 15280, *4 (E.D. Pa. Oct. 27, 1993).[7]

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[7] In September 1993, the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") announced its support of the proposed settlement and on September 29, 1993, was granted leave by the Court to appear as *amicus curiae*. The AFL-CIO noted in its motion that it had long been active in assisting its members in receiving compensation for asbestos-related injuries and in seeking reform of the current system of asbestos litigation.

In the October 27, 1993 memorandum opinion, this Court also approved the proposed program of class notice, finding that, with several modifications ordered by the Court, the notice program would satisfy the requirements of Fed. R. Civ. P. 23(e) and 23(c)(2) and the requirements of the Due Process Clause of the United States Constitution. The Court ordered that notice to the class be disseminated beginning November 1, 1993, and continuing for eight weeks.[8] Class members were given three months, from November 1, 1993 through January 24, 1994, to exclude themselves from the class if they so chose. The Court also ordered the Settling Parties to file both an interim report (on December 6, 1993), and a final report (on February 16, 1994), regarding implementation of the Court-approved notice program.

Concurrent with the AFL-CIO's Motion for Leave To Appear as *Amicus Curiae*, the Settling Parties filed an amendment to the stipulation, making several changes in the Stipulation, one of which gives the AFL-CIO an oversight role in the implementation of the compensation system established by the Stipulation. The amendment would give the AFL-CIO the right to participate in annual audits of the compensation system, as well as giving the union a role in selecting arbitrators and medical panel members under the Stipulation.

[8] On October 29, 1993, the Wiese Objectors moved the U.S. Court of Appeals for Third Circuit for an emergency stay of notice to the class, after this Court declined to certify for immediate interlocutory appeal its Order approving class notice. Along with the emergency motion to stay, the Wiese Objectors filed a petition for writ of mandamus. On November 2, 1993 the Court of Appeals for the Third Circuit denied the emergency motion to stay, allowing class notice to go forward as outlined in the Court's Order. The Wiese Objectors voluntarily dismissed their mandamus petition shortly thereafter.

After the close of discovery, written objections to the settlement were filed with the Court on February 8, 1994, and the formal fairness hearing began on February 22, 1994. Counsel for the Settling Parties, several lawyers representing various Objectors, and counsel for various *Amici* participated at the fairness hearing. Under the direction of the Court, the Objectors closely coordinated their activities throughout the fairness proceedings.

Because of the complexity of the issues involved, and to give all interested parties a full and fair opportunity to present their views, the fairness hearing was extensive and protracted, involving the testimony of some twenty-nine witnesses (live or by deposition) during 18 hearing days over a period of over five weeks. The Court heard testimony from participants in the settlement negotiations, several representative plaintiffs, two high-ranking officers of the CCR, medical experts, financial experts, legal ethics experts, and representative asbestos plaintiffs' attorneys. Numerous exhibits were also submitted. The substance of the testimony covered, among other things: the decades-long history of asbestos litigation in the United States; the details of the handling of asbestos litigation in the current tort system; the negotiation and operation of the proposed settlement and various objections to certain of its provisions; the competence and adequacy of Class Counsel; the medical conditions caused by exposure to asbestos and the reasonableness of the medical criteria set forth in the settlement; the ability of the CCR defendants to meet their financial obligations under the Stipulation through insurance proceeds or otherwise; and the negotiation and operation of settlements reached between Class Counsel and the CCR defendants to settle in the present

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In all, thousands of pages of documents were produced and over thirty depositions took place during the discovery period.

tort system the inventory of pending claims of clients represented by Class Counsel and their affiliated law firms.

In May, 1994, this Court received voluminous post-hearing submissions from the Settling Parties, Objectors and *Amici*. On May 23, 1994, the Court heard day-long final oral arguments on the fairness of and objections to the proposed settlement.

The Settling Parties now urge this Court, pursuant to Fed. R. Civ. P. 23, to: (1) certify the class pursuant to Fed. R. Civ. P. 23(b)(3); (2) approve the proposed stipulation of settlement as fair, adequate, and reasonable; (3) conclude that Class Counsel adequately represented the class in the negotiation of the settlement and during the pendency of this action; and (4) approve the adequacy of the notice program as implemented by the settling parties.

The following constitute the findings of fact and conclusions of law of this Court which support its ultimate conclusion that the Settling Parties have satisfied all the requirements of a Fed. R. Civ. P. 23 opt-out class action, that the class as defined should be finally certified, and that the settlement should be approved pursuant to Fed. R. Civ. P. 23(e) as fair to the class. Because this Court conducted the entire fairness proceedings, made the jurisdictional determination, afforded the Settling Parties, the Objectors and the *Amici* appropriate due process, and saw and heard the witnesses and examined the evidence first hand, it is intended for purposes of judicial comity and efficiency that these findings of fact and conclusions of law be accorded the status of an adjudication of an Article III Court of co-ordinate jurisdiction.

FINDINGS OF FACT[10]

I. THE CLASS AND THE CLASS REPRESENTATIVES

A. The Class

1. The Court adopts the factual definition of the class as quoted above and as defined in Judge Weiner's Order of January 29, 1993. Order, Dkt. No. 11 (Jan. 29, 1993) at 3.

2. Although the exact size of the class is unknown, it is undisputed that there are many tens of thousands of class members. Over the past fifteen years, the CCR defendants have been named in over 180,000 asbestos personal injury claims. *See* Response of CCR Defendants To Order To Show Cause, Dkt. No. 173 (Mar. 17, 1993) at 6. One group of objectors to the proposed settlement have conceded that the numerosity requirement is satisfied. *See* Brief in Support of Wiese Objectors' Motion To Decertify, Dkt. No. 160 (Mar. 16, 1993) at 4.

B. The Representative Plaintiffs

3. Representative plaintiff Ty Annas is 70 years of age and currently resides in Woodleaf, North Carolina. Mr. Annas has not presently manifested an asbestos-related disease but was exposed to products supplied by the CCR defendants from 1951 through at least 1973, during the course of his employment as a construction worker. Annas 2/24/94 Tr. at 221, 224-27.

4. Representative plaintiff Robert A. Georgine resides in Silver Spring, Maryland and is President of the Building Construction Trades Department of the AFL-CIO. He was exposed to asbestos products supplied by the CCR defendants

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[10] To the extent that the following findings of fact include conclusions of law or mixed findings of fact and conclusions of law, those findings and conclusions are hereby adopted by this Court.

during the course of his employment as a lather beginning in 1950. Mr. Georgine has not presently manifested an asbestos-related disease. Georgine 2/28/94 Tr. at 4, 7, 13-19.

5. Representative plaintiff Anna Baumgartner is a resident of Baltimore, Maryland and recently lost her husband, John, to asbestos-related mesothelioma. Mr. Baumgartner's disease resulted in part from his exposure to the CCR defendants' asbestos products in the course of various industrial employment. Baumgartner 1/6/94 Dep. at 10-14, 54-57. Both Mr. and Mrs. Baumgartner were representative plaintiffs when this class action was filed. Mr. Baumgartner died while the action has been pending.

6. Mrs. Nafssica Kekrides is 54 years of age and resides in Florida. Kekrides 1/12/94 Dep. at 8, 10. Her husband Pavlos died of asbestos-related mesothelioma on April 18, 1993. *Id.* at 9. Mr. Kekrides was exposed to asbestos products supplied by the CCR defendants during the course of his employment as a painter, from 1967-1981. *Id.* at 11. Like John Baumgartner, Pavlos Kekrides was also a representative plaintiff and died during the pendency of this case.

7. Ambrose and Joanne Vogt reside in Pasadena, Maryland. Vogt 2/24/94 Tr. at 144. Mr. Vogt is 42 years of age and has been an insulation worker for some 22 years, during which time he has been exposed to asbestos products supplied by the CCR defendants. *Id.* at 144. Mr. Vogt is a member of the International Association of Heat and Frost Insulators and Asbestos Workers. *Id.* He has not presently manifested an asbestos-related disease. *Id.* at 145.

8. Mrs. LaVerne Winbun is 73 years of age and resides in Louisville, Kentucky. Winbun 1/6/94 Dep. at 9. Her husband died of asbestos-related mesothelioma in November 1991, caused in part by exposure to asbestos products supplied by the CCR defendants. *Id.* at 10.

9. Carlos and Dorothy Raver reside in Finksburg, Maryland. Mr. Raver has worked as a laborer for Congoleum Corporation for 31 years, during which time he has been exposed to asbestos products supplied by the CCR defendants. Raver 1/11/94 Dep. at 10-11. Although a doctor has identified asbestos-related pleural changes in Mr. Raver's lungs (*id.* at 48-49), he suffers no physical disability or impairment from those changes. *Id.* at 25.

10. Timothy and Gay Murphy reside in Louisville, Kentucky. Murphy 1/6/94 Dep. at 11. Mr. Murphy is 41 years of age and was exposed to asbestos products supplied by the CCR defendants during the course of his employment as an insulation worker. Complaint, Dkt. No. 1 (Jan. 15, 1993) at 9-10. Mr. Murphy has not presently manifested an asbestos-related disease. Murphy 1/6/94 Dep. at 58.

11. Fred A. Sylvester, a resident of South Carolina, was a representative plaintiff in this action until his death, from asbestos-related mesothelioma, on March 13, 1994. Complaint, Dkt. No. 1 (Jan. 15, 1993) at 11; Motion to Substitute Party, Dkt. No. 1042 (May 2, 1994) at 1. Mr. Sylvester had been a sheet metal worker and was exposed to defendants' asbestos products in the course of that employment. Complaint, Dkt No. 1 (Jan. 15, 1993) at 11.

12. In sum, the representative plaintiffs hail from a variety of jurisdictions and represent a wide range of occupations, medical conditions, and exposure to the CCR defendants' products, and all the representative plaintiffs are members of the class. All have expressed their support of the terms of the proposed settlement.

II. BACKGROUND OF THIS CLASS ACTION

A. History of the Asbestos Litigation[11]

13. The Court of Appeals for the Third Circuit has observed that asbestos litigation has been "an unparalleled situation in American tort law." *In re School Asbestos Litig.*, 789 F.2d 996, 1000 (3d Cir. 1986). The Judicial Panel for Multidistrict Litigation ("MDL Panel") has summarized what it terms the "most objectionable aspect of asbestos litigation":

> "dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether."

In re Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 419 (J.P.M.L. 1991) (quoting *Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation* 1-3 (1991)).

14. The Court of Appeals adds the following, citing the observations of a Philadelphia Common Pleas Judge:

> Results of jury verdicts are capricious and uncertain. Sick people and people who died a terrible death from asbestos are being turned away from the courts, while people with minimal injuries who may never suffer severe asbestos disease are being awarded hundreds of thousands of dollars, and even in excess of a million dollars. The asbestos litigation often resembles the

[11] The history of asbestos litigation and the background of the *Georgine* negotiation are ably augmented and amplified by Judge Weiner's memorandum opinion and order of April 15, 1993. Mem. Op. and Order, Dkt. No. 292 (April 15, 1993) (Weiner, J.) at 3-10.

> casinos 60 miles east of Philadelphia, more than a courtroom procedure.

In re School Asbestos Litig., 789 F.2d at 1001.

15. Personal injury and wrongful death litigation related to asbestos had its real beginnings in the late 1960's. During the decade from the late 1960's through the late 1970's, plaintiffs' counsel around the country were crafting the initial theories of liability against various asbestos suppliers, conducting discovery, and identifying the various medical conditions that could be attributed to asbestos exposure.

16. After this beginning, the period from the late 1970's through the mid-1980's saw a steep increase in the number of claims against asbestos suppliers. The fundamental legal theories and liability cases against various defendants had been established, and litigation against these companies intensified dramatically. By the early to mid-1980's, however, major problems began to appear on the horizon in the asbestos litigation. Fitzpatrick 2/22/94 Tr. at 73, 74.

17. First, facing enormous liabilities and overwhelming costs to defend thousands of asbestos-related claims, many asbestos producers were on the road to bankruptcy, including a number of companies previously considered to be immune from financial difficulty. Hatten 3/17/94 Tr. at 35-36 (comparing shock the day Johns-Manville Corporation went bankrupt to "the day Kennedy was shot")[12]; *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 420 (J.P.M.L. 1991) (more than a dozen asbestos producers bankrupt by 1991) (citation omitted); Fitzpatrick 2/22/94 Tr. at 67, 74 (bankrupt asbestos manufacturers customarily sued in these cases

[12] Robert R. Hatten is an experienced asbestos plaintiffs' attorney and was presented by the Settling Parties. The Court finds that Mr. Hatten is qualified to testify regarding his experience in asbestos litigation in the tort system.

included, among many others, Johns-Manville, Celotex, Eagle Pitcher, H.K. Porter, Carey Canada, Keene Corp., and Unarco).

18. During this same time period, asbestos dockets across the country were growing exponentially, and plaintiffs began to face substantial delay in having their claims resolved. *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation*, 7-12 (1991) (Exhibit SP-208). Further, transaction costs began to far outpace compensation to victims. *Id.* at 12-14 (1984 Rand Corporation study, which is credited here, reliably found that only 37-39% of money paid by asbestos defendants went to victims, with 61-63% going to transaction costs). *See also* Fitzpatrick 2/22/94 Tr. at 77 (the majority of the dollars being spent on asbestos litigation was going to the lawyers).

19. Beginning near 1986-1987 (around the time of the Court of Appeals' comments in the *Asbestos Schools* case cited above), numerous plaintiffs and defense counsel, commentators, and courts began to recognize the enormous problems facing all involved in the asbestos litigation. There were legions of examples of erratic verdicts in the tort system; mesothelioma victims would sometimes receive nothing while persons with no impairment would receive six and seven figure verdicts. Although by this time state and federal courts were already burdened by many asbestos claims, amazingly 1986 saw the rate of filing of new asbestos suits **quadruple**. Fitzpatrick 2/22/94 Tr. at 72-73 (filing rate jumped from around 500 new cases per month prior to 1986, or 6,000 per year, to 2,000 new cases per month after 1986, or 24,000 per year).

20. In 1987, the Federal Judicial Center convened a conference of judges as well as plaintiffs' and defense counsel to discuss the problems with the asbestos litigation as well as the possibility for some type of global resolution. Discussed at that meeting were many of the conditions outlined above, including the growing backlog of cases, the fact that new

cases were being filed at a much greater rate than existing cases could be tried or settled, the fact that transaction costs greatly outweighed victims' recoveries, and the growing number of bankrupt defendants. *Id.* at 76-77.

B. Early Background Which Led to the *Georgine* Negotiations

21. At the time of the Federal Judicial Center meeting in 1987, Lawrence Fitzpatrick, now the President and Chief Executive Officer of the CCR, was Vice President of Law for the Asbestos Claims Facility ("ACF"), also known as the Wellington Group.[13] Like the CCR, the ACF was formed by a number of asbestos defendants for the purpose of coordinated processing of asbestos claims. Fitzpatrick 2/22/94 Tr. at 63-65. All the members of the CCR were formerly members of the ACF. *Id.* at 69.

22. After the Federal Judicial Center meeting in 1987, Mr. Fitzpatrick had several discussions with Mr. Motley, who the CCR considered to be the most prominent member of the plaintiffs' bar with the largest asbestos practice in the country, regarding the possibility of global settlement that was urged at the Judicial Center meeting. Fitzpatrick 2/22/94 Tr. at 78. There is no suggestion in the record that Fitzpatrick formally set out to choose a plaintiffs' attorney with whom to negotiate a global plan to settle cases. These discussions were in the nature of brainstorming the entire problem. Mr. Fitzpatrick and Mr. Motley had a number of telephone conferences and exchanged a number of documents, but did not begin any negotiations at that time. *Id.* Unfortunately, by this point the members of the ACF were not in agreement as to how best to try to resolve the asbestos claims against them, and the ACF was dissolved in October 1988. The CCR was formed shortly thereafter and included

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[13] Mr. Fitzpatrick attended and addressed the 1987 Federal Judicial Center conference. Fitzpatrick 2/22/94 Tr. at 77.

a number of former ACF companies who shared the same philosophy on the asbestos litigation. *Id.* at 66-69.

23. In 1990, the Federal Judicial Center convened another conference to address the asbestos litigation. This conference also included judges, academics and counsel representing plaintiffs and defendants. By this time, the asbestos problem had worsened, as new case filings and bankruptcies had continued unabated and the backlog of cases now numbered more than 70,000. Fitzpatrick 2/22/94 Tr. at 82-83; Hatten 3/17/94 Tr. at 44. The 1990 Judicial Center conference was an "enormously significant event in the history of the asbestos litigation" in that those involved came away with the clear impression that "business as usual" would no longer be acceptable given the dramatic proportions of the problem. Fitzpatrick 2/22/94 Tr. at 84.

24. In the wake of the 1990 conference, the members of the plaintiffs' bar, the defense bar, and the judiciary all took preliminary steps toward national action on the asbestos problem. A number of federal judges formed what became known as the *ad hoc* committee of asbestos judges. Fitzpatrick 2/22/94 Tr. at 84-85. In addition, the plaintiffs' bar and defense bar both organized committees and held meetings to discuss global settlement possibilities. *Id.* at 87-88.

25. In July, 1990, members of the plaintiffs' bar filed a Rule 23(b)(1)(b) limited fund class action in Beaumont, Texas, *Linscomb* v. *Pittsburgh Corning Corp. et al.*, on behalf of all present and future persons with asbestos-related claims, against many of the major asbestos defendants. Fitzpatrick 2/22/94 Tr. at 86. Lead class counsel for that action was Mr. Motley. Defendants were vigorously opposed to a single litigation class action, such as *Linscomb*, as the vehicle for global resolution of the asbestos litigation. *Id.* at 86-87. Nonetheless, there were some negotiations between plaintiffs' counsel and defendants at the time of *Linscomb*, and several concepts emerged that later would reappear in

other national settlement proposals. First, it was then recognized that any global resolution should address future asbestos claims as well as present claims. Second, it was then recognized that objective medical criteria should be sought to determine victims' compensation equitably and to treat like victims alike. *See* Hatten 3/17/94 Tr. at 71. The *Linscomb* case was never certified as a class action and was later transferred to Judge Weiner as part of the multidistrict litigation ("MDL") proceedings pending in this Court involving all asbestos-related personal injury claims.

26. In addition to the Judicial Conference meeting and the filing of the *Linscomb* class action, the year 1990 saw two other major events in the asbestos litigation. First, in September 1990, Chief Justice William H. Rehnquist appointed a panel of federal judges (the *Ad Hoc* Committee on Asbestos Litigation) to study the asbestos litigation and produce recommendations. Second, in November 1990, eight federal district judges with significant asbestos experience sent a letter to the Judicial Panel for Multidistrict Litigation ("MDL Panel") urging the Panel to reverse its prior rulings on the issue and to consolidate the federal asbestos litigation in a single judicial district. Exhibit SP-206. Consolidation, these judges argued, would among other things "facilitate global settlements," and allow the transferee court to "fully explore . . . national disposition techniques such as classes and sub-classes under Rule 23." *Id.* at 1.

27. In March 1991, the Rehnquist Committee issued its report. Exhibit SP-208. The report was a ringing condemnation of the asbestos litigation process in the tort system. The Committee stated:

> [T]he [asbestos] situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which courts are ill-equipped to meet effectively.

Id. at 2. The Committee noted that an astonishing *six* percent of all civil cases filed in the federal courts in 1990 were asbestos-related (over 13,000 new federal cases), and that nearly two new asbestos cases are filed each year for every one case that is resolved. *Id.* at 7-8. The report concluded:

> The volume and complexity of asbestos cases have resulted in the violation of a basic tenet of American justice and the spirit of the Civil Justice Reform Act of 1990: speedy and inexpensive resolution of cases.

Id. at 10.

28. The Rehnquist Committee also expressed its hope that some alternative dispute resolution mechanism for processing asbestos claims could be fashioned. *Id.* at 14, 27-39. Dean Mary Kay Kane of the Hastings Law School was the Reporter for the Rehnquist Committee and testified in this case at the fairness hearing that the judges on the Committee considered the following factors to be of the kind preferable in such mechanism: that it provide for compensation to future asbestos claimants, that it pay claims quickly with low transaction costs, that it pay cash compensation only to those claimants who suffer some actual disability or impairment related to asbestos exposure, and that it have sufficient funds to guarantee compensation for all exposed persons who in the future develop such impairment or disability. Kane 2/22/94 Tr. at 164-71. This Court credits Dean Kane's testimony.

29. Shortly after the release of the Rehnquist Committee Report, the MDL Panel, accepting the recommendation of the eight judges with heavy asbestos dockets, issued an order on July 29, 1991 transferring all federal personal injury asbestos litigation to Judge Weiner of this Court for coordinated or consolidated pretrial proceedings. *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415 (J.P.M.L. 1991). The Panel voiced its hope that the MDL transfer might foster global settlements of the "asbestos mess," noting that transfer

"offer[s] a great opportunity to all participants who sincerely wish to resolve these asbestos matters fairly and with as little unnecessary expense as possible." *Id.* at 424. At the time of the MDL transfer, almost 30,000 claims were pending in the federal courts, with two times that number pending in the state courts. *Id.* at 416, 421.

30. After the MDL transfer, plaintiffs' and defendants' steering committees were formed for the MDL litigation. Fitzpatrick 2/22/94 Tr. at 99-100. Judge Weiner appointed Mr. Motley and Mr. Locks co-lead counsel of the Plaintiffs' Steering Committee after their election by committee members. *Id.* at 99; Exhibit SP-1020 at 6. It has not been shown that either CCR or any party to the instant case influenced the selection of these attorneys as co-lead counsel in the MDL litigation. Likewise, counsel for the CCR defendants were active participants on the Defendants' Steering Committee, along with counsel for other asbestos defendants. Fitzpatrick 2/22/94 Tr. at 100.

31. In addition to the general discussions which had occurred between Mr. Motley and Mr. Fitzpatrick from 1987-1990, the natural genesis of the discussions leading to the negotiations for a settlement in this case was in the global settlement negotiations which began between the Plaintiffs' and Defendants' Steering Committees in the consolidated MDL litigation before Judge Weiner. The primary purpose of the settlement talks in the consolidated MDL litigation was to craft a national settlement that would provide an alternative resolution mechanism for asbestos claims. Fitzpatrick 2/22/94 Tr. at 100.

32. Perhaps the major issue facing those in the asbestos litigation was and is the filing of thousands of claims by workers with minimal x-ray changes associated with asbestos-exposure (*i.e.*, "pleural changes"), but with no physical impairment. During the MDL negotiations in 1991, there were significant differences of opinion within and between the Plaintiffs' and Defendants' Steering Committees

about when and how to compensate these non-impaired "pleural claimants." Fitzpatrick 2/22/94 Tr. at 100-01. However, one possible concept emerged then as a starting point for further negotiation. Although plaintiffs' and defense counsel differed over whether immediate cash compensation should be provided to non-impaired pleural claimants who had *already* brought claims and entered the tort system, CCR believed there was a general consensus that pleural claimants in the *future* should receive some package of insurance-like benefits, including a waiver of the statute of limitations, and some reasonable assurance that there would be money, among other things, in return for deferring their receipt of cash compensation unless and until their condition worsened and they suffered some actual impairment. *Id.* at 105-06. No specific medical criteria for delineating impaired from non-impaired claimants was agreed to, but the general concept of negotiating such criteria was then a consensus among the affected parties. *Id.*

33. In late 1991, discussions between the MDL Plaintiffs' Steering Committee (and its co-chairs Messrs. Locks and Motley) and the Defendants' Steering Committee came to a head. Fitzpatrick 2/22/94 Tr. at 114. The Defendants' Steering Committee made an offer in November 1991, which would have provided plaintiffs' counsel with a single sum of money to resolve all present and future cases. It was proposed that non-impaired pleural claimants who had already filed claims in the tort system would receive some modest sum, and future pleural claimants would be deferred in exchange for a package of benefits as described above. *Id.* at 115-17.

34. The Plaintiffs' Steering Committee reported to the defendants that they had rejected the Defendants' Steering Committee's global settlement offer for two reasons. First, the Plaintiffs' Steering Committee felt that it would have difficulty dividing the sum of money among various claimants. Second, and closely related, it was felt that as to

lawsuits already pending in the tort system, individual plaintiffs' counsel across the country would insist on negotiating these cases individually with defendants rather than accepting a sum determined by the MDL Plaintiffs' Steering Committee. Fitzpatrick 2/22/94 Tr. at 115.

35. Although some progress had been made in the MDL discussions concerning a global resolution of the asbestos crisis, these efforts ultimately broke down due to the inability of either side to get beyond the lowest common denominator on their points of agreement. Hatten 3/17/94 Tr. at 80. CCR believed, however, that significant progress had been made in the MDL discussions and hoped that a fair, equitable, and reasonable solution to the crisis could be found. CCR therefore determined to, and did, continue the discussions with lawyers known to CCR to be two of the most respected and active firms in the asbestos litigation, Ness, Motley and Greitzer and Locks, who were chosen by the Plaintiffs Steering Committee and approved by Judge Weiner as co-lead counsel in the MDL consolidated litigation. Ultimately, after another year of discussions and negotiations, the result was the filing of this class action and the Stipulation of Settlement that is now before this Court. There was no contradictory history of this litigation presented by any Objectors before the Court, and most of this history is a matter of public record.

36. At the time of the settlement negotiations and the filing of this class action, the asbestos litigation was probably the most mature mass tort litigation in this country. The liability and medical issues had been the subject of massive discovery and trial and settlement experience, the results of which were known to Class Counsel and CCR.

III. FAIRNESS OF THE SETTLEMENT

A. Introduction

37. The Stipulation of Settlement in this proceeding is a 106-page document (with a 9-page amendment) which essen-

tially sets up a schedule of benefits and an administrative procedure for compensating class members if and when they meet certain asbestos exposure and medical requirements.

38. Claims for compensation under the Stipulation are to be submitted to the staff of the CCR, who will process those claims in accord with the specific procedures set forth in the Stipulation. As explained below, there are numerous provisions for resolving disputes concerning application of the Stipulation to individual claimants, and there is also a provision for annual monitoring of the administration of the Stipulation by Class Counsel and by representatives of the AFL-CIO.

39. The Stipulation is an intricate document, with many provisions that were not debated during the course of the fairness hearing. This Court need not address here each such provision. Rather, this Court will focus on the negotiations which led to the Stipulation, on the primary provisions of the Stipulation, and on those provisions that have generated complaint from the Objectors and certain *Amici*.

B. The Negotiations Between CCR and Class Counsel

40. As is amply reflected by the complexity of the Stipulation, the testimony in the record and the parties' knowledge of this very mature litigation, the negotiations resulting in the Stipulation were difficult, lengthy, and time-consuming. Many discussions took place among parties of like interests to those here. Virtually no provision of the Stipulation was not the subject of significant negotiation. Rooney 2/28/94 Tr. at 200; Fitzpatrick 2/23/94 Tr. at 183-87; Hatten 3/17/94 Tr. at 89-91. The terms of the Stipulation changed substantially during the negotiations. Hatten 3/17/94 Tr. at 93; Hatten 3/18/94 Tr. at 9-11.

41. The negotiations included a substantial exchange of information as well. In March 1992, the CCR negotiators began to share certain confidential data with Class Counsel in order to further the negotiations. Rooney 2/28/94 Tr. at

178-80; Exhibits SP-500 through SP-502. The CCR had never before shared such confidential data with any plaintiffs' counsel. Rooney 2/28/94 Tr. at 179. The data furnished to these counsel consisted of certain schedules giving detailed information concerning the CCR defendants' historic settlement averages and the numbers of claims settled and filed against the CCR defendants over time. Rooney 2/28/94 Tr. at 178-80; Exhibit SP-502.[14]

42. In late October 1992, information on the insurance coverage available to CCR members was provided to Class Counsel. Rooney 3/3/94 Tr. at 79-80. Representatives of Peterson Consulting Limited Partnership, the firm that handles all insurance billing and coverage analysis for the CCR members, began meeting in October 1992 with Meadowcroft Associates, financial consultants employed by Class Counsel for this proceeding. Murray 3/11/94 Tr. at 174-76.

43. Messrs. Locks, Motley and Rice also consulted other asbestos plaintiffs' counsel for their views on various provisions in the Stipulation during the negotiations. Hatten 3/17/94 Tr. at 89-99; Hatten 3/18/94 Tr. at 13-15, 163-65; Freeman 3/10/94 Tr. at 70.[15]

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[14] These schedules were used during negotiations of both the Compensation Schedule (Exhibit B to the Stipulation) and the Case Flow Maximums (Exhibits A and A* to the Stipulation).

The data base from which these schedules were compiled includes information on filings and disposition of claims against CCR members over several years. Murray 3/11/94 Tr. at 91. The schedules supplied to Class Counsel during the negotiations were checked for accuracy. *Id.* at 94.

[15] Professor John P. Freeman, an expert and fact witness of the Settling Parties, testified that he attended a meeting

44. The Settling Parties' negotiations leading to the medical criteria were as well protracted and vigorous, commencing with agreement on certain general principles early in the discussions, but only concluding in a final agreement on all medical issues several months later, only a few days prior to filing the class action suit. Rooney 2/28/94 Tr. at 208-09; Rooney 3/1/94 Tr. at 248-49; Rooney 3/3/94 Tr. at 92. Class counsel did not consult with medical experts during the negotiations, but they had had many years of extensive and sophisticated experience with the medical issues that were being negotiated, and prior to the negotiations had from time to time consulted with a number of medical experts. Rooney 3/3/94 Tr. at 168-69.

45. As a result of the negotiations, changes were made in the medical criteria that made them more favorable to claimants. Hatten 3/17/94 Tr. at 92-93. One of the CCR defendants' objectives was to provide monetary compensation only to persons with "an asbestos-related malignancy or demonstrable impairment." Rooney 2/28/94 Tr. at 230. Class Counsel, on the other hand, did not want a "hard and fast rule with respect to qualification of an individual" claimant. *Id.* One result of the negotiations was to add a provision for Exceptional Medical Claims (described below) for those claimants who would not otherwise qualify for compensation under the objective medical criteria. *Id.* at 230-31.

C. Eligibility for Compensation

46. The basic requirements that a claimant must meet for cash compensation under the Stipulation are (1) evidence of occupationally-related exposure to asbestos products supplied by one or more CCR defendants sufficient to meet the

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held in Charleston, South Carolina in which Class Counsel briefed other plaintiffs' counsel on the terms of the settlement. Freeman 3/10/94 Tr. at 70.

asbestos exposure criteria, and (2) evidence of a medical condition sufficient to meet the medical criteria. Exhibits SP-300, Part III.A at 12 and SP-509 at 2; Rooney 2/28/94 Tr. at 228. There is no requirement that a claimant prove any legal liability on the part of any CCR defendant. All liability defenses are waived by defendants except for exposure as aforesaid.

(1) Asbestos Exposure Requirements

47. Under Parts IV.A and IV.C of the Stipulation, the asbestos exposure requirements are at least no more burdensome than they are under the law that would apply to the claimant's suit if it were in the tort system. Stipulation, Parts IV.A and IV.C at 19; Rooney 2/28/94 Tr. at 228-29. Disputes over whether sufficient occupational exposure has been shown by particular claimants are to be resolved by a single arbitrator selected by Class Counsel (with input from the AFL-CIO) and the CCR defendants. The exposure requirements serve the purpose of compensating those who have actual exposure to asbestos while excluding those with only trivial (*i.e.*, not medically significant) exposure to asbestos, Churg 3/3/94 Dep. at 31, and thus are fair and reasonable.

48. At the fairness hearing, the Objectors presented only minimal testimony in opposition to the exposure requirements. Oliver 3/14/94 Tr. at 144. Because it is factually clear that the exposure requirements will for some claimants be less burdensome to meet than in the tort system, and for others will mirror the tort system, such objections are not credited by the Court.[16]

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[16] Certain *Amici* asbestos suppliers and manufacturers have also objected to Part III.B.4 of the Stipulation, which states that asbestos exposure information (or similar data), which is furnished to the CCR by a class member seeking compensation, will be held confidential by the CCR. *See*

(2) Medical Requirements/Criteria

49. Part V of the Stipulation contains a comprehensive set of medical criteria that the CCR defendants are to use in determining whether a claimant qualifies for compensation. Exhibit SP-300, Part V at 21-48, and SP-301 at 2-5. Part V thus serves to implement the requirement of Part III.A that a claimant submit "evidence that the Exposed Person meets the medical criteria for one of the Compensable Medical Categories, as defined in Part V, . . . or should be identified as an Exceptional Medical Claim, under the procedure set forth in Part V.D" Part V contains five subparts.

50. Subpart A, "General Provisions," defines certain commonly used medical terms that are used in the medical criteria. These definitions are clear and accurate.

51. Subpart B, "Compensable Medical Categories," contains the basic medical criteria claimants are to meet to be eligible for cash compensation and includes four types of disease deemed associated with asbestos exposure. These are "mesothelioma" (a form of cancer of the lining of the lung or abdomen), "lung cancer," certain "other cancers" (such as colon-rectal tumors), and "non-malignant conditions" (defined as "asbestosis" and "bilateral pleural thickening"). Exhibits SP-300 at 25-26, 29-33 and SP-301 at 2-5. Each section in this subpart specifies the objective criteria that diagnosing physicians are to find in order for claimants' conditions to be currently compensable under the Stipulation.

SP-300, Part III.B.4 at 14-15. Based on the testimony, this Court finds that such confidentiality provisions are not unusual in settlement agreements in the asbestos litigation. Rooney 3/9/94 Tr. at 245-46. Furthermore, the Court finds that there is nothing in this confidentiality provision that would prevent a third-party from seeking access to the information in question through a subpoena or other legal process. Thus, the Court does not credit this objection.

52. Subpart C, "Disputes," provides for the resolution of disagreements as to the correctness of medical diagnoses by physicians under Subpart B. Exhibits SP-300 at 33-43 and SP-301 at 5, 8-9. In general, this subpart specifies that the Class Counsel (with input from the AFL-CIO), and the CCR defendants are to select, by agreement or arbitration, panels of physicians with designated specialties, depending upon the type of disease involved, who will review disagreements between claimants and the CCR defendants as to whether physicians' diagnoses are correct and meet the medical criteria in the Stipulation. An initial review of claimant's diagnosis is to be made by one such panel member, assigned by rotation, and an additional review may be had at the request of either the claimant or the CCR defendants by two other panel members. To prevail in such a dispute where a diagnosis by a claimant's physician appears on its face to meet the medical criteria, the CCR defendants have the burden of showing that the diagnosis is "clearly erroneous," a burden that the defendants otherwise would not have in the tort system.

53. Subpart D, "Exceptional Medical Claims," provides for consideration of medical claims that do not automatically meet the prescribed medical criteria for compensation. Exhibit SP-300 at 43-47. Under this subpart, Class Counsel (with input from the AFL-CIO), and the CCR defendants are to select, by agreement or arbitration, an "Exceptional Medical Panel" of five physicians with particular specialties who will review on an annual basis "exceptional" claims submitted to the CCR defendants. In such cases, the diagnosing physicians believe that the claimants should be compensated because they suffer from conditions specified in one of the four compensable medical categories under Subpart B, notwithstanding the fact that, for one reason or another, the claims do not meet the specific medical criteria prescribed in the Stipulation for that category. Rules are prescribed regarding the diagnostic materials to be submitted with such

claims and the procedures to be followed by the Exceptional Medical Panel. Exhibit SP-300 at 43. There are "caps" on the number of such exceptional claims that can be allowed in any one year, ranging from 5% of the "qualifying" mesothelioma claims for that year, as set forth in Part VIII of the Stipulation, to 20% of the qualifying lung cancer claims and another 20% of the other cancer claims for that year. Exhibit SP-300 at 47. Provision is made for a person whose claim is denied to resubmit a claim after two years if new supporting evidence becomes available. Exhibit SP-300 at 46-47.

54. The Exceptional Medical Panel is intended to, and does, identify claims that for reasons beyond the control of the claimant do not satisfy the requirements for a given compensable medical category. The Exceptional Medical Panel is required to exert every reasonable effort to implement the intent of the requirements of the compensable medical categories, which is to act as a "screen" to ensure inclusion only of exposed persons with asbestos-related conditions associated with those requirements. Exhibit SP-300 at 45.

(a) Overall Fairness of the Medical Criteria

55. The Court received testimony from seven expert medical witnesses regarding various aspects of the medical criteria in Part V.B, "Compensable Medical Categories." The Settling Parties presented the testimony of Dr. Paul Epstein, a board-certified pulmonologist from the University of Pennsylvania, who, among other things, served as Chair of an American Medical Association panel that recently published Guidelines to the Evaluation of Pulmonary Impairment (Epstein 3/8/94 Tr. at 6); Dr. James Crapo, a board-certified pulmonologist from Duke University, who is a former President of the American Thoracic Society (Crapo 1/13/94 Dep. at 92); Dr. Andrew Churg, a board-certified pathologist from the University of British Columbia, who, among many scholarly works, is author of a text entitled

Pathology of Occupational Lung Disease, and who, among his professional qualifications, serves as the Chair of the U.S.-Canadian Mesothelioma Reference Panel (Churg 3/3/94 Dep. at 11-12); and Dr. Victor Roggli, a board-certified pathologist from Duke University, who is a member of the U.S.-Canadian Mesothelioma-Reference Panel, and who, among other scholarly works, is the author of a text entitled *Pathology of Asbestos Associated Diseases* (Roggli 3/8/94 Tr. at 223). *See* Exhibits SP-700 through SP-703. All these physicians have from time to time testified as experts over the years in the ongoing asbestos tort litigation, and all except Dr. Crapo regularly consult and testify for both plaintiffs and defendants. Epstein 3/8/94 Tr. at 9; Churg 3/3/94 Dep. at 23-24; Roggli 3/8/94 Tr. at 229. Drs. Epstein, Crapo, Churg and Roggli are competent experts because they have the knowledge, skill, experience, training and education to form an opinion on issues relating to their field of expertise.

56. All four of these experts reviewed the medical criteria in Part V and gave their professional opinions that the provisions are fair and reasonable, particularly in the context of the objectives of the Settling Parties to achieve a workable administrative system for the handling of future claims. It was the professional opinion of all four experts that the Stipulation will fairly include as eligible for compensation substantially all persons who have asbestos-related malignancies or other asbestos-related conditions involving demonstrable impairment. Epstein 3/8/94 Tr. at 32-33; Crapo 1/13/94 Dep. at 123, 138-40; Churg 3/3/94 Dep. at 25-27; Roggli 3/9/94 Tr. at 6-9.

57. All four of the Settling Parties' experts are also of the opinion that the medical criteria in the Stipulation would not exclude from cash compensation substantial numbers of persons with asbestos-related cancer or asbestos-related impairment. Dr. Epstein believes that although no compromise agreement can be perfect, this Stipulation will compensate "most of the people, the large majority, the

overwhelming majority of individuals who have been truly damaged by exposure to asbestos . . . " Epstein 3/8/94 Tr. at 33-34. Dr. Crapo reviewed the Stipulation to see if it excluded individuals with a significant asbestos-related disability or injury, and could not "find any significant process that should be compensated that doesn't fall in [the Stipulation]." Crapo 1/13/94 Dep. at 117. *See also* Churg 3/3/94 Dep. at 27; Roggli 3/9/94 Tr. at 7-9.

58. The Settling Parties' medical experts also emphasized that the Exceptional Claims Panel would serve to include meritorious claims which would not qualify under the specific medical criteria. Epstein 3/8/94 Tr. at 33-34; Crapo 1/13/94 Dep. at 125-26.

59. The Objectors proffered three expert witnesses regarding the medical criteria: Dr. Christine Oliver, a board-certified internist on the staff of the Massachusetts General Hospital and an Assistant Professor of Medicine at the Harvard Medical School (Oliver 3/14/94 Tr. at 71); Dr. Samuel Hammar, a practicing pathologist and teacher of pathology at the University of Washington (Hammar 2/3/94 Dep. at 6-7); and Dr. Kaye Kilburn, a board-certified internist from the University of Southern California (Kilburn 2/2/94 Dep. at 151). Dr. Hammar has performed independent research on asbestos-related disease, and while some years ago he performed litigation consulting work with an asbestos manufacturer (Johns-Manville), his primary litigation consulting work for some years has been for plaintiffs' counsel. Hammar 2/3/94 Dep. at 8-12, 16-18. Dr. Oliver and Dr. Kilburn have testified in the ongoing asbestos litigation (*e.g.*, Oliver 3/14/94 Tr. at 166-67; Kilburn 2/2/94 Dep. at 157-58), generally for plaintiffs' counsel. Drs. Oliver, Hammar, and Kilburn are competent experts because they have the knowledge, skill, experience, training and education to form an opinion on issues relating to their field of expertise.

60. Dr. Oliver was not asked for an opinion as to the overall fairness or reasonableness of the medical criteria in the Stipulation. Dr. Hammar, when asked his "overall opinion" simply described the Stipulation as a "well-organized" document which "set forth a certain amount of criteria" to determine "which persons fell into [certain categories] . . . " Hammar 2/3/94 Dep. at 27 (he opined that certain medical criteria were "arbitrary" or "incorrect"). When Dr. Kilburn was asked his opinion of the Stipulation as a whole, he responded that "virtually every paragraph [was] objectionable, one way or another," and that the agreement "was a lousy, reprehensible, and diabolically cunningly designed document to take the rights and privileges away from the asbestos-exposed workers of America." Kilburn 2/2/94 Dep. at 24-25.

61. Based upon the testimony of these seven experts, the Court finds and accepts the testimony that the medical criteria of the Stipulation, viewed as a whole, meet the objectives of the Settling Parties of compensating substantially all claimants with asbestos-related cancer or asbestos-related impairment. Epstein 3/8/94 Tr. at 34-35; Crapo 1/13/94 Dep. at 98, 123; Roggli 3/9/94 Tr. at 4-5. In achieving these objectives, the medical criteria in the Stipulation present a sound and workable compromise of current medical and scientific opinion on important and sometimes difficult issues related to asbestos exposure and disease. *Id.* This finding is amply supported by the uniform and comprehensive opinions of the four experts presented by the Settling Parties in which they reviewed all the potentially controversial criteria.

62. The Court does not credit the testimony of the Objectors' medical experts. The three experts presented by the Objectors were not united in their overall view of the medical criteria, although they agreed with each other on certain specific issues. Nor did these three experts give meaningful opinions as to the reasonableness of the medical criteria in the context in which the criteria were put forth by

the Settling Parties — that is, as a compromise of vigorously disputed complex issues in a large class settlement designed to provide a fair and workable system of handling future claims for asbestos-related malignancies and other demonstrable asbestos-related impairment. Rather, with the exception of Dr. Kilburn, whose diatribe against the medical criteria in their entirety appeared immoderate and contrary to the weight of the scientific evidence and therefore unpersuasive, the Objectors' experts merely pointed to specific aspects of the medical criteria that they questioned either as a purely scientific matter divorced from consideration of the settlement as a whole, or as less desirable provisions than others that might have been negotiated by the Settling Parties. *E.g.*, Oliver 3/14/94 Tr. at 171-72, 177-78. In sum, the Court finds that the testimony of the Objectors' medical experts is unpersuasive in the context of the task before the Court.[17]

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[17] There were virtually no substantive objections voiced to four portions of Part V: "A. *General Provisions*," "C. *Disputes*," "D. *Exceptional Medical Claims*," and "*E. Waiver of Medical Qualifications*." One medical expert witness for the Objectors, Dr. Christine Oliver, questioned certain provisions of Part V.A regarding the need for prescribed techniques for giving chest x-rays ("four views" of the chest and "graded quality one" films) and administering pulmonary function tests (use of bronchodilators), *see* Exhibit SP- 300, Part V.A.8 and 10 at 23-24. Oliver 3/14/94 Tr. at 116-20. These points were adequately answered by an expert witness for the Settling Parties, Dr. Epstein, who is a board-certified pulmonary specialist. Epstein 3/8/94 Tr. at 5, 40-42. The Court finds Dr. Epstein's testimony persuasive and the provisions of Part V.A fair and reasonable.

(b) The Major Specific Medical Issues

63. Two specific medical issues, involving two types of potential claimants, require closer attention: (1) compensation for claimants who only evidence pleural changes without impairment, *i.e.*, "pleural thickening" and "pleural plaques," and therefore do not meet the stated criteria for compensation in Part V.B.4 ("Non-Malignant Conditions"), and (2) compensation for claimants with lung cancer who only produce evidence of some asbestos exposure or pleural changes, or both, and who therefore do not meet the stated criteria for compensation in Part V.B.2 ("Lung Cancer").

(i) "Pleural" Claims

64. As a result of the negotiations described above,[18] the non-malignant medical criteria in Part V.B.4 (in the subdivisions captioned "clinical evidence of asbestosis" and "pathological evidence of asbestosis") require either evidence of interstitial, or parenchymal, scarring on x-ray accompanied by abnormal pulmonary function test results, or comparable pathological evidence of scarring by tissue analysis to qualify for payment. Exhibit SP-300, Part V.B.4.b.c. A showing of pleural thickening can lead to immediate compensation in certain circumstances — where it is bilateral (*i.e.*, on both lobes of the lung), extensive, and accompanied by abnormal pulmonary function test results, as set out in Part V.B.4.d. The Settling Parties concede that these particular medical

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[18] Early in the negotiations, the CCR defendants insisted upon a medical impairment line that would generally exclude immediate cash compensation for persons with asbestos-related pleural changes alone. The Settling Parties reached an understanding in principle several months prior to the final agreement that there would be medical criteria that set some such impairment line and defined compensable "asbestosis" accordingly. *See* Rooney 3/1/94 Tr. at 157, 3/3/94 Tr. at 5; *see also* Finding of Fact ("FOF") ¶ 44.

criteria would, in varying degrees, be more stringent than those used by some courts. Rooney 3/1/94 Tr. at 252-63. That concession is accepted by the Court.

65. This Court will consider the objections to the Stipulation centering on the issue of excluding pleural claims from qualifying for immediate cash compensation. The Objectors offered two expert witnesses in support of the objections, Drs. Oliver and Kilburn. The core of Dr. Kilburn's and Dr. Oliver's position, as reflected in their testimony, is that (1) they define "asbestosis" as including more individuals than those who qualify for immediate cash compensation under the Stipulation, and (2) they claim that individuals with pleural changes alone can have functional impairment and would therefore be improperly excluded from compensation. Kilburn 2/2/94 Dep. at 76, 156; Oliver 3/14/94 Tr. at 94-95, 126-30, 142-43, 210.

66. Neither the objections to the exclusion of pleural claims from qualifying for immediate cash compensation nor Drs. Kilburn and Oliver, however, has either adequately considered this issue in the context of the overall fairness and reasonableness of the compromise struck by the Settling Parties in the agreement, or in terms of the benefits received by those not receiving immediate cash compensation but receiving a group of non-cash benefits. *E.g.*, Oliver 3/14/94 Tr. at 171-72, 177-78.

67. Moreover, after reviewing and crediting the testimony of the four medical experts presented by the Settling Parties, this Court finds that Dr. Kilburn's and Dr. Oliver's opinions regarding asbestosis, pleural changes and impairment in those with pleural changes are in substantial disagreement with many of their colleagues and with a large and well-respected authoritative body of medical literature. Oliver 3/14/94 Tr. at 212-13; Kilburn 2/2/94 Dep. at 76; Epstein 3/8/94 Tr. at 25, 59-60, 207-08; Churg 3/3/94 Dep. at 62; Roggli 3/9/94 Tr. at 36. These Objectors' opinions are not accepted as persuasive in the context of the task before

the Court. The Settling Parties' experts' opinions regarding pleural changes, on the other hand, reflected the prevailing view in the medical literature and are accepted by the Court. Epstein 3/8/94 Tr. at 25, 59-60.

68. Based on the testimony of the Settling Parties' experts, the Court finds that pleural changes alone "will in the vast majority of the cases cause no symptoms[,]" "no change in physiology, and [] will not have any effect on the individual's life span." Epstein 3/8/94 Tr. at 25, 58; *see also* Epstein 3/8/94 Tr. at 58-60, 207-08; Crapo 1/13/94 Dep. at 45-47, 162-63; Churg 3/3/94 Dep. at 34, 62; Roggli 3/9/94 Tr. at 36-37.

69. Having credited the testimony of the Settling Parties' experts on this point, the Court finds that the Stipulation should not be considered unfair because individuals with "evidence of pleural thickening or pleural plaques alone" will not receive immediate cash compensation.[19]

70. Ultimately, having reviewed and credited the testimony of the Settling Parties' experts, the Court finds that the Stipulation's working definition of "asbestosis" and the exclusion from immediate cash compensation of claims for pleural changes alone are reasonable, particularly when the Stipulation also provides for a group of benefits for these claimants (as described and discussed below).

(ii) Lung Cancer

71. The second issue on which there appeared to be considerable disagreement between the Settling Parties and the Objectors was the reasonableness of the medical criteria for attributing a lung cancer to asbestos exposure in Part

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[19] It is important to note that pleural claimants are not uncompensated. They will receive a group of benefits under the Stipulation which is explained below. *See* FOF ¶¶ 171-76.

V.B.2. The Stipulation lists five medical criteria the presence of which will allow a claimant with lung cancer to qualify for compensation: (1) "clinical evidence of asbestosis" under Part V.B.4.b; (2) "pathological evidence of asbestosis" under Part V.B.4.c; (3) evidence of "bilateral pleural thickening" under Part V.B.4.d; (4) evidence of bilateral pleural thickening or plaques coupled with sufficient occupational exposure under Part V.B.2.c; (5) and favorable resolution by the Exceptional Medical Panel under Part V.D. Exhibits SP-300, Part V.B.2 at 26-27 and SP-301 at 2-3.

72. The medical criteria in the Stipulation would not automatically permit compensation of persons with lung cancer who simply produce some evidence of asbestos exposure, as reflected in a work history, or as reflected by pleural changes alone, or as reflected by some milder abnormality in a chest x-ray or pulmonary function test result than would qualify as "asbestosis" under the medical criteria, unless such a claim based upon a showing of exposure would be found persuasive to the Exceptional Medical Panel under Part V.D. Exhibit SP-300, Parts V.B.2 and V.D.

73. Two of the three medical experts offered by the Objectors, Drs. Oliver and Kilburn, explained that it was their medical opinion that a person "need have only a history of exposure" and "appropriate latency" to attribute his lung cancer to asbestos exposure. Oliver 3/14/94 Tr. at 230; *see also* Kilburn 2/2/94 Dep. at 146-48.

74. The third expert produced by the Objectors, Dr. Hammar, however, testified that it was his opinion that, in order to attribute lung cancer to asbestos exposure, "there has to be a concentration of asbestos in the lung tissue great enough to cause the disease asbestosis, and that can either be in the form of fibers per gram of lung tissue . . . or asbestos bodies per gram of lung tissue." Hammar 2/3/94 Dep. at 40-41. The medical criteria in the Stipulation, however, do not provide for automatic compensation for lung cancer on the basis of such pathological or tissue analysis alone.

75. Dr. Hammar also testified that if the Exceptional Medical Panel were able to evaluate cases where there was an elevated fiber burden such as he described but no asbestosis, he would find the lung cancer criteria reasonable. Hammar 2/3/94/ Dep. at 94.[20] After reviewing Dr. Hammar's testimony and the testimony of the Settling Parties' experts on this point, the Court finds that method described by Dr. Hammar for attributing lung cancer to asbestos exposure would be persuasive to the Exceptional Medical Panel.

76. All seven medical experts who testified on this point recognized that there was a difference of opinion in the medical community as to whether underlying asbestosis is required before a lung cancer may be attributed to asbestos exposure or whether it is sufficient that there be exposure sufficient to cause asbestosis, whether or not the claimant has actually contracted asbestosis. *See, e.g.*, Hammar 2/3/94 Dep. at 45, 47-48. However, all four of the Settling Parties' experts found the medical criteria in the Stipulation to be a reasonable compromise between the mainstream opinions, and none of the four faulted the criteria for not permitting lesser evidence, such as recommended by Drs. Oliver and Kilburn. Churg 3/3/94 Dep. at 49-50, 52-53, 54-57 (describing the mainstream medical opinions); Crapo 1/13/94 Dep. at 86;

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[20] Dr. Hammar also expressed some concern over the 20% cap on the number of lung cancer claims that may qualify for compensation through the Exceptional Medical Panel. Hammar 2/3/94 Dep. at 84-86. Dr. Hammar guessed that "maybe 30% of the cases that [he has] seen as a pathologist would" have significant concentrations of asbestos fibers in their lungs but would not have pathological evidence of asbestosis. After reviewing Dr. Hammar's testimony, and this particular provision of the Stipulation, this Court finds that the number caps on the claims payable through the Exceptional Medical Panel represent a fair and reasonable compromise.

Epstein 3/8/94 Tr. at 52-53, 55-57; Roggli 3/9/94 Tr. at 42-60, 134-47.

77. Having reviewed and credited the testimony of the Settling Parties' experts, this Court finds that the position of Drs. Oliver and Kilburn on this point is in substantial disagreement with the vast majority of their colleagues and with a large, well-respected and authoritative body of medical literature. *E.g.*, Churg 3/3/94 Dep. 57.

78. Given the provision in the Stipulation for the Exceptional Medical Panel, this Court finds that few, if any persons with lung cancer that is claimed to be attributable to asbestos exposure would be denied compensation under the Stipulation. Epstein 3/8/94 Tr. at 56-57; Roggli 3/9/94 Tr. at 48-60; Hammar 2/3/94 Dep. at 94.

79. Ultimately, having reviewed and credited the testimony of the Settling Parties' experts on this point, this Court finds that the lung cancer qualifying criteria in the Stipulation are fair and reasonable.

(c) Subsidiary Medical Issues

80. Various objections were made to other specific portions of the medical criteria in the Stipulation that, for purposes of discussion, may be grouped as follows: (i) Mesothelioma, Part V.B.1, (ii) Lung Cancer, Part V.B.2, (iii) Other Cancer, Part V.B.3, and (iv) Non-Malignant Conditions, Part V.B.4.

(i) Mesothelioma

81. The Objectors raised the following concerns regarding the medical criteria for mesothelioma prescribed in Part V.B.1 of the Stipulation: that the criteria may not be clear enough to include "pericardial" mesotheliomas (Hammar 2/3/94 Dep. at 31; Oliver 3/14/94 Tr. at 144); that the criteria should be clarified to include specific references to compensation for mesotheliomas of the "tunica vaginalis" and diagnosis of mesotheliomas by "electron microscopy"

(Hammar 2/3/94 Dep. at 30-31); that a latency period of ten years may not provide for the possibility that a person with mesothelioma would be diagnosed less than ten years after first exposure (Hammar 2/3/94 Dep. at 33-34); and that the criteria's insistence upon pathological diagnoses, *i.e.*, from tissue analysis, as opposed to diagnosis merely by clinical observation may not be fair (Oliver 3/14/94 Tr. at 145).

82. The Settling Parties' experts testified on these issues, and having reviewed and credited their testimony, this Court finds that the mesothelioma criteria are fair and reasonable and that the objections to the mesothelioma criteria are not supported by persuasive evidence. Churg 3/3/94 Dep. at 30; Epstein 3/8/94 Tr. at 47; *see also* Hammar 2/3/94 Dep. at 31 ("pericardial" mesothelioma is "very rare"); Hammar 2/3/94 Dep. at 30-31 (mesotheliomas of the "tunica vaginalis" are probably implicitly included in the mesothelioma criteria); Hammar 2/3/94 Dep. 33-34 (a latency period for mesothelioma of less than ten years is "a very rare thing."); Oliver 3/14/94 Tr. at 145 (most cases of mesothelioma are diagnosed from pathological evidence and not merely by clinical observation).

(ii) Lung Cancer

83. This Court has already made findings regarding the basic qualifications for compensability for asbestos-related lung cancer under Part V.B.3 of the Stipulation. FOF ¶¶ 71-79. The Objectors also raised the following concerns regarding specific aspects of the criteria: that the requirement in Part V.B.2.a that lung cancer diagnoses be made by a board-certified pathologist, pulmonary specialist, or oncologist may be unnecessary (Oliver 3/14/94 Tr. at 156-57); and that the twelve-year latency requirement for lung cancer in Part V.B.2.b may be unfair because the Objectors' experts believed that lung cancer can occur within shorter periods after first exposure to asbestos (Hammar 2/3/94 Dep. at 35-36; Kilburn 2/2/94 Dep. at 172-73; Oliver 3/14/94 Tr. at 157).

84. Having reviewed the Objectors' experts' testimony on these issues, having found their testimony unpersuasive, and having credited the testimony of the Settling Parties' expert who testified as to one of the issues, this Court finds that the lung cancer criteria are fair and reasonable. Epstein 3/8/94 Tr. at 51 (testifying as to the latency requirement for lung cancer); *see also* Hammar 2/3/94 Dep. at 36 (acknowledging that he had seen "very few" lung cancer cases that he thought were asbestos-related but that had shorter latency periods).

(iii) Other Cancer

85. Part V.B.3 of the Stipulation provides for compensation for certain types of cancer other than lung cancer and mesothelioma. Some of the Objectors asserted that still other types of cancer can be asbestos-related and should be compensated under the agreement, such as: kidney cancer, pancreatic cancer, oral pharyngeal tumors, and lymphoma. Kilburn 2/2/94 Dep. at 165-66; Oliver 3/14/94 Tr. at 161 (would only add kidney cancer); Hammar 2/3/94 Dep. at 61-62 (same).

86. The Settling Parties' experts testified on these issues and agreed that there was not sufficient scientific evidence to associate kidney cancer with asbestos exposure. Roggli 3/9/94 Tr. at 40; Crapo 1/13/94 Dep. at 96; Epstein 3/8/94 Tr. at 30-31. Having reviewed and credited their testimony, this Court finds that the medical criteria for other cancer are fair and reasonable and that the objections regarding the exclusion of certain other cancers are not supported by persuasive evidence.

(iv) Non-Malignant Conditions

87. Beyond the objections regarding the basic impairment criteria for non-malignant conditions that have been discussed earlier in these findings, some of the Objectors, supported by one or more of their medical experts, raised the following specific concerns regarding the non-malignant conditions

criteria in Part V.B.4 of the Stipulation: that the latency requirement in Part V.B.4.a "will be a problem" for certain class members (Oliver 3/14/94 Tr. at 121); that the requirement that diagnoses of non-malignant conditions be made by board-certified internists, pulmonary specialists or pathologists is not necessary (Oliver 3/14/94 Tr. at 122); that the requirement in Part V.B.4 that x-rays be read by a "certified B-reader" is not necessary (Kilburn 2/2/94 Dep. at 162); that the requirements for abnormal pulmonary function test results in Part V.B.4 are not adequate to take account of some persons, chiefly smokers, who have both "restrictive" disease from asbestos exposure and "obstructive" disease and whose total lung capacity may therefore be normal (Oliver 3/14/94 Tr. at 138-39; Hammar 2/3/94 Dep. at 52-53); that the requirement of in Part V.B.4.c of evidence of asbestos bodies in the tissue sample for a pathological finding of asbestosis may be unfair (Hammar 2/3/94 Dep. at 53); that the Stipulation should provide compensation for "fear of cancer" and "medical monitoring" of persons with exposure to asbestos but who do not manifest a qualifying condition (Kilburn 2/2/94 Dep. at 160, regarding medical monitoring); and that the Stipulation should compensate persons with benign "pleural effusions" because they may be caused by asbestos exposure and they may cause impairment (Kilburn 2/2/94 Dep. at 162-64).

88. Having reviewed the Objectors' experts' testimony on these issues, having found their testimony does not support a conclusion that the medical criteria for non-malignant conditions are unfair or unreasonable, and having credited the testimony of the Settling Parties' experts who testified as to several of these issues, this Court finds that the medical criteria for non-malignant conditions are fair and reasonable. Epstein 3/8/94 Tr. at 36, 38-40, 60-61, 72-96; Crapo 1/13/94 Dep. at 48, 56-59, 76-79, 186; Churg 3/3/94 Dep. at 35-36, 73-74; Roggli 3/9/94 Tr. at 28-30; *see also* Kilburn 2/2/94 Dep. at 64 (uses a fifteen-year latency period in his work);

Oliver 3/14/94 Tr. at 75-76, 185-86 (uses B-readers in her work); Hammar 2/3/94 Dep. at 57 (rarely has seen cases where asbestos bodies were lacking and fibrosis was considered to be asbestos-related).

D. Compensation Procedures

89. Parts VII, VIII and IX of the Stipulation set forth procedures for determining how, when, and how much will be paid for claims that qualify for compensation. Part VII establishes a (1) Compensation Schedule for the payment of qualifying claims; (2) Part VIII sets forth the Case Flow Maximums and payment procedures; (3) and Part IX discusses the payment of "extraordinary" claims. Exhibits SP-300, Parts VII - IX at 51-66 and SP-301 at 5-6.

(1) Compensation Schedule

90. The Compensation Schedule (described in Part VII and attached to the Stipulation as Exhibit B)[21] sets forth a maximum and a minimum value, as well as a middle range (a so-called "negotiated average value range"), for each of the four medical categories. These values will be used to determine compensation dollar payments for most of the qualifying claims under the Stipulation. Rooney 2/28/94 Tr. at 233; Exhibits SP-300 (Exhibit B) and SP-509 at 6. The Compensation Schedule also includes a "negotiated average value" for "extraordinary" claims, which will be used to determine the funds available for the payment of such "extraordinary" claims. Rooney 2/28/94 Tr. at 235-36; Exhibits SP-300 (Exhibit B) and SP-509 at 6.

91. A claimant who qualifies for compensation under the Stipulation has several options for obtaining compensation: (1) the "simplified" payment procedure, whereby he or she will receive the "minimum value" in the appropriate medical

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[21] The Compensation Schedule is also attached to this memorandum opinion.

category in a short period of time (Exhibit SP-300, Part VIII.B at 55-56; Rooney 2/28/94 Tr. at 245); (2) the "individualized" payment procedure, whereby he or she will receive compensation in some amount between the "minimum" and "maximum" values for the appropriate medical category, and where the average of all compensation amounts offered to claimants in that medical category in a six-month interval will fall within the "negotiated average value range" for that medical category (Exhibit SP-300, Part VIII.B at 58; Rooney 2/28/94 Tr. at 233-34; Murray 3/11/94 Tr. at 105-06); and (3) the "extraordinary" claim procedure, whereby the claimant will be awarded an amount due to extraordinary damages by an independent three-person panel[22] from a fund of money calculated using the "negotiated average value" for "extraordinary" claims on the Compensation Schedule (Exhibit SP-300, Part IX at 61-66; Rooney 2/28/94 Tr. at 235). *See also* Rooney 2/28/94 Tr. at 235, 245-46.

92. For those qualifying claimants that elect the individualized payment procedures, Part VIII.B.2 provides that the CCR will make offers to such claimants based on all the factors that it has used historically to evaluate claims for settlement. These factors include:

> type of claim, nature and extent of asbestos disease or injury, questions of medical causation, disability, age, number and age of dependents, special damages, pain and suffering, likelihood and amount of exposure to products manufactured or supplied by the CCR

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[22] One member of this three-person panel will be selected by counsel for the CCR defendants, and one member will be selected by Class Counsel, with input from the AFL-CIO. These two panel members will jointly select the third member of the panel. Exhibits SP-300, Part IX.D at 62-63 and SP-301 at 8-9; Rooney 2/28/94 Tr. at 238-41.

> defendants . . . job history, location of the forum in which a lawsuit for asbestos-related injury or damage could properly be maintained by the Claimant, information concerning historical settlement values, jury verdicts, and judgments in comparable cases involving various plaintiffs' counsel in that forum and in other jurisdictions, type of release to be provided by the Claimant, and any other relevant criteria generally utilized in the settlement of litigated tort cases.

Exhibits SP-301 at 5-6, SP-300, Part VIII.B.2.a at 57 and SP-509 at 9; Rooney 2/28/94 Tr. at 234-35, 246-47. These factors will be weighed by the CCR in accord with its historical practices. Exhibit SP-301 at 6; Rooney 2/28/94 Tr. at 247. Generally, claims will be paid in the order in which they are submitted; however, this principle may change in any year where the maximum number of qualifying claims in a medical category exceeds the number that may be paid. Exhibit SP-300, Part VIII.B.3 at 59; *see for explanation* Rooney 3/1/94 Tr. at 132-33, 144.

93. Part VII.B of the Stipulation further provides that, after the first ten years that the settlement operates, Class Counsel and the CCR defendants will renegotiate the Compensation Schedule. Part VII.B provides a dispute resolution procedure for deciding this issue if Class Counsel and the CCR defendants cannot agree. The values in the Compensation Schedule may not be adjusted at that time by greater than 20%. Exhibit SP-300, Part VII at 52.

94. The values in the Compensation Schedule, including those set for the payment of extraordinary claims, were negotiated based on the CCR defendants' historical settlement averages and several other factors. These other factors included reasons for increasing the compensation payments over the CCR's historical averages, such as that the historical averages include payments made to claimants without demonstrable breathing problems due to asbestos whose claims will be deferred under the Stipulation. Rooney

2/28/94 Tr. at 241-43; Exhibit SP-509 at 8. They also included reasons for decreasing the compensation payments from the CCR's historical averages, such as the fact that the Stipulation involves a waiver of defenses to qualifying claimants by the CCR defendants; that payments under the Stipulation should, in most cases, be made faster than under the tort system at lower transaction costs, including attorneys' fees; and finally, that qualifying claimants with non-malignant conditions will be able to receive additional compensation if and when they contract cancer.[23] Rooney 2/28/94 Tr. at 243-45; Exhibit SP-509 at 8.

95. Having reviewed the underlying documents provided to Class Counsel during the negotiations and accepted into evidence at the fairness hearing, and having found these documents to be accurate and valid, this Court finds that the values in the Compensation Schedule are indeed a reasonable reflection of the CCR defendants' historical settlement averages from the tort system. Exhibits SP-502, SP-504 and SP-601(B)-(D); Rooney 2/28/94 Tr. at 182-85; Rooney 3/1/94 Tr. at 115-28; Murray 3/11/94 Tr. at 94-101, 109-11, 112-15, 128-30 (analyzing the CCR defendants' historical data). This Court further finds that it was reasonable and logical for the CCR defendants and Class Counsel to negotiate the values in the Compensation Schedule based on

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[23] As set forth in ¶¶ 105, 130 and 137, this Court finds based on the evidence at the fairness hearing that, on average, claims against the CCR defendants in the tort system take almost three years to resolve, and that delays in certain jurisdictions are much longer; that 33-40% contingency fee contracts are the norm in the asbestos litigation (compared to the 20-25% contingency fee maximum for claims under the Stipulation); and that 90% of the claims settled by the CCR defendants in the tort system have been settled for "full" releases, with the claimant thereby waiving all rights to additional compensation if cancer later develops.

the CCR defendants' historical averages and the other factors described above. This Court finds that the Objectors have offered no persuasive evidence that the method for setting these values or the values themselves are manifestly flawed.

96. The Objectors raised several concerns regarding the Compensation Schedule. First, the Objectors question why the information provided to Class Counsel regarding the CCR defendants' historical averages did not break down the claims in the non-malignant medical category into "asbestosis," "disputed asbestosis," and "pleural." There was testimony at the fairness hearing that the CCR defendants had data with the non-malignant category broken down as the Objectors described. Rooney 3/1/94 Tr. at 171-75. However, this Court infers from the testimony that such data would not have been a reliable basis for negotiation of the values in the Compensation Schedule because there were in place no standards for the CCR claims personnel to follow in placing non-malignant claims in the three categories and the data collected was thus flawed. Rooney 3/3/94 Tr. at 41-44; Rooney 3/1/94 Tr. at 177-80; Fitzpatrick 2/24/94 Tr. at 15-22. Having credited the above-mentioned testimony, this Court finds that it was not reasonable for Class Counsel to demand such data for purposes of negotiating the values in the Compensation Schedule.

97. The Objectors argued that because the CCR defendants' averages increased during 1992, the use of four-year historical averages as a primary component of the compensation amounts under the Stipulation is unfair. *See* Fitzpatrick 2/23/94 Tr. at 225. However, there was testimony, which this Court credits, that the increase was caused primarily by the settlement in 1992 of large consolidated trials in Maryland and New York. Rooney 2/28/94 Tr. at 185-86. Furthermore, the 1992 increase was fully disclosed during the negotiations. *Id.* Accordingly, this Court finds that the four-year settlement averages for the

CCR defendants constitute a reasonable basis for determining the compensation values under the Stipulation.

98. The Objectors' also argue that the Compensation Schedule is unfair because they claim that the loss of consortium claims are thereby settled for no compensation. Based on the evidence at the fairness hearing, however, this Court finds that the CCR defendants' historical averages, upon which the compensation values are based, include payments for loss of consortium claims, and, accordingly, the Compensation Schedule is not unfair for this ascribed reason. Rooney 2/28/94 Tr. at 186-87.

99. Finally, the Objectors argue that the Compensation Schedule is unfair because it contains no adjustment for inflation. This Court has taken judicial notice of the general Consumer Price Index statistics, *see* Order, Dkt. No. 1005 (April 8, 1994), and the CCR defendants presented no evidence at the fairness hearing to rebut the Objectors' argument that a settlement agreement that settles future cases over the course of ten years should indeed contain an adjustment for inflation. *See* Hatten 3/17/94 Tr. at 13.[24] Having reviewed and considered the arguments on this issue, the Court finds that a picture perfect negotiator for the class members might have insisted on and achieved an adjustment for inflation. However, the Court also finds that the absence of such an adjustment does not render the Stipulation unreasonable or unfair when viewed as a whole in light of the significant advantages presented to the class members.

100. In sum, this Court finds that the compensation values under the Stipulation are fully justified by the CCR

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[24] Mr. Hatten testified that in his almost twenty years of experience, inflation has generally not been taken into account in settlement negotiations. This Court finds that Mr. Hatten was not discussing the type of settlement negotiations at issue in this class action.

defendants' historical settlement averages and other factors, and, accordingly, that the compensation values are fair and reasonable to the class. The objectors' arguments concerning the inadequacy of these compensation amounts do not persuade this Court that they are unfair to the class.

(2) Case Flow Maximums

101. The Stipulation also contains, as Exhibit A and A*, annual Case Flow Maximums for the payment of qualifying claims during the first ten years of the Stipulation. These Case Flow Maximums govern only the timing of when claims may be paid; the CCR defendants remain obligated to pay all qualifying claims. Moreover, the Case Flow Maximums may be adjusted one time during the first ten years of the Stipulation, and are subject to renegotiation without limitations after ten years. Exhibit SP-300, Part VIII.A at 53-54 (and Exhibit A *); Rooney 3/1/94 Tr. at 14-15. If after ten years, Class Counsel and the CCR defendants cannot agree on new Case Flow Maximums, Part VIII.A.3 provides a dispute resolution procedure. Exhibit SP-300, Part VIII.A.3 at 54; Rooney 3/1/94 Tr. at 19-20.

102. There are various provisions of the Stipulation that allow the Case Flow Maximums in a given medical category to be exceeded in a given year if less than the maximum number of claims or settlement dollars have been paid in another category. Exhibit SP-300, Part VIII at 60; Rooney 3/1/94 Tr. at 5-7; Murray 3/11/94 Tr. at 116-17. To the extent there are such "saved" dollars, qualifying claims in the mesothelioma category will be the first additional claims paid. Exhibit SP-300, Part VIII.C at 60; Rooney 3/1/94 Tr. at 5-6. Further, Part VIII.A provides that if the number of qualifying claims in any medical category exceeds these Case Flow Maximums in a given year, then such excess claims shall have priority for payment in the next year. Exhibit SP-300, Part VIII.A at 53; Rooney 3/1/94 Tr. at 4; Murray 3/11/94 Tr. at 116.

103. The Case Flow Maximums were negotiated based on the number of claims settled by the CCR defendants in each of the four disease categories in each of the four years preceding the settlement. Taken into account was CCR's commitment to settling all present claims filed against the CCR defendants in the tort system in addition to settling future claims through the Stipulation. Exhibit SP-502; Rooney 2/28/94 Tr. at 187-89; Rooney 3/1/94 Tr. at 9-11.

104. At the fairness hearing, the Settling Parties presented additional evidence, which this Court credits, to substantiate the point that the Case Flow Maximums, if reached, would result in the CCR defendants paying more claims, at a faster rate, than they have ever paid in the past. Exhibit SP-601(G) shows that, from October 1988 through the date that the Stipulation was filed (January 15, 1993), the CCR defendants settled (calculated on a paid basis) approximately 60,000 claims in the tort system during this four-and-one-quarter year period. Murray 3/11/94 Tr. at 102-03. *See also* Exhibit SP-504 at Bates Stamp No. CCR 2000313. Taking into account payment of settlements for the remainder of the pending tort claims (either under previously agreed-to or new settlements), and payment of "future" claims at the Case Flow Maximums in the Stipulation, SP-601(G) shows that the CCR defendants would pay settlements in approximately 225,000 claims from January 15, 1993 through the end of 2003. Murray 3/11/94 Tr. at 118-126. Exhibit SP-601(H) contains this data to set forth the calculation of the average number of claims paid per year by medical category both before (October 1988 - January 15, 1993) and after (January 15, 1993 - December 31, 2003). Murray 3/11/94 Tr. at 120-24, 127. Exhibits SP-601(G) and SP-601(H) together show that, in the mesothelioma, other cancer, and non-malignant medical categories, the CCR defendants would pay more claims each year after the instant Settlement Stipulation was filed than they did during the four years prior to this filing; in the lung cancer category, the CCR

defendants would pay claims at approximately the same rate that they have historically paid such claims. Murray 3/11/94 Tr. at 127.[25]

105. This Court also finds based on the evidence at the fairness hearing that the average asbestos case takes almost thirty-one (31) months to resolve in the tort system, Exhibit SP-208 at 10-11, and that claims against the CCR defendants have, on average, taken almost three years to resolve. Rooney 3/1/94 Tr. at 129-30, 155, 67-68.

106. The Objectors argued that the Case Flow Maximums in the Stipulation are set unfairly low. The CCR defendants settled 128,000 claims in the last five years (1989-93). *See* Fitzpatrick 2/23/94 Tr. at 131-32. However, there was explanatory testimony, which this Court credits, that more claims were settled in the tort system by the CCR defendants in 1993 than ever before (approximately 53,000) because after this class action was settled, the CCR defendants undertook to settle all present tort claims over the next five years. Fitzpatrick 2/23/94 Tr. at 136; Exhibit SP-300 at 3. Prior to 1993, the most claims that the CCR defendants had ever settled in one year was approximately 25,000 (1992), and the most claims they had ever paid in one year was approximately 19,000 (1990). Murray 3/11/94 Tr. at 102-03; SP-504 at Bates Stamp No. CCR 2000313. In other years, the number of claims settled or paid has been much lower. Exhibit SP-504 at Bates Stamp No. CCR 2000313.

107. The Objectors also argued that the Case Flow Maximums are inadequate for the following reasons: (1) the

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[25] In a March 18, 1994 Order, this Court ruled that both Exhibits SP-601(G) and SP-601(H), along with certain other of the Settling Parties' exhibits, are to be treated as confidential in accord with the Court's December 3, 1993 Confidentiality Order, and that such exhibits are to be maintained under seal.

Case Flow Maximums are less than the annual new case filings against the CCR defendants; (2) the maximum number of lung cancer claims is slightly less than the maximum number of mesothelioma claims even though the CCR defendants have traditionally settled more lung cancer claims than mesothelioma claims; (3) the decrease from year-to-year in the mesothelioma and lung cancer categories is too great (Nicholson 3/31/94 Dep. at 64-66).[26] None of these arguments, however, refutes the central fact which this Court finds is supported by the evidence at the fairness hearing: the Case Flow Maximums, if reached, would result in the CCR defendants paying claims at a faster rate, than they have ever paid before, in the mesothelioma, other cancer, and non-malignant medical categories, and paying lung cancer claims at approximately the same rate that they have paid such claims historically. Murray 3/11/94 Tr. at 127; Exhibit SP-601(H). Further, with respect to lung cancer claims, the medical testimony, which this Court credits, was that claims for asbestos-related lung cancer should be on the decline due to the diminished levels of asbestos exposure to the class members in the past few decades. *See* Roggli 3/9/94 Tr. at 59.

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[26] As to the third argument, the Objectors presented the expert testimony of Dr. William Nicholson, a Ph.D. scientist and professor from the Mount Sinai School of Medicine in New York City. Nicholson 3/31/94 Dep. at 10-13. In 1982, Dr. Nicholson published his opinion as to some general projections of future asbestos-related disease. *Id.* at 41-49. However, Dr. Nicholson admitted that the general projections in the 1982 paper could not be extrapolated to project the experience of a particular company or group of companies without more information. *Id.* at 84-86. In view of this concession, the Court does not consider the 1982 paper relevant or persuasive to the issue of whether the Case Flow Maximums here are adequate.

108. Based on the foregoing findings of fact, this Court finds that the Case Flow Maximums will result in less delay for asbestos claimants than that experienced in the present tort system, and in the payment of the same amount of or more claims each year than CCR paid during the four years prior to this filing. Accordingly, this Court finds that the Case Flow Maximums are reasonable, adequate and fully justified by the evidence at the fairness hearing. The Objectors' arguments to the contrary are rejected as unpersuasive.

(3) Extraordinary Claim Procedure

109. For those qualifying claimants that elect the extraordinary claim procedure, Part IX.C of the Stipulation provides that the Extraordinary Claims Panel will select extraordinary claims at annual intervals. Exhibit SP-300, Part IX.E.1 at 63. Criteria for selection as an "extraordinary" claim will include:

> a combination of age, number and age of dependents, relevant economic factors, an unusually high percentage of exposure to the asbestos or asbestos-containing products of the CCR Defendant(s) . . . or other similar factors that would demonstrate a truly extraordinary claim for compensatory damages against the CCR Defendant(s) if litigated as a tort case in an appropriate forum.

Exhibits SP-300, Part IX.C at 62-63 and SP-509 at 10. The number of extraordinary claims able to be selected will be capped at a certain percentage of total qualifying claims for each medical category. Exhibit SP-300, Part IX.E.1 at 63-64; Rooney 2/28/94 Tr. at 235-37.

110. The "negotiated average value" figures for extraordinary claims set forth in the Compensation Schedule (Exhibit B) will be used to determine the fund of money that the Extraordinary Claims Panel has available to award every year. There is no fixed limit on the amount that may be awarded by the panel to any claim that it selects as extraordinary, but the total amount of money available for

such extraordinary claimants is capped, as indicated above. Exhibit SP-300, Part IX.E.2 at 64-65; Rooney 2/28/94 Tr. at 235-38.

111. Based on the foregoing findings of fact, and after reviewing the evidence on the record on this issue, the Court finds that the Extraordinary Claims Procedure, including the cap on the amount available for all extraordinary claims, is reasonable and fair to the class. There were no substantive objections to the Extraordinary Claims Procedure which the Court credits.

(4) Other Issue

112. The Objectors raised one final argument regarding the procedures for evaluating and paying claims under the Stipulation: that it is improper to include the identity of "plaintiffs' counsel" in the list of factors to be considered in settlement offers under the individualized payment procedures. Part VIII.B.2 describes this factor to include "historical settlement values, jury verdicts, and judgments in comparable cases involving various plaintiffs' counsel in that [appropriate] forum and in other jurisdictions." Exhibit SP-301 at 6. This Court infers from the record that the "identity of counsel" factor means that the claim evaluator for CCR will consider the demonstrated skill, ability, talent and experience of a claimant's counsel to assemble, understand and present the claim and the materials in support thereof and to fairly arrive at the settlement demand presented to CCR. This Court takes judicial notice of the fact that such considerations are endemic to all similar relations with attorneys making claims of any and all kinds.

113. Under Part VIII.B.2 of the Stipulation, however, this factor is only one of several factors to be weighed by the CCR in making settlement offers, and its importance will vary from claim to claim and over time. Fitzpatrick 2/24/94 Tr. at 86-87, 135-37. Furthermore, an individual claimant's lawyer's ability to litigate a claim before the Extraordinary

Claims Panel under Part IX or in the alternative dispute resolution procedures under Part X of the Stipulation is relevant to the settlement offer that the claimant would receive from the CCR. Fitzpatrick 2/24/94 Tr. at 132-33, 126-27; Fitzpatrick 2/23/94 Tr. at 80-81. There is no suggestion that the "identity of counsel" factor will dominate substantive factors in the evaluation process.

114. In short, the Court finds that the reference to "plaintiffs' counsel" in the list factors in Part VIII.B.2 is of minor significance and is reasonable based upon historically considered factors.

E. Alternative Compensation Procedures

115. Part X of the Stipulation provides a procedure whereby claimants with qualifying claims, who are not satisfied with the settlement offers they receive under the other procedures of the Stipulation, may have their claims resolved in the tort system or through binding arbitration. Exhibits SP-300, Part X at 67 and SP-509 at 15. Under Part X.A, however, there is a limit on how many qualifying claimants may make this election each year, which is a set percentage by medical category,[27] of the qualifying claims that were paid in that medical category during the previous year. Those claimants that wish to proceed to the tort system or to binding arbitration but who exceed this numerical limitation will have the first priority to have their compensation amount determined in this fashion in the next

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[27] The maximum number of qualifying claimants who may make this election shall not exceed, in any one year, 1% of either the total number of claims that qualified for payment in each compensable medical category during the previous year or the maximum number of qualifying claims that may be paid in each
compensable medical category during the previous year. Exhibit SP-300, Part X.A at 67-68.

year.[28] Exhibit SP-301 at 6-7; Rooney 3/10/94 Tr. at 31.

116. Part X.C provides that the only issues to be resolved in claims that proceed to the tort system or binding arbitration under Part X will be (a) "whether the exposed person has/had an asbestos-related disease or condition"; (b) whether exposure to asbestos products of a CCR defendant "was a substantial contributing factor in causing the . . . condition;" and (c) "the amount of compensatory damages, if any, to be awarded." Exhibit SP-300 Part X.C at 70. Thus, certain liability defenses may not be raised. In addition, Part X.C specifically provides that neither punitive damages nor damages for increased risk of cancer may be sought or recovered under this provision. Part X.C explains that the reason that damages for increased risk of cancer may not be recovered is that a claimant who recovers damages for a nonmalignant condition under this Part will have the right to present a claim for additional compensation for a malignant condition, if such a malignancy develops. Exhibit SP-300, Part X.C at 71-72.

117. Part X.D of the Stipulation explains that there is no limit on the amount of damages that may be awarded to a claimant who elects to have his or her compensation determined in this manner. To the extent, however, that the damages award exceeds 150% of the CCR's last settlement

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[28] Under Part X.A.3, qualifying claimants are generally to proceed to the tort system or to binding arbitration in the order in which they make an election to so proceed (so-called "FIFO" or "first in-first out" order). If the case flow limits are exceeded in a given year, however, this Court, upon application, will have authority to alter this principle of FIFO order so that a "disproportionate number" of claimants proceeding to the tort system or binding arbitration in that year in a given medical category are not represented by one attorney or firm. Exhibit SP-301 at 7-8.

offer, the excess will be paid over five years. SP-300, Part X.D at 72-73; SP-509 at 15.

118. The evidence at the fairness hearing established that the annual percentage limitations for claimants that may make the election under Part X of the Stipulation each year far exceeds the percentage of claims that have historically proceeded to verdict against the CCR defendants in the tort system. Fitzpatrick 2/22/94 Tr. at 130-32; Exhibit SP-217; Fitzpatrick 2/23/94 Tr. at 132-34; Exhibit SP-509 at 15. Also, testimony at the fairness hearing established that no judgment for punitive damages in an asbestos personal injury case has ever been entered against any of the CCR members in the almost six years that the CCR has been in existence. Fitzpatrick 2/22/94 Tr. at 130. This Court credits these documents and this testimony.

119. Based on the foregoing findings of fact, the Court finds that the Alternative Compensation Procedures in the Stipulation are factually reasonable and fair to the class and are fairly representative of the historical methods acceptable to claimants in the tort system.

F. Releases; Deemed Releases; Contribution and Indemnity Claims

120. Parts II and XII.B of the Stipulation provides that the procedures for attaining compensation under the Stipulation shall be the "exclusive remedy" for class members who have not excluded themselves from the class, and who wish to pursue claims for asbestos-related personal injury or damage against one or more of the CCR defendants. Exhibit SP-300, Part II at 10, Part XII.B at 77; Exhibit SP-509 at 2. Parts XII and XIII, in turn, generally deal with the subject of releases by class members, and the procedures concerning contribution and indemnity against the CCR defendants by the co-defendants. Exhibit SP-300, Parts XII and XIII at 75-82.

121. Part XII.D and E of the Stipulation provide that, upon approval of the Stipulation, class members in certain

states "shall be deemed to provide each of the twenty CCR defendants with a Deemed Release." Exhibits SP-300, Parts XII.D and E, at 78-79 and SP-509 at 16. The word "deemed" in the deemed release provision in the Stipulation is defined to mean simply that the Settling Parties have agreed that an order of this Court approving the settlement will have the effect of ordering or "deeming" releases to have been constructively given to the CCR defendants by the class members in enumerated states in exchange for the benefits provided to class members under the Stipulation.[29] Rooney

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[29] Part XII of the Stipulation divides the fifty states, along with the District of Columbia, Puerto Rico, and the Virgin Islands, into four categories: (1) "*pro tanto* jurisdictions"; (2) "per capita-percentage share jurisdictions without contribution bar"; (3) "per capita or percentage share jurisdictions with contribution bar"; and (4) "no joint and several liability jurisdictions." Exhibit SP-300, Part XII.A at 75-77. *See* Parts XII.A at 75-77 (for description of each jurisdiction).

Whether a class member provides a deemed release shall depend on which of the descriptions in Part XII.A of the various jurisdictions "most accurately describes the law of the jurisdiction in which a claim for contribution or indemnity is asserted against the CCR Defendant(s). . . ." Exhibit SP-300, Part XII.C at 78. Thus, under Part XII.D and E, class members whose claims for asbestos-related personal injury would be brought in jurisdictions in three of the four types of jurisdictions will be deemed to have provided each of the CCR defendants with a "deemed release" upon approval of the Stipulation. Exhibit SP-300, Part XII.D and E at 78-79.

Part XII.F of the Stipulation does not provide that a "deemed release" will be provided to the CCR defendants upon approval of the Stipulation by class members whose claims for asbestos-related personal injury would be brought

3/1/94 Tr. at 21-22; Exhibit SP-300, Part XII.A at 75.

122. Parts XIII.D, E and F of the Stipulation provide that when a class member receives a compensation payment under the Stipulation, that class member shall provide to the CCR defendants a release "containing all provisions included in the CCR Defendant(s)' customary release for the counsel representing the . . . Class Member in the applicable jurisdiction." Where no history of a prior negotiated release exists, the CCR and the class member's counsel will negotiate the terms of the release or, if such negotiations fail, the CCR's standard release for the jurisdiction will be used. Exhibit SP-300, Part XII.D, E and F at 78-80.

123. The Stipulation provides that certain entities in addition to the twenty named CCR defendants, so-called "Additional Releasee(s)," will be entitled to the same benefits as the CCR defendants under the Stipulation. Exhibit SP-300, Part I.A at 5. This provision was intended to cover only those entities that the CCR defendants have traditionally settled for and obtained releases, such as distributors of asbestos or asbestos containing products. Rooney 3/1/94 Tr. at 135-36; Fitzpatrick 2/23/94 Tr. at 115.

124. Under Part XII of the Stipulation, a class member is required to take certain steps if, in a lawsuit for asbestos-related personal injury that class member brings against non-CCR defendants, the non-CCR defendants assert claims for contribution or indemnity against a CCR defendant, and that CCR defendant has received an actual or deemed release fully protecting it against such contribution or

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in a "per capita or percentage share jurisdiction with a contribution bar." Exhibit SP-300, Part XIII.F at 79-80. The reason being that such releases might possibly disadvantage the class members in those jurisdictions as compared to most other class members. Fitzpatrick 2/24/94 Tr. at 114; Exhibit SP-509 at 16; Rooney 3/1/94 Tr. at 22.

the Stipulation, that class member shall provide to the CCR defendants a release "containing all provisions included in the CCR Defendant(s)' customary release for the counsel representing the . . . Class Member in the applicable jurisdiction." Where no history of a prior negotiated release exists, the CCR and the class member's counsel will negotiate the terms of the release or, if such negotiations fail, the CCR's standard release for the jurisdiction will be used. Exhibit SP-300, Part XII.D, E and F at 78-80.

123. The Stipulation provides that certain entities in addition to the twenty named CCR defendants, so-called "Additional Releasee(s)," will be entitled to the same benefits as the CCR defendants under the Stipulation. Exhibit SP-300, Part I.A at 5. This provision was intended to cover only those entities that the CCR defendants have traditionally settled for and obtained releases, such as distributors of asbestos or asbestos containing products. Rooney 3/1/94 Tr. at 135-36; Fitzpatrick 2/23/94 Tr. at 115.

124. Under Part XII of the Stipulation, a class member is required to take certain steps if, in a lawsuit for asbestos-related personal injury that class member brings against non-CCR defendants, the non-CCR defendants assert claims for contribution or indemnity against a CCR defendant, and that CCR defendant has received an actual or deemed release fully protecting it against such contribution or indemnity claims. Specifically, Part XIII.A.1 provides that, in this limited situation, the class member "will move jointly" with the CCR defendants "for severance and continuance of the trial of such contribution or indemnity claims." Exhibit SP-300, Part XIII.A at 81.

125. Certain non-settling asbestos manufacturers or suppliers, as *Amici*, have argued that these release and contribution and indemnity provisions unfairly prejudice their rights to contribution and indemnity against the CCR defendants.

126. Having reviewed the memoranda and evidence presented by the *Amici*, this Court finds that no provision of the Stipulation is factually intended to or attempts to alter the rights of a non-settling asbestos manufacturer or supplier against the CCR defendants under applicable state law. It is clear that under the terms of the Stipulation, factually the parties intended that the rights of the other asbestos manufacturers or suppliers sued in the future that makes claims against the CCR defendants will be determined under whatever state law may apply if and when claims for contribution or indemnity by the non-settling asbestos manufacturers or suppliers against the CCR defendants are asserted. Rooney 3/1/94 Tr. at 23; Fitzpatrick 2/24/94 Tr. at 103-04; Exhibit SP-509 at 16.

127. The credited evidence at the fairness hearing demonstrated to this Court that, in the tort system, third-party actions for contribution and indemnity are routinely severed from the plaintiff's main claim in the tort system. Rooney 3/9/94 Tr. at 240-41; Fitzpatrick 2/24/94 Tr. at 113. The credited evidence at the fairness hearing also demonstrated that the practical impact on the non-settling asbestos manufacturers or suppliers of the release and contribution and indemnity provisions of the Stipulation is likely to be small. In the almost six-year history of the CCR, there have been only one or two times when a non-settling co-defendant has pursued to judgment a contribution or indemnity claim against a CCR defendant, or when the CCR defendants have pursued to judgment a similar claim against a co-defendant. Rooney 3/1/94 Tr. at 23.

128. Based on the foregoing findings of fact, this Court finds that the release and contribution and indemnity provisions in the Stipulation do not unfairly prejudice the rights of non-settling asbestos manufacturers or suppliers to contribution and indemnity against the CCR defendants.

G. Miscellaneous Provisions

(1) Right to Additional Compensation

129. Under Part XIV.B of the Stipulation, a class member who receives compensation for a non-malignant condition may submit a new claim, and receive additional compensation, if and when that class member develops a qualifying malignant condition. Exhibits SP-300, Part XIV.B at 83 and SP-509 at 17; Rooney 3/1/94 Tr. at 24.

130. Evidence was presented at the fairness hearing and credited by this Court supporting the Settling Parties' contention that this "re-entry" or "automatic limited release" provision is of great benefit to class members. This credible evidence showed that, of the claims paid by the CCR defendants through the end of 1992, just over 90% of the claims were settled for "full" releases, whereby the claimant releases all claims for any future asbestos-related injury, including cancer. In the tort system, therefore, less than 10% of the claimants whose claims the CCR settled received the benefit of "limited" releases approaching or similar to the benefits provided to all class members under Part XIV.B of the Stipulation. Fitzpatrick 2/22/94 Tr. at 127; Rooney 2/28/94 Tr. at 196-97; Rooney 3/1/94 Tr. at 114; Exhibit SP-508. Thus, this Court finds that this benefit has significant value to the class.

(2) No Joint and Several Liability Among the Settling Defendants for Unpaid Claims

131. Part XVI provides that compensation payments to class members will be funded in accordance with the CCR defendants' sharing agreement wherein each CCR defendant agrees to pay a fixed percentage share of the entire sum due on a settled claim, but recourse for each defendant's obligations if its share remains unpaid under the Stipulation will be limited to that defendant. Exhibits SP-300, Part XVI at 86 (Exhibit C) and SP-509 at 18; Fitzpatrick 2/23/94 Tr. at 202-04. If any CCR defendant should default under the

Stipulation, its terms provide that that CCR defendant would have to give notice of the default to class members, and class members who have not received compensation under the Stipulation would have the option of enforcing the defaulting CCR member's obligations under the Stipulation, or asserting full rights in the tort system against the defaulting CCR member. Exhibits SP-300, Part XVI at 86-87 and SP-509 at 18.

132. Some Objectors and *Amici* have criticized the absence of joint and several liability in this provision on the ground that, in many states, *judgments* in the tort system are joint and several. But neither these Objectors or *Amici* offered any evidence that historically *settlement agreements* with multiple defendants provide for joint and several liability among the settling defendants. The clear implication is that each settling defendant is only responsible for its own share when a claim is settled in the tort system. In addition, several witnesses testified that, despite the principle of joint and several liability in many jurisdictions, most defendants have not picked up the share of a co-defendant who has become insolvent. Fitzpatrick 2/23/94 Tr. at 199; Rooney 1/10/94 Dep. at 182-83; Hatten 3/18/94 Tr. at 90-91. The Court credits this testimony.

133. Based on the foregoing and the healthy financial condition of the settling defendants (*see* FOF ¶¶ 142-170), this Court finds that the provision for no joint and several liability is reasonable and fair to the class, especially when there is de facto joint payment of the total sum agreed to be paid for all claims settled under the Stipulation.

(3) Withdrawal Rights

134. Although the Stipulation is a perpetual agreement, Part XXII of the Stipulation gives each CCR defendant the right to withdraw from the settlement at the end of ten years. Exhibits SP-300, Part XXII at 95 and SP-509 at 19; Fitzpatrick 2/23/94 Tr. at 202, 204. Under Part XXII, any

withdrawing member would be obliged to give notice of the withdrawal to class members, and class members who have not received compensation under the Stipulation would have one year or more to exercise their full rights in the tort system against the departing CCR defendant. If any CCR defendant elects to withdraw at the end of ten years, Part XXII of the Stipulation provides that the Compensation Schedule would be adjusted at that time by the share of the withdrawing CCR member. Exhibits SP-300, Part XXII at 95-96 and SP-509 at 19; Rooney 3/1/94 Tr. at 25.

135. This Court observes that class members would have the full benefits of the settlement for ten years and retain their rights in the tort system thereafter since any withdrawing CCR member will have authorized suit against it. Based on the foregoing, and having reviewed the objections to this provision raised at the fairness hearing, the Court finds that the CCR defendants' withdrawal rights are reasonable and fair to the class.

(4) Attorneys' Fees

136. Under Part XIX, the CCR defendants will pay the attorneys' fees incurred by Class Counsel in their role as Class Counsel, with the amount to be approved by this Court. Exhibit SP-300, Part XIX at 92. Any claimant who submits a claim for compensation under the Stipulation may proceed without an attorney or may be represented by his or her own attorney, including Messrs. Motley, Locks and Rice, if they so choose; provided, however, that, under Part XX, the fee that may be charged by such attorney will be limited to 25% of the compensation award received by the claimant (and 20% of any amount received by the claimant above the maximum award under the individualized payment procedures for that claimant's medical category). Exhibits SP-300, Part XX at 93 and SP-509 at 20; Rooney 3/1/94 Tr. at 25-27.

137. Testimony at the fairness hearing demonstrated the benefit to claimants from the 20-25% limitation on attorneys'

fees under Part XX for representing an individual claimant seeking compensation under the Stipulation. This testimony reliably proved that the fee arrangements used by most plaintiffs' attorneys in the asbestos litigation have provided for a 33-40% contingency. Hatten 3/18/94 Tr. at 33-34. Furthermore, the availability of counsel to class members, based upon traditional considerations, is improved when counsel are adequately compensated. This provision was negotiated by well- experienced lawyers who are obliged to consider the availability of counsel to the class members, and there were no persuasive objections to the stipulated rate of compensation.

138. Based on the foregoing, the Court finds that the provisions regarding attorneys' fees in the Stipulation are reasonable and fair to the class.

(5) Annual Audit

139. Under Part XXIII, Class Counsel and a representative of the AFL-CIO will annually audit the disposition of claims under the Stipulation to ensure that the Stipulation is being administered fairly and in accord with its terms. Class Counsel and the AFL-CIO will have full access to the CCR's records with respect to claims processed under the Stipulation for the purpose of that audit. Exhibits SP-301 at 8, SP-300, Part XXIII at 97 and SP-509 at 20; Rooney 3/1/94 Tr. at 27; Georgine 2/28/94 Tr. at 48-49, 103-04 (the AFL-CIO will be a "full participant" in monitoring implementation of the settlement).

140. Based on the foregoing, the Court finds that the provision for annual audits of the disposition of claims under the Stipulation, which includes the participation of Class Counsel and the AFL-CIO, is reasonable and fair to the class.[30]

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[30] See discussion below regarding the future appointment of additional class counsel to fulfill this role given this

(6) Operational Date

141. The CCR began operating to settle claims under the terms of the Stipulation on January 25, 1994 — which marked the end of the opt-out period.[31] Exhibit SP-300, Part XXVII at 102-03; Rooney 3/1/94 Tr. at 136.

H. CCR Defendants' Ability to Meet The Financial Obligations Required by The Stipulation

(1) Overview

142. One issue related to fairness is whether the CCR defendants are likely to be able to meet their financial obligations under the Settlement. The Settling Parties presented two witnesses on this issue, Martha Wilke Murray and John H. Laeri, Jr., without objection as to qualification or the foundation for their opinions.[32]

Court's finding that Messrs. Motley, Rice and Locks will be impermissibly conflicted if they both represent claimants who submit claims to CCR for compensation under the Stipulation, and participate in the auditing of the disposition of claims under the Stipulation by CCR. *See* FOF ¶ 235-238.

[31] As both the Stipulation and Amendment indicate (Exhibits SP-300 at 105-06 and n. * and SP-301 at 10-11 and n. *), the participation of the Asbestos Claims Management Corporation (formerly National Gypsum Company) in the Stipulation is subject to the approval of the bankruptcy court. It is anticipated that the Asbestos Claims Management Corporation will seek a ruling from the bankruptcy court on this issue shortly after this Court rules on the fairness of the settlement. Rooney 2/28/94 Tr. at 198-99.

[32] Ms. Murray is a Vice-President of Peterson Consulting Limited Partnership ("Peterson"). Ms. Murray and Peterson have for many years worked for the CCR defendants and the CCR in compiling information and data

143. Ms. Murray testified concerning the sums the CCR defendants are likely to be required to pay (1) to pay claims brought under the Stipulation during the initial ten year period of the Stipulation, (2) to pay other asbestos personal injury claims that had been filed against the CCR defendants as of the end of 1993 but either had not been resolved or had not been completely paid (hereinafter the claims in this category will be referred to as "present claims and claims filed through 1993"), and (3) to meet expenses involved in disposing of both types of claims. Ms. Murray also testified with respect to the insurance coverages which the CCR defendants have available to satisfy all or some of the above claims and expenses. Mr. Laeri gave his expert opinion as to whether

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concerning asbestos personal injury claims against the CCR defendants, the compensation and expenses paid in disposing of such claims, and the insurance coverages of the CCR defendants, including particularly the coverages that still remain available to the CCR defendants. Ms. Murray has testified as an expert on insurance matters in several other cases involving asbestos companies. Murray 3/11/94 Tr. at 90-93. Based on her curriculum vitae and her testimony, the Court finds that Ms. Murray is qualified to analyze the CCR defendants obligations and to present her opinions to the Court. *Id.*; Exhibit SP-600.

Mr. Laeri and his firm, Meadowcroft Associates ("Meadowcroft"), were retained by Class Counsel to advise Class Counsel whether each of the CCR defendants is likely to be able to make the payments required of it under the Stipulation during the initial ten-year period of the Stipulation. Mr. Laeri has extensive experience in financial matters, and based on his curriculum vitae and his testimony, the Court finds that Mr. Laeri is qualified to conduct the study and to present his opinions to the Court. Exhibit SP-400; Laeri 3/14/94 Tr. at 4-20 (for a description of Mr. Laeri's background).

each of the CCR defendants is likely to be able to meet its obligations under the Stipulation during the initial ten-year period of the Stipulation. Murray 3/11/94 Tr. at 141-296; Laeri 3/14/94 Tr. at 20-66; Laeri 3/15/94 Tr. at 3-93. This Court finds these factual subjects to be compellingly factually relevant to the determination of whether the Stipulation is fair to the class.

144. Objectors presented no testimony or other evidence indicating that the CCR defendants would not be able to pay the amounts required of them under the Stipulation. To the contrary, Frederick M. Baron, Esquire, on behalf of several Objectors, stated, with reference to the CCR defendants, that "these companies are not going bankrupt. They're not insolvent. They're in very good financial condition." Baron 2/22/94 Tr. at 55. Nonetheless, it is the obligation of the Court to review and analyze the financial condition of the settling defendants.

(2) Mr. Laeri's Initial Involvement in Matters Relating to the Stipulation

145. In late July, 1992, and later in August and September, 1992, while the Stipulation was being negotiated, Mr. Laeri was approached by Gene Locks, one of the Class Counsel, and was asked to evaluate the ability of the CCR defendants to meet certain future obligations. Laeri 3/14/94 Tr. at 21-22. After various discussions with Mr. Locks and representatives of CCR, Mr. Laeri and Meadowcroft were ultimately retained on November 27, 1992. Laeri 3/14/94 Tr. at 22-27.

(3) The CCR Defendants' Estimated Obligation to Compensate Claims Under the Stipulation

146. Ms. Murray developed a "worst case" scenario designed to estimate the maximum financial liability that the CCR defendants will have to meet under the Stipulation

during the initial ten-year period of the Stipulation.[33] Ms. Murray generally assumed that the CCR defendants will have to pay the maximum amount possible on all claims brought under the Stipulation, and that compensation on all those claims will be due at the earliest date possible under the Stipulation. Murray 3/11/94 at 141-58; Exhibit SP-604(A).

147. Based on the above and footnoted "worst case" assumptions, Ms. Murray estimated that the total sum the CCR defendants will be obligated to pay in compensation to class members during the initial ten-year period of the Stipulation will be one billion two hundred and eighty-nine million dollars ($1.289 billion). Through the use of those assumptions, Ms. Murray also estimated the amount the CCR defendants will be obligated to pay in compensation in each

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[33] Ms. Murray made the following assumptions in her analysis of the "worst case" scenario: (1) that no qualifying claimant would choose the minimum payment through the "simplified payment" procedures (Murray 3/11/94 Tr. at 146-47; Exhibit SP-604(A)); (2) that the amount paid for all non-extraordinary claims in all medical categories will be at the top end of the "negotiated average value range" in the Compensation Schedule (Murray 3/11/94 Tr. at 147; Exhibit SP-604(A)); (3) that the total amount paid on all extraordinary claims during the initial ten-year period will be the maximum possible (Murray 3/11/94 Tr. at 147; Exhibit SP-604(A)); and (4) that the maximum number of qualifying claimants who could go to court or arbitration will do so, and that the amount paid to these claimants will on average be at the top end of the negotiated average value range (Murray 3/11/94 Tr. at 147; Exhibit SP-604(A)).

These hypotheses included all of the increases in the case flow maximums triggered by events adverse to CCR. Murray 3/11/94 Tr. at 115-16; Exhibits SP-601(F) and SP-604(A).

year of that initial ten-year period. Murray 3/11/94 Tr. at 149; Exhibits SP-604(B) and SP-604(F).

148. Finally, Ms. Murray used the "Sharing Agreement" entered into by the CCR members to allocate among the members the compensation to be paid class members under the Stipulation (Exhibit C to the Stipulation) to determine the amount that each CCR defendant will have to pay of the $1.289 billion total and how much each CCR defendant will have to pay each year. Murray 3/11/94 Tr. at 147-48; Exhibit SP-604(F).

(4) The CCR Defendants' Estimated Obligation to Compensate Present Claims and Claims Filed Through 1993

149. Ms. Murray also estimated the CCR defendants' liability with respect to present claims and claims filed through 1993 and, based on the applicable "sharing agreement", determined how that liability will be allocated among the different CCR defendants. Murray 3/11/93 Tr. at 150, 190-93; Exhibit SP-604(C).

150. With respect to claims as to which a settlement agreement has been entered into but full payment has not been paid, Ms. Murray valued the remaining liability on those claims based on the actual amounts that remained to be paid on them, and assumed that payments on these claims would be made at the agreed upon times. Murray 3/11/94 Tr. at 150, 154; SP-604(C).

151. With respect to claims as to which no settlement or other disposition had been reached, Ms. Murray, in conjunction with advice from CCR's claims staff, valued those claims based on the averages that were expected to be reached on settlements proposed as of July 1993 considering CCR's historical averages for settlements. Ms. Murray assumed that the amounts paid out in settlement of these currently unresolved claims will be paid in equal amounts

over the next four years. Murray 3/11/94 Tr. at 150-51, 154; SP-604(C).

152. Based on these different assumptions, Ms. Murray estimated the total liability of all the CCR defendants for compensating all present claims and all claims filed through 1993 would be one billion six hundred and twenty-six million dollars ($1.626 billion). Murray 3/11/94 Tr. at 155.

153. Ms. Murray then allocated this $1.626 billion among the CCR defendants in accordance with the applicable "sharing agreement." She also estimated the amount that each CCR defendant would have to pay each year to meet its obligation to compensate present claims and claims filed through 1993. Murray 3/11/94 Tr. at 152-54; Exhibits SP-604(C) and SP-604(E).

(5) The CCR Defendants' Estimated Obligation to Pay Costs Involved in Disposing of All Claims

154. Ms. Murray also estimated the total costs of disposing of claims under the Stipulation during its initial ten-year period and present claims filed through 1993 to be three hundred and seventeen million dollars ($317 million), and determined what each CCR defendant's liability for costs would be in each year of the initial ten-year period of the Stipulation based on the applicable "sharing agreement." Murray 3/11/94 Tr. at 154-55, 157-58; Exhibit SP-604(C)-(F).

(6) The CCR Defendants' Estimated Total Obligation and the Ten-Year Estimates Concerning the Payment of this Obligation

155. In sum, Ms. Murray estimated that the total cost to all the CCR defendants of resolving all claims under the Stipulation for the initial ten-year period and all present claims and claims filed through 1993 would be three billion two hundred million dollars ($3.2 billion) ($1.289 billion plus

$1.626 billion plus $317 million). Murray 3/11/94 Tr. at 155; Exhibit SP-604(F).

156. In January 1993, Ms. Murray and Peterson prepared schedules for each CCR defendant indicating the total estimated amounts that each CCR defendant will have to pay in each year of the initial ten-year period of the Stipulation. These schedules were updated in July 1993. Murray 3/11/94 Tr. 141-43, 158; Exhibit SP-604(H).

(7) The CCR Defendants' Insurance Coverages

157. Ms. Murray also determined and testified to her articulate reasoned analysis and conclusions regarding: (1) what insurance coverages will be available to each CCR defendant to meet that CCR defendant's obligation to pay claims under the Stipulation; (2) present claims and claims filed through 1993; and (3) the costs for disposing of those claims. She also estimated to what extent insurance coverages of each CCR defendant will be used up in each year of the initial ten-year period of the Stipulation. She made these latter estimates by dividing the CCR defendants' insurance coverages into certain categories[34] and applying

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[34] Ms. Murray divided the CCR defendants' insurance coverage for the purposes of her analysis in the following ways: (1) she divided all insurance companies providing coverages to the CCR defendants into three categories based on whether issues involving the coverages provided by those companies had been resolved (Murray 3/11/94 Tr. at 161-62; Exhibit SP-604(I)); (2) she determined which insurance companies providing coverages to the CCR defendants, or which portions of a coverage, were insolvent and assumed that none of those coverages would be available (Murray 3/11/94 Tr. at 164-65); (3) she classified insurance policies according to whether and to what extent they covered expenses resolving asbestos claims as well as liability on the claims (Murray 3/11/94 Tr. at 165-66).

the rules for the allocation of an asbestos producer's insurance coverages set forth in the Wellington Agreement, an agreement among certain asbestos producers, including all the CCR defendants, and certain insurance companies which among other things provides commitments for payment and agreements as to when insurance coverages will become payable. Murray 3/11/94 Tr. at 159-71; Exhibits SP-604(I) and SP-604(O).

158. Through the use of the Wellington rules and the different classifications, Ms. Murray was able to estimate not only what dollars of insurance coverages of each CCR defendant will be used in each year of the first ten years under the Stipulation, but also whether and to what extent excess coverages will be available to the CCR defendant in each year.[35] Murray 3/11/94 Tr. at 165-67, 173.

159. In total, Ms. Murray estimated that of the three billion two hundred million dollars ($3.2 billion) necessary to pay claims under the Stipulation, present claims and claims filed through 1993, and the costs for resolving those claims, slightly in excess of two billion dollars ($2 billion) in insurance coverage by non-bankrupt insurers is available to pay those claims and costs,[36] and the remaining one billion

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[35] Ms. Murray also explained why estimates of excess coverage are relevant. Murray 3/11/94 Tr. at 165-67, 173.

[36] Of the $2 billion in insurance coverages available to the CCR defendants, $840 million constitutes coverage by companies who have agreed to the coverages by signing the Wellington Agreement ("Signatory" companies), $409 million constitutes coverage by companies who did not sign the Wellington Agreement but have since resolved all their coverage issues with the CCR defendants ("Resolved Non-Signatory" companies), and $779 million constitutes coverage by those companies that still dispute coverage issues with the CCR defendants ("Other Non-Signatory"

two hundred million dollars ($1.2 billion) will have to be paid by the CCR defendants themselves. Murray 3/11/94 Tr. at 161-62, 168-70; Exhibits SP-604(I) and (L).

160. Ms. Murray and Peterson also prepared and presented at the fairness hearing, schedules showing the insurance coverages, allocated by the categories of insurance companies and by insurance company and amount, that will be available to fund each CCR defendant's obligation to pay claims under the Stipulation, present claims and claims filed through 1993, and the costs for disposing of such claims. Those schedules also indicate the amount that each CCR defendant will itself have to pay, which is referred to as the "Non-Insurance Allocation" or "NIA." These insurance schedules were also originally prepared in January 1993, and then were updated in over the course of 1993. Murray 3/11/94 Tr. at 141-43, 171-74; SP-604(O). The Court has studied these schedules during the fairness hearing and since.

(8) The Likelihood That The CCR Defendants Can Meet Their Obligations Under the Stipulation

161. Before determining whether the CCR Defendants can meet their obligations under the Stipulation, Mr. Laeri or others at Meadowcroft: (1) received analyses and schedules from Peterson demonstrating the CCR defendants' obligations under the Stipulation (allocated by year), the CCR defendants' obligations to pay present claims and claims filed through 1993, the costs for resolving those claims, the insurance coverages available to the different CCR defendants (allocated by insurance company, amount and the categories of "Signatory," "Resolved Non- Signatory," and "Other Non-Signatory") and each CCR defendants' "Non-Insurance Allocation" (Laeri 3/14/94 Tr. at 29-31, 33, 36-37; Murray

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companies). Murray 3/11/94 Tr. at 161-62, 168-70; Exhibits SP-604(I) and (L).

3/11/94 Tr. at 171-172; Exhibit SP-602); (2) met face-to-face with four of the five CCR defendants with the largest obligations, and spoke by phone with the fifth CCR defendant, to obtain information about those companies and their financial conditions[37] (Laeri 3/14/94 Tr. at 27, 34-35); (3) received letters from each CCR defendant in which the respective CCR defendant represented that it did not believe that claims against it other than asbestos personal injury claims would materially adversely affect the insurance coverages available to the CCR defendant to pay claims under the Stipulation during its initial ten-year period, that it did not believe that the Stipulation obligations would render it insolvent as of the date of execution of the Stipulation, and that it also expected to have sufficient resources available to pay its Non-Insurance Allocation (Laeri 3/14/94 Tr. at 34, 36-37; Exhibit SP-603).

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[37] Mr. Laeri and Meadowcroft determined that the five CCR defendants with the largest obligations under the Stipulation, including their insurance companies, were responsible for approximately 85% of the total obligation under the Stipulation.

One of these five companies, T&N plc, assumed the obligations of two of its subsidiaries who are also members of the CCR. In light of this and other arrangements, Mr. Laeri and Meadowcroft determined that there were seventeen "obligors" for the twenty CCR defendants, and it analyzed the ability to pay obligations under the Stipulation of each of these "obligors," not of each CCR defendant. Laeri 3/15/94 Tr. at 10. Of course, the net effect was still to analyze whether the obligations of each CCR defendant under the Stipulation will be met, and for the sake of simplicity, these findings of fact do not draw a distinction between the 20 CCR defendants and the 17 "obligors."

162. On January 14, 1993 (the date the settlement was finalized for presentation to the Court) based on a preliminary review of the information it had received and the research it had conducted to that date, Mr. Laeri informed Class Counsel that "it is Meadowcroft's present opinion that the CCR Members can be reasonably expected to meet" their obligations under the Stipulation during the initial ten-year period. Laeri 3/14/94 Tr. at 34, 40-41; Exhibit SP-401.

163. Throughout 1993, Mr. Laeri and Meadowcroft continued to receive extensive, updated information from Peterson concerning the CCR defendants' total obligations. In this connection, Peterson provided Meadowcroft revised and updated versions of the schedules Meadowcroft had relied upon for its preliminary opinion. *See* Exhibits SP-604(A) through SP-604(O). Mr. Laeri and Meadowcroft worked very closely with Peterson to understand the data that Peterson provided and constantly retested that data to confirm that it was reliable. Murray 3/11/94 Tr. at 143, 145, 174; Laeri 3/14/94 Tr. at 31.

164. Through much of 1993, Mr. Laeri and Meadowcroft also did very complex analyses to examine the possibility that one or more of the insurance carriers providing coverages to the CCR defendants might become insolvent during the initial ten-year period of the settlement by determining the ratings that Standard and Poor's and Moody's and A.M. Best gave the insurance companies and by determining how many defaults there were among insurance companies with those particular ratings. Laeri 3/14/94 Tr. at 33-34, 38-39, 42-44; Laeri 3/15/94 at 28-36; Exhibits SP-428 and SP-430. Based on the ratings and the projections, Mr. Laeri and Meadowcroft reduced to some extent the insurance coverages that were available to the CCR defendants and increased the estimated amount that the CCR defendants will have to pay themselves under the Stipulation. Laeri 3/14/94 Tr. at 38-39, 42-44; Laeri 3/15/94 at 26-36.

165. Through 1993, Mr. Laeri and Meadowcroft did a comprehensive due diligence analysis of those CCR defendants as to which they considered such an analysis necessary. Laeri 3/14/94 Tr. at 39, 64-65 (discussing what the analysis entailed). Mr. Laeri and Meadowcroft also did an extensive overview of each CCR defendant which included analyzing its business, reviewing its historical financial results, comparing it to a peer group of comparable companies to determine how it would be valued based on such a comparison, and using historical financial results and projections for the future to determine its value based on them. Laeri 3/14/94 Tr. at 65-66; Exhibits SP-403 through SP-419.

166. Mr. Laeri and Meadowcroft applied four separate tests to the information they obtained about each CCR defendant to determine whether it would be able to meet its obligation under the Stipulation during the initial ten-year period it was in effect. The tests compared, in different ways, the present value of each CCR defendant to its Non-Insurance Allocation, and examined whether, in each of the first ten years, the CCR defendant would generate enough cash from its business to meet both the amount of the Non-Insurance Allocation estimated to be due from it that year and its other obligations. These tests were relevant because if a CCR defendant could not in a given year meet its NIA for the year and its other obligations from the cash generated by its business but its value was several times greater than its total NIA, it could reasonably be assumed that it could borrow against value, sell an asset, or sell part of the equity in the company to meet the shortfall in a particular year. In applying these tests, Mr. Laeri and Meadowcroft made a point of being conservative in making estimates and projections. Laeri 3/15/94 Tr. at 14-23; Exhibits SP-403 through SP-419 (explaining the application of the four tests).

167. With respect to each of the CCR defendants, Mr. Laeri and Meadowcroft prepared an extensive report setting

forth much of the relevant information they had obtained about that CCR defendant and explaining the results of their research and analysis concerning that CCR defendant. These reports were submitted and received into evidence as Exhibits SP-403 through SP-419, and considered by the Court in the fairness analysis. Laeri 3/14/94 Tr. 49-50.[38]

168. In these reports, Mr. Laeri and Meadowcroft rated each of the CCR defendants in terms of the likelihood that it will meet its obligations under the Stipulation during the initial ten-year period. Eleven of the CCR defendants, with a combined Non-Insurance Allocation of three hundred twenty-five million one hundred thousand dollars ($325.1 million), were rated "highly probable" in terms of the likelihood of their meeting those obligations. Eleven CCR defendants, with a combined Non-Insurance Obligation of one million ninety-eight thousand six hundred dollars ($1.0986 million), were rated as "very probable" to meet those obligations. And the remaining two CCR defendants, with a combined Non-Insurance Allocation of only four hundred thousand dollars ($400,000), were rated "probable" in terms of the likelihood that they would meet the obligation. The "highly probable" rating was assigned when there was only a two percent (2%) chance that the CCR defendant involved would default on its obligations under the Stipulation, the "very probable" rating was assigned when there was only a five percent (5%) chance of default, and the "probable" rating was assigned when there was a twenty-five percent

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[38] By Order, Dkt. No. 958 (March 18, 1994), this Court ruled that these reports and certain other exhibits of the Settling Parties containing non-public informational projections specific to certain CCR defendants are to be treated as confidential in accord with the Court's December 3, 1993 Confidentiality Order, and are to be maintained under seal.

(25%) chance of default. Laeri 3/15/94 Tr. at 42-43; Exhibits SP-403 through SP-419.

169. It is also Mr. Laeri's opinion that the Stipulation itself will, if approved, significantly enhance the financial condition and prospects of those CCR defendants with large Non-Insurance Allocations because it will remove "uncertainty which adversely affects these companies' ability to access the capital markets, to raise debt in equity, or to attract people, or to compete in the marketplace . . . ." Laeri 3/15/94 Tr. at 44-46. Mr. Laeri believes that the resulting improvement in these CCR defendants' financial condition and prospects will benefit "everyone," specifically including "claimants who are hoping to be paid in the future." *Id.* In a February 18, 1994 letter to Class Counsel, Mr. Laeri gave his final opinion concerning the likelihood that the CCR defendants will be able to meet their obligations under the settlement during the initial ten-year period of the Stipulation. In that letter, he stated that to the best of his and Meadowcroft's "knowledge and belief," all of the CCR defendants "should reasonably be expected" to meet their obligations under the Stipulation during that ten-year period. Laeri 3/14/94 Tr. at 51-52; Exhibit SP-420. This Court credits the uncontradicted testimony of Mr. Laeri.[39]

170. Based on the foregoing findings of fact and the compelling evidence presented by the Settling Parties, this Court finds that all the CCR defendants will be likely to meet

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[39] As mentioned earlier, FOF ¶ 17, many asbestos producers have gone into bankruptcy because of the overwhelming costs of defending thousands of asbestos lawsuits in the tort system. This Court finds that the ability of the CCR defendants to pay all claimants under the Stipulation is important. Along this line, the Court finds that all the class members benefit from a system of compensation which works to avoid the bankruptcies of these companies.

their obligations under the Stipulation during the initial ten-year period.[40]

I. Benefits to Non-Impaired Claimants

171. The Objectors claim that the settlement is unfair because under the Stipulation, non-impaired class members, *i.e.*, those who do not presently meet the medical criteria for compensation, will not receive any cash compensation unless and until they meet the medical criteria. These class members in the tort system have traditionally received modest cash settlements, often having to give up all future rights by general releases. Under the Stipulation, however, the non-impaired class members will receive the following benefits:

a. The statute of limitations and timeliness defenses for all class members whose claims were not time-barred as of January 15, 1993 will be waived. Rooney 3/1/94 Tr. at 63; Fitzpatrick 2/23/94 Tr. at 113; SP-300, Part VI.A at 49.

b. If and when non-impaired class members file qualifying claims, the claims will, in most cases, be resolved faster than they have been in the tort system. Rooney 3/1/94 Tr. at 66-68, 70-71; Hatten 3/18/94 Tr. at 25-25.

c. Transaction costs (including attorneys' fees) will be lower than in the tort system. Hatten 3/18/94 Tr. at 23-24.

d. The defenses to liability will be waived, and the CCR defendant have agreed to pay all claims that qualify for compensation. Rooney 3/1/94 Tr. at 68, 70-71; Fitzpatrick 2/23/94 Tr. at 116-17; Hatten 3/18/94 Tr. at 22-25.

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[40] The Objectors presented no evidence to the contrary, and have indeed conceded at the fairness hearing that it is their belief that the CCR defendants are "in very good financial condition" and "are not going bankrupt." Baron 2/22/94 Tr. at 55.

e. Non-impaired class members will have some assurance that there will be funds available if and when they get sick as this Court has found that each CCR defendant has shown an ability to fund the payment of all qualifying claims under the Stipulation. Fitzpatrick 2/23/94 Tr. at 116; Hatten 3/18/94 Tr. at 23, 39; Rooney 3/1/94 Tr. at 70-71; *see* FOF ¶¶ 142-170.

f. If and when a class members develops a qualifying *non-malignant* condition, they may file a claim under the Stipulation without forfeiting their right to file a subsequent claim if they develop a qualifying *malignant* condition. Exhibit SP-300, Part XIV.B; Fitzpatrick 2/23/94 Tr. at 26, 116; Rooney 3/1/94 Tr. at 70. In other words, class members are not required to give the CCR defendant a full release if they receive compensation for a qualifying non-malignant condition. Fitzpatrick 2/23/94 Tr. at 90; Fitzpatrick 2/22/94 Tr. at 127; Hatten 3/18/94 Tr. at 21-22.

172. This Court finds that the group of benefits offered to non-impaired class members has significant value. Non-impaired class members will no longer be forced to file premature lawsuits or risk their claims being time-barred. Fitzpatrick 2/23/94 at 90; Hatten 3/18/94 Tr. at 21-22, 113-14. Second, if and when class members do become sick, they will not have to suffer the uncertainties, long delays and high transaction costs of the tort system. Third, the waiver of the defenses under the Stipulation is a significant benefit because there are approximately a dozen CCR defendants who have, to date, been held not liable under negligence or strict liability principles in an asbestos case. Fitzpatrick 2/22/94 Tr. at 130; Hatten 3/18/94 Tr. at 22-24. Fourth, while many companies that have appeared financially healthy have filed for bankruptcy protection in the face of many asbestos lawsuits, this Court has found that the CCR defendants are able to fund the payment of claims under Stipulation. Hatten 3/17/94 Tr. at 39; *see* FOF ¶¶ 142-170. Finally, under the Stipulation, qualifying claimants with a non-malignant

condition do not have to chose between filing now or waiting to see if they develop a more serious malignant condition. This is in marked contrast to the current tort system, where non-impaired claimants usually settle their claims for small amounts and a full release of all claims for any future asbestos-related injury, including cancer. Fitzpatrick 2/23/94 Tr. at 90; Fitzpatrick 2/22/94 Tr. at 127; Hatten 3/18/94 Tr. at 21-22. *See also* Wages 3/16/94 Tr. at 260. This is especially important given the uncontradicted testimony of two medical experts that currently non-impaired class members are likely to develop more serious asbestos-related medical conditions, such as lung cancer or mesothelioma. Roggli 3/9/94 Tr. at 62-63; Oliver 3/14/94 Tr. at 205-06. *See also* Vogt 2/24/94 Tr. at 147, 155-57; Vogt 1/12/94 Dep. at 18-19, 28-29; Annas 2/24/94 Tr. at 237-39, 245-46, 262, 271-73; Annas 1/14/94 Dep. at 53; Georgine 2/28/94 Tr. at 51, 52, 58, 90-91, 165-66; Georgine 1/27/94 Dep. at 94-95; Baumgartner 1/6/94 Dep. at 32-34, 50, 53, 69-70, 85-86, 93-94; Murphy 1/6/94 Dep. at 108-09, 112, 117-18; Raver 1/11/94 Dep. at 83, 115 (these representative plaintiffs testified, and the Court credits their testimony, that, in their view, the Stipulation offers significant non-monetary value to non-impaired class members).

173. The Objectors argue that the Stipulation offers claimants with non-impairing asbestos-related conditions the same benefits that such claimants would receive under "green card" settlements with the CCR defendants, and that the CCR defendants have offered such "green card" settlements to any claimant who wanted one for several years. *E.g.*, Fitzpatrick 2/23/94 Tr. at 87-89. Thus, the Objectors' argument runs, the Stipulation offers no advantages to non-impaired claimants that were not already available to such claimants from the CCR defendants under the existing tort system. *Id.*

174. Although both "green card" settlements and the Stipulation provide for the deferral of claims of non-impaired individuals until certain objective medical criteria are

satisfied, this Court finds that the benefits offered to non-impaired class members by the Stipulation are far more than those offered by "green card" settlements. Unlike "green cards", the Stipulation provides for a waiver of the statute of limitations, and guaranteed payment through an administrative procedure if and when a claimant develops a qualifying condition. Furthermore, once a claimant develops a qualifying condition, the Stipulation offers faster compensation, lower transaction costs, and a limited release if a claimant were to subsequently develop a qualifying malignant condition. Rooney 3/1/94 Tr. at 54-55, 58, 63-64, 66, 68, 70-72, 129-30, 155; Fitzpatrick 2/22/94 Tr. at 121; Fitzpatrick 2/23/94 Tr. at 26, 113, 116-17; Hatten 3/18/94 Tr. at 24. *See also* Exhibits SP-300, Part VI at 49 and SP-510(B) at 2-3.

175. The Objectors have also argued that the benefits offered non-impaired claimants under the Stipulation are not meaningful because few, if any, of these claimants will become sick and qualify for cash compensation. The Court credits the uncontradicted testimony of two medical experts in finding that currently non-impaired claimants are likely to develop more serious asbestos-related medical conditions, such as lung cancer or mesothelioma. Roggli 3/9/94 Tr. at 62-63; Oliver 3/14/94 Tr. at 205-06.

176. In sum, this Court finds that the group of benefits offered to non-impaired class members has significant value in that it gives each such class member the security of knowing that if and when they become impaired due to asbestos exposure, they will receive payment without having to suffer the delays, expense and uncertainty of the current tort system and will retain the right to re-enter the claims process a second time if he or she contracts cancer or mesothelioma. The Objectors' arguments to the contrary are unpersuasive.

IV. ADEQUACY OF CLASS COUNSEL

177. In considering whether it is appropriate to enter a final class certification order under Rule 23 and whether to approve the settlement negotiated on behalf of the class, this Court must evaluate the conduct and adequacy of Class Counsel. The following constitute the Court's findings of fact as to this issue.

A. Selection, Qualifications, and Conduct of Class Counsel

178. In or around November 1991, it became clear to the CCR defendants and Class Counsel that settlement negotiations in the MDL proceeding would not produce a global agreement among all plaintiffs and all asbestos defendants nationwide. *See* FOF ¶ 33-35. Thus, CCR concluded that it wanted to pursue individual global settlement negotiations on its own behalf. *See* FOF ¶ 35. To that end, CCR approached Mr. Motley and Mr. Locks in late 1991. Fitzpatrick 2/22/94 Tr. at 117.

179. At the time, CCR was aware that Mr. Motley and Mr. Locks had been appointed by Judge Weiner in the MDL proceedings as the co-chairpersons of the Plaintiffs' Steering Committee. Fitzpatrick 2/22/94 Tr. at 99. By this time, Mr. Fitzpatrick had been discussing possible solutions to the asbestos crisis with Mr. Motley for many years. *See* FOF ¶¶ 22, 31; Fitzpatrick 2/22/94 Tr. at 78, 86-87, 99-100, 114. And CCR was aware that the law firms of Ness, Motley and Greitzer and Locks had played prominent roles in representing thousands of asbestos victims in various national proceedings. Fitzpatrick 2/22/94 Tr. at 117. Indeed, the experience of Messrs. Motley, Locks and Rice was recognized by the Honorable Robert M. Parker in the United States District Court for the Eastern District of Texas. Order Provisionally Certifying Class for Settlement Purposes at 3 in *Ahern* v. *Fibreboard Corp.*, No. 93-526, (E.D. Tex. Sept. 9, 1993).

180. Messrs. Motley and Rice's law firm, Ness, Motley, was widely known by those involved in asbestos litigation, including CCR, to represent more asbestos victims either directly or through co-counsel networks than any other law firm in the country. They had been involved in all the major events in the asbestos litigation, including consolidated trials, the *Linscomb* class action, and the major bankruptcies. Mr. Motley had served for the past 20 years as Chair of the Asbestos Litigation Group, a national organization of plaintiffs' counsel involved in asbestos litigation. Hatten 3/17/94 Tr. at 26-27.

181. It was known to CCR that Mr. Motley had played a significant role in the Manville bankruptcy proceeding and in other bankruptcy proceedings involving former asbestos manufacturing companies. He had been active in congressional efforts to enact legislation to remedy the problems posed by the asbestos litigation. He was very active in representing unions whose members were occupationally exposed to asbestos and asbestos-containing products over the years. Fitzpatrick 2/22/94 Tr. at 117-18.

182. It was known to CCR that Mr. Locks also had played a prominent role in various national matters for asbestos victims. Fitzpatrick 2/22/94 Tr. at 117. In addition, Mr. Locks was actively involved in the Manville bankruptcy proceeding, as well as the Unarco bankruptcy proceeding. Further, Mr. Locks served as Chairman of the Board of UNR. Fitzpatrick 2/22/94 Tr. at 118.

183. Mr. Rice's prominence, competence and skill was also recognized when he was appointed Class Counsel by Judge Parker in the recent settlement class action involving pending asbestos claims against one asbestos defendant, Fibreboard. *Ahern* v. *Fibreboard Corp.*, No. 93-526, Order Provisionally Certifying Class for Settlement Purposes at 3 (E.D. Tex. Sept. 9, 1993).

184. This Court finds that Messrs. Motley, Locks and Rice are highly respected for their skills and experience in the asbestos litigation and had and have the knowledge and credibility necessary to negotiate on behalf of future asbestos victims in any global settlement effort. This Court also finds that CCR commenced negotiations with Class Counsel based on their reputation and experience in the asbestos litigation. There is no suggestion in the exhaustive discovery and litigated record that CCR executives or attorneys met and decided to "choose" plaintiffs' counsel with the largest inventory of unsettled claims in order to facilitate a global settlement by creating an atmosphere of collusion. That never happened.

B. Conflict of Interest

(1) Settlement of Present Cases and Future Claims

185. During the first two years of CCR's existence, in 1989-90, CCR entered into a number of block or "inventory" settlements. Fitzpatrick 2/23/94 Tr. at 64-65. The CCR settlement philosophy at that time was to work ambitiously to settle large numbers of pending claims. *Id.* at 144, 148-49. CCR, however, determined that it would no longer pursue this ambitious settlement effort, after finding that the settlement strategy was not diminishing the number of pending claims. Fitzpatrick 2/23/94 Tr. at 144.

186. In 1991, CCR continued to make some settlements that were not trial driven. Fitzpatrick 2/23/94 Tr. at 148-49. In general, however, CCR determined to continue to make inventory settlements only if it could obtain some kind of protection for the future. *Id.* at 144, 148-49.

187. During the period of the MDL global settlement negotiations in 1991, CCR's position was that it was not prepared to agree to "inventory settlements," unless the plaintiffs' bar was willing to work with CCR and the courts

for the establishment of pleural registries.[41] Fitzpatrick 2/23/94 Tr. at 146, 161, 191-92. In August 1992, for example, a regional settlement of the asbestos cases pending in New England was reached and, as part of that settlement, the plaintiffs' counsel agreed to support the entry of mandatory pleural registries in the applicable jurisdictions. Fitzpatrick 2/22/94 Tr. at 128.

188. CCR, however, reached the conclusion that its concerns about the filing of pleural claims, by persons with little or no impairment, could not be successfully addressed by pursuing pleural registries. First, there was opposition in many quarters from the plaintiffs attorneys to such pleural registries. Fitzpatrick 2/22/94 Tr. at 123. The opposition was based in part on the desire to receive immediate cash compensation and in part on the lack of funding for the registries to ensure that companies would still be viable if and when a pleural claimant became impaired and moved off the registry. *Id.* at 123-24. In addition, this Court finds that CCR reasonably concluded that pleural registries were unsatisfactory unless a national pleural registry could be established, because it would be difficult for plaintiffs in one state to defer their claims if plaintiffs in other states would not be subject to deferral. *Id.* at 124.

189. Sometime in or around May or June of 1992, CCR negotiators came to believe that the class action settlement

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[41] Pleural registries are deferral docket mechanisms, created by court order, under the terms of which the resolution of claims of persons with pleural conditions resulting from asbestos exposure, but who do not meet certain medical criteria and/or impairment criteria, are deferred as to all asbestos defendants in the jurisdiction, with the statute of limitations being tolled, until such time as the medical condition progresses so as to satisfy the medical/impairment criteria. Fitzpatrick 2/22/94 Tr. at 123.

negotiations, which ultimately led to the filing of this lawsuit, were likely to result in an agreement. This belief was based upon the progress of the negotiations with Greitzer and Locks, although major components of the settlement including negotiation of the medical criteria and examination of the CCR defendants' financial ability to pay had not been completed. Rooney 2/28/94 Tr. at 202-03, 211; Laeri 3/14/94 Tr. at 21-24.

190. CCR had, for some time, been looking for a rational way of dealing with the entire asbestos problem, both pending and future cases. CCR communicated to Mr. Motley, Mr. Rice, and Mr. Locks that once the CCR defendants "believed that there was some rational way of dealing with the futures [claims], that [they] were prepared to address the settlement of pending cases." Rooney 2/28/94 Tr. at 202. This Court finds that, indeed, once it was probable to the CCR negotiators that the negotiations would be successfully concluded for a class action settlement, CCR began to negotiate inventory settlements without a pleural registry. *Id.* at 202, 225; Fitzpatrick 2/23/94 Tr. at 66.

191. During the summer of 1992, CCR and Greitzer and Locks began negotiations for the settlement of currently pending claims. Included in the Greitzer and Locks inventory settlements were 3922 claims representing cases then pending in New York, Pennsylvania, Kentucky, New Jersey, Virginia, Indiana, Ohio, Illinois, North Carolina, Tennessee, and Maryland.[42] The settlements included those cases that were filed, and a few cases that had not been filed but were

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[42] These Greitzer and Locks inventory settlements were concluded on August 3, 1992 in Kentucky, August 20, 1992 in New Jersey, Virginia, Maryland, Indiana, North Carolina, Illinois, Ohio and Tennessee, October 26, 1992 in Pennsylvania, and December 10, 1992 in New York. Exhibit SP-302C.

sufficiently prepared such that filing was imminent. Rooney 2/28/94 Tr. at 201, 207; Exhibit SP-302C.

192. During the period May-June 1992 when CCR commenced negotiating the Greitzer and Locks inventory settlements, Ness, Motley was otherwise engaged trying a large consolidated trial, where CCR defendants were involved, in state court in Baltimore, Maryland. Rooney 2/28/94 Tr. at 177-78; Rooney 3/1/94 Tr. at 76. Ness, Motley did not re-enter the global negotiations which resulted in this class action until late summer or fall of 1992. Rooney 2/28/94 Tr. at 178.

193. Sometime in late September or early October 1992, CCR began negotiating with Ness, Motley to settle their pending inventory of cases. Rooney 2/28/94 Tr. at 203. In November 1992, these negotiations resulted in an agreement in principle to settle 450 Ness, Motley cases pending in South Carolina and 9834 cases with Ness, Motley affiliated counsel located primarily in the states of West Virginia, Illinois, and Georgia. *Id.* at 204; Exhibit SP-302A.

194. These Ness, Motley inventory settlements, similar to the Greitzer and Locks settlements, included all cases pending in the jurisdictions as of November 1992, and a few unfiled cases that were ready to be filed as of that date. Rooney 2/28/94 Tr. at 207-08.

195. The inventory settlement agreements with Class Counsel did not provide for immediate compensation to all claimants. Rather, these agreements provided for a schedule of payments over a number of up to five years. Rooney 2/28/94 Tr. 205; Exhibits SP-302A and SP-302C.

196. In addition to inventory settlements with Greitzer and Locks and Ness, Motley, CCR settled approximately 9,000 - 10,000 cases prior to the filing of this class action, with other law firms, not affiliated with Class Counsel, under the same or similar provisions. Rooney 2/28/94 Tr. at 204.

197. The evidence in the record reflects, and this Court finds, that, in 1992, it was the CCR's policy not to settle pending cases without some protection for the future. With the negotiation of the settlement in this class action, CCR was exploring a different way to resolve the burgeoning number of asbestos claims, that is a different way of providing some protection for the future. The asbestos bar and the MDL Court were well aware of the CCR settlement policy. Fitzpatrick 2/23/94 Tr. at 161; Mem. Op. and Order, Dkt. No. 292 (Apr. 15, 1993) (Weiner, J.) at 6. The evidence in the record also reflects, and this Court finds, that Class Counsel did not enter into the *Georgine* negotiations for the purpose of settling their pending cases.

198. Moreover, the evidence reflects, and this Court finds, that the settlement of the inventory cases was not conditioned upon an agreement being finally reached in *Georgine*. It is clear on the face of the inventory settlement agreements, that if the Stipulation of Settlement had not been concluded after the negotiation of the inventory settlements, the inventory settlements nevertheless remained in full effect. Rooney 3/1/94 Tr. at 102-03.

199. This Court finds that in negotiating the inventory settlements for their present clients and the *Georgine* Stipulation for the futures class, Class Counsel and CCR bargained vigorously and at arms-length. The settlements reached for both groups of claimants were not negotiated against each other, and Class Counsel worked diligently to negotiate what they considered to be the best possible settlements achievable for each group of claimants. *See, inter alia*, Rooney 2/28/94 Tr. at 177-200, Fitzpatrick 2/23/94 Tr. at 184-85; Exhibit SP-300 (the fairness of the medical criteria and the compensation procedures is evidence of the adequacy of Class Counsel).

200. The Objectors argue that the simultaneous representation of present and future claimants by Class Counsel constituted an impermissible conflict of interest. They offered

Professor Roger Cramton as an expert witness on this issue. Professor Cramton is the Robert Stevens Professor of Law at Cornell University and former Dean of the Law School. He is a co-author with Professor Geoffrey Hazard, one of the Settling Parties' ethics experts, of the textbook *The Law and Ethics of Lawyers*. He has published numerous articles on the legal profession and legal education and has experience teaching legal ethics. Cramton 3/15/94 Tr. at 94-102; O-67. Professor Cramton, however, has no asbestos litigation experience, or any litigation experience, and has had no experience as a lawyer or expert in mass tort cases. Cramton 3/15/94 Tr. at 189-90; Cramton 3/16/94 Tr. at 78.

201. Professor Cramton testified that, in his opinion, the concurrent representation of a very large number of present clients, whose asbestos cases Class Counsel wanted to settle, while negotiating on behalf of what became the *Georgine* class presented an impermissible conflict of interest under Model Rule 1.7(b) of the ABA Model Rules of Professional Responsibility. Cramton 3/15/94 Tr. at 108, 112-15, 213, 216. The Court rejects Professor Cramton's conclusion as to the existence of an impermissible conflict of interest because: (1) he lacks of experience in mass tort cases, class actions and asbestos litigation; and (2) because, as described below, the credible evidence in the record does not support his factual predicate.

202. Professor Cramton testified that, as he understood the facts, CCR demanded that "a large portion of the future claimants . . . get no or little monetary recovery" under the class action and that CCR wouldn't talk to Class Counsel "unless [they] agreed to that." Cramton 3/15/94 Tr. at 206. Professor Cramton's factual assumption that a large portion of future claimants who suffer from an asbestos-related disease will receive little or no monetary benefit under the Stipulation is contradicted by the evidence in the record. Rather, this Court has found that the eligibility criteria for cash compensation are fair and reasonable to the class as a whole and that, while non-impaired pleural claimants will not receive *immediate* cash compensation unless and until they meet certain medical criteria, these claimants receive a group of valuable benefits in lieu of immediate cash, including the right to claim future money benefits. *See* FOF ¶¶ 171-176. A significant percentage of these claimants will ultimately develop a compensable injury and receive compensation under the settlement. *See* FOF ¶ 172; Roggli 3/9/94 Tr. at 62-63; Oliver 3/14/93 Tr. at 205-08. Further, this Court finds that Professor Cramton's conclusion was outweighed by the opinions of the experts offered by the Settling Parties.

203. The Settling Parties presented the expert testimony of Professor Geoffrey Hazard on this issue. Professor Hazard is Professor of Law at Yale University (recently at the University of Pennsylvania Law School) and Director of the American Law Institute. Professor Hazard teaches in the fields of legal ethics and professional responsibility and civil procedure, including class actions. He is the lead author of *The Legal Profession: Responsibility and Regulation*, and the lead author of the textbook *The Law and Ethics of Lawyering*. He was the Reporter to the Kutak Commission which was responsible for reconsideration of the Rules of Professional Responsibility. He was a member of the advisory board for studies concerning the asbestos litigation undertaken by the Rand Institute of Civil Justice. He has extensive experience as a consultant in the field of legal ethics. Exhibit SP-900A; Hazard 2/25/94 Tr. at 5-18. Professor Hazard is a competent expert because he has the knowledge, skill, experience, training and education to form an opinion on issues relating to his field of expertise.

204. Professor Hazard testified that, in his expert opinion, which this Court credits and accepts, Class Counsel did not have "a conflict of interest that impaired their ability or in any way disqualified them from performing the functions that they performed." Hazard 2/25/94 Tr. at 31. The Court accepts Professor Hazard's conclusions: (1) that it was not a

conflict for a lawyer to represent two groups of clients with similar claims against a common defendant, in this case, clients with pending claims and future claimants; (2) that this kind of concurrent representation was common practice and not a violation of Model Rule 1.7(b); and (3) that such representation "requires the lawyer to exercise proper judgment and fair mindedness in working out the negotiations concerning allocation of any settlement, but that's part of the job. It doesn't mean you are out of the job." *Id.* at 31-35.

205. This Court accepts Professor Hazard's testimony that in reaching his conclusion that there was no impermissible conflict of interest in this case, he took account of the settlement policy of the CCR defendants, which called for some assurances as to the resolution of future claims before the CCR defendants were willing to embark on a program to settle inventories of present cases. Hazard 2/25/94 Tr. at 47-48. This Court finds persuasive Professor Hazard's explanation that CCR's interest in resolving the litigation, including both present and future claims, was not unlike a typical case where "defendants do not settle cases against the same lawyer involving similar or the same transactions unless they will settle them all, except under extraordinary circumstances." *Id.* at 47.

206. Professor Hazard was aware that some of the inventory settlements included a few cases that were as yet unfiled, but were ready to be filed. Hazard 2/25/94 Tr. at 48-50. This Court accepts his opinion that this fact does not change the ultimate conclusion that Class Counsel did not have an impermissible conflict in settling their present cases at the same time that they negotiated the *Georgine* settlement. *Id.* at 50, 198-201.

207. Professor Hazard also took into account the contention made by Objectors that since the terms of the proposed *Georgine* settlement were not identical to the settlement terms for the inventory claims, then Class Counsel had an impermissible conflict of interest in their concurrent

representation of their present clients and the futures class. Hazard 2/25/94 Tr. at 38. This Court finds Professor Hazard's rejection of that contention persuasive when he explained that pending claimants are not identically situated to future claimants in that they have already incurred at least some of the transaction costs, delays and burdens of the tort system and that present claimants are in certain respects different than future clients. *Id.* at 38-39. Based on this testimony, this Court finds that it was neither inappropriate nor evidence of a conflict to treat these two groups of claimants differently.

208. The Settling Parties also presented the testimony of Professor John P. Freeman on this issue. Professor Freeman is a Professor of Law at the University of South Carolina Law School, holding the chair of the John Campbell Professor of Business and Professional Ethics. He serves on the Professional Responsibility Committee, the Ethics Advisory Committee, and the Corporate and Securities Law Committee for the South Carolina Bar. Professor Freeman has extensive experience in the teaching of legal ethics and in consulting with lawyers in connection with legal ethics issues. He has published extensively in the area. In addition, Professor Freeman has significant experience in the litigation of class actions. Freeman 3/10/94 Tr. at 51-59; Exhibit SP-1075. Professor Freeman is a competent expert because he has the knowledge, skill, experience, training and education to form an opinion on issues relating to his field of expertise.

209. Professor Freeman also testified, and this Court credits and accepts his testimony, that Class Counsel did not have an impermissible conflict of interest in proceeding to negotiate the *Georgine* settlement at the same time that they continued to represent their present clients. Freeman 3/10/94 Tr. at 117. The Court accepts Professor Freeman's conclusion that (1) it would have been irresponsible for Class Counsel to dismiss their present clients in order to explore the possibility of a futures class, *Id.* at 117-18, and (2) a lawyer

can represent multiple clients against a common defendant in multiple forums. *Id.* at 119.

210. Professor Freeman testified, and this Court credits his testimony, that Class Counsel did not have an impermissible conflict of interest in settling their present cases while proceeding with the *Georgine* negotiations. Freeman 3/10/94 Tr. at 121. Professor Freeman explained that fiduciary obligations to two sets of clients does not create an impermissible conflict. *Id.* at 121-22. As with all of their clients, Class counsel was obligated to obtain what they considered was the optimum recovery for both their present clients and for the class in this action. *Id.*

211. This Court accepts Professor Freeman's testimony that the fact that non-impaired pleural claimants in the inventory settlements received immediate cash compensation, where similarly situated claimants under *Georgine* would receive a different bundle of rights, with no immediate cash payment, was not evidence that Class Counsel were burdened by an impermissible conflict of interest. This is so, Professor Freeman explained, because the present claimants had gone to Class Counsel in the tort system and "had a realistic expectation that their cases were going to be resolved in the tort system" by means of judgment or settlement. Freeman 3/10/94 Tr. at 126-27. Future claimants would have different expectations, and were receiving a "bundle or basket" of rights under *Georgine*. *Id.* at 128. Professor Freeman observed and this Court credits his view that while pleural non-impaired claimants who were paid in the tort system became "self-insured" upon signing a release to the settling defendant, under the *Georgine* settlement, "you've got . . . CCR in essence being the insurer, with CCR standing ready with the money to pay these people, when, as and if they get ill, and qualify under the *Georgine* standard." *Id.* at 129.

212. Based upon the testimony of Professors Hazard and Freeman, and the foregoing findings of fact, this Court finds that Class Counsel were not conflicted, and indeed acted

responsibly, diligently, and ethically in representing their present clients while negotiating on behalf of the *Georgine* class.

(2) Futures Provisions in the Inventory Settlement Agreements

213. Objectors argued at the fairness hearing that the language of provisions in the inventory settlement agreements known as the "futures provisions" also created a conflict of interest for Class Counsel.

214. Before entering into the inventory settlement agreements, Class Counsel had consulted with and had been advised by Professor John Freeman, an ethics expert, in connection with these futures provisions and the class action settlement generally. Freeman 3/10/94 Tr. at 67. Professor Freeman advised Class Counsel that ethical propriety on the part of class counsel should be a keystone of any class action settlement. *Id.* at 67-68. Specifically, as it relates to the issue of the futures provisions, Professor Freeman advised them that it was impermissible to enter into an agreement, known as a "lockout agreement," which would amount to an agreement to restrict their right to practice law in exchange for the settlement of pending cases in violation of Model Rule 5.6(b). Exhibit O-35. Based upon Professor Freeman's testimony, this Court finds that before the original futures provisions in the inventory settlement agreements were drafted, it was the expressed intention of Class Counsel to act in accordance with the ethical rules governing the conduct of attorneys. Specifically, this Court finds that it was not the intention of Class Counsel to impermissibly restrict their right to practice law in exchange for the settlement of their pending cases.

215. The original futures provisions entered into by Class Counsel and CCR took two forms: the first was memorialized in letters from Mr. Locks to a representative of CCR (*see* Exhibit SP-302C) (hereinafter "the Greitzer and Locks

inventory settlement agreements"), and the second was contained in inventory settlement agreements between Ness, Motley or their affiliate counsel and CCR (*see* Exhibits SP-302A and 302B) (hereinafter "the Ness, Motley inventory settlement agreements").

216. The language of the futures provision in the Greitzer and Locks inventory settlement agreements was as follows:

> It is further understood that in the future, Greitzer and Locks will not handle or process claims against the CCR defendants unless they meet certain mutually agreeable disease criteria.

Exhibit SP-302C.

217. At the time these letter agreements were written and the inventory settlements concluded, CCR and Greitzer and Locks had reached agreement on the concept of deferral of claims that would not meet certain medical criteria, but the actual medical criteria had not yet been determined. Rooney 2/28/94 Tr. at 208-09. The parties intended the medical criteria from the *Georgine* Stipulation, when they were finally agreed upon,[43] to constitute the "mutually agreeable disease criteria" in the futures provision. Rooney 2/28/94 Tr. at 211-12.

218. The futures provision in the Ness, Motley inventory settlement agreements was as follows:

> Ness, Motley agrees further that his law firm will not file any future asbestos personal injury claims in any court in the State of South Carolina or in any other state for a case which would be properly venued in South Carolina against the CCR or any of its current members, so long as the current member remains a member of the CCR, unless the

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[43] These medical criteria were not finally agreed upon until January 1993. Rooney 2/28/94 Tr. at 211-12.

> medical evidence support one of the following asbestos-related diagnoses. . . .

See Exhibit SP-302A (¶ 5 of January 14, 1993 South Carolina agreement).[44] The "asbestos-related diagnoses" in the agreements are substantially comparable to the medical criteria for qualifying for cash compensation under the *Georgine* Stipulation. *See* Exhibit SP-300 at 25-32.

219. There was testimony at the fairness hearing, which this Court credits, that these futures provisions were understood by CCR to confirm Class Counsel's commitment to the concept of the deferral of claims that did not meet the medical criteria in the Stipulation. Rooney 2/28/94 Tr. at 211. CCR understood that Class Counsel would recommend to clients that they defer their claims if they did not satisfy the medical criteria, and that, in CCR's experience, clients in the normal course followed the advice of counsel. Rooney 3/1/94 Tr. at 102. CCR was also under the impression that if a client did not accept their counsel's recommendation, Class Counsel was free to file a lawsuit on the client's behalf. *Id.*

220. On July 9, 1993, the Greitzer and Locks inventory settlement agreements were revised and superseded. The clarifying language provided:

> This letter is to *confirm and memorialize our prior understanding* concerning the agreement between Greitzer and Locks and CCR companies concerning future claimants.

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[44] Subsequent to the January 14, 1993 South Carolina agreement, Ness, Motley or their affiliated counsel and CCR entered into 10 settlement agreements for pending inventories in Georgia, Illinois, West Virginia. These settlements involved 10 separate law firms within the three states. Each such agreement contained a provision identical or substantially the same as Paragraph 5. *See* Exhibit SP-302B.

At the time we negotiated the settlements for our present clients, we agreed that if ever mutually acceptable medical disease criteria were to be agreed to in a class action, we would adopt those criteria for each of our settlements for future claimants. We, of course, never intended that Greitzer and Locks nor CCR would enter into any settlement which would be a violation of any canon of ethics or the model code of professional responsibility.

To clarify what we always agreed to and what was always our understanding, we stated that our firm would use its best efforts to encourage and would recommend that our future clients defer litigation against the CCR defendants until that claimant's medical condition satisfied the mutually acceptable medical criteria set forth in [*Georgine*]. We will make this recommendation in exchange for a tolling of the statue of limitations and in exchange for future nonmalignant and malignant "insurance policies" because this is advisable and in the best interests of our future clients, unless in the exercise of our independent professional judgment, given some unforeseen circumstance, we conclude otherwise for a particular client.

As you also know, we made this agreement because we believe this alternative procedure is better than and more valuable than the existing system for any of our future clients who do not meet the medical criteria. Most important, it protects them from being compelled to prematurely litigate, settle, or release their claims against the CCR defendants.

Despite our recommendation that we believe our future clients should accept the fair and reasonable medical criteria we agreed to in [*Georgine*], and as we always indicated and agreed, *in the event a potential future client of our firm should not wish to accept our recommendation, we would notify the CCR. In addition, it was always understood and agreed that we could and*

would, if we chose, represent that client against the CCR as well as all other defendants.

Exhibit SP-302C (emphasis added).

221. On June 11, 1993, the January 14, 1993 Ness, Motley inventory settlement agreement was revised and superseded. The amended agreement provided:

> Plaintiff Counsel believes that the criteria set forth in paragraph 5 is fair and reasonable criteria and acceptance of CCR's offer will be in the interest of its future clients who do not have a medical condition described in paragraph 5, in that it protects such clients from being forced prematurely to litigate, or settle and release their claims for asbestos injury. *Plaintiff Counsel therefore agrees, unless in the exercise of its independent professional judgment, given some unforeseen circumstances, it determines otherwise, to recommend that its clients seriously consider, and accordingly will use its best efforts to encourage, each client to accept this alternative dispute resolution procedure. With respect to all clients who accept this alternative dispute resolution procedure, Plaintiff Counsel agrees to defer filing any asbestos-related personal injury claims against CCR or any of its current members until such time, if ever, as the claimant develops one of the asbestos-related diseases described in paragraph 5.*
>
> . . . . .
>
> Subject to paragraph 11 below, this agreement shall remain in full force and effect unless and until the Stipulation of Settlement in [*Georgine* v. *Amchem Products, Inc.*], C.A. No. 93-0215 (E.D. Pa.) is finally approved by the Court, with all appeals, if any, exhausted. Upon final approval of the [*Georgine*] settlement, which includes medical criteria substantially comparable to the criteria of paragraph 5, this Agreement shall be superseded by [*Georgine*], except for those who

have chosen to opt out in accordance with the orders of the Court.

Exhibit SP-302B (emphasis added).

222. In the interim, between the time when the futures provisions were originally drafted by the parties and subsequently revised, the American Bar Association Committee on Professional Responsibility issued a Formal Opinion, No. 93-371. This opinion raised a question as to the propriety under ABA Model Rule 5.6(b) of these futures provisions in the inventory settlements. Accordingly, CCR and Class Counsel determined to and did clarify the meaning of the futures provisions as set forth in the original inventory settlement agreements as quoted above.

223. The Settling Parties presented the testimony of Professor Freeman, Professor Hazard, and Professor Sam Dash on the issue of the ethical propriety of the futures provisions. The Court has previously found that Professors Freeman and Hazard are competent experts. *See* FOF ¶¶ 203, 208. Professor Samuel Dash is currently Professor of Law and Director of the Institute of Criminal Law and Procedure at Georgetown University Law Center. He has been employed by Georgetown since 1965 where his primary teaching responsibilities include Professional Responsibility, criminal procedure, criminal law, and a seminar on Congressional investigations. He is a former District Attorney in Philadelphia, partner in private practice, and Director of the Philadelphia Council for Community Advancement. He has served as a consultant to a number of Congressional and other governmental committees to consult on various issues involving ethics and legislative procedure. In January 1973 he was asked to serve as Chief Counsel and Staff Director of the Senate Watergate Committee. In 1983 he was asked by the President of the Senate of Puerto Rico to supervise and train their staff to conduct a major Senate investigation of a political murder in Puerto Rico. He is a member of the Board of the International League for Human Rights which is

frequently called upon to investigate human rights abuses and corruption in government. He has served as Chair of the Criminal Law Section of the American Bar Association and served for six years on the Standing Committee of Ethics and Professional Responsibility of the ABA. He continues to consult actively in the field of professional ethics. Dash 3/30/94 Tr. at 172-90; Exhibit SP-902. The Court finds that Professor Dash is a competent expert because he has the knowledge, skill, experience, training and education to form an opinion on issues relating to his field of expertise.

224. Professor Freeman testified that it was his opinion that Class Counsel had not entered into an unethical, improper, lock-out agreement with CCR in settling their pending inventory cases, and further did not constitute in any respect an ethical impropriety. Freeman 3/10/94 Tr. at 108.

225. In providing this opinion, Professor Freeman relied for the most part on: (1) the terms of the Stipulation which focus on the recognition that Class Counsel must proceed in a manner consistent with their ethical obligations; (2) the fact that the earlier agreements were superseded by language making clear that Class Counsel was not restricted in the cases it could file, but was only reaffirming their professional judgment with respect to the application of the medical criteria to future clients; and (3) the testimony of Mr. Rooney and Mr. Fitzpatrick in the fairness hearing about what CCR understood the futures provisions to mean. Freeman 3/10/94 Tr. at 99-104.

226. Professor Hazard also testified that these futures provisions did not violate Model Rule 5.6. Hazard 2/25/94 Tr. at 63. The question, as analyzed by Professor Hazard, was whether it was inappropriate for lawyers who were handling a substantial number of asbestos cases, and who expect to handle a continuing flow of these cases, to state that in their professional judgment pleural cases should not be filed and agree to handle the pleural cases differently in the future. Professor Hazard concluded that the net effect of this

statement is not a restriction; rather it is an affirmation about the standards that the lawyers will apply in screening the cases they handle in the future and an affirmation to the defendants that they should not be confronted with certain claims until the claimants are impaired. Hazard 2/25/94 Tr. at 64-65.

227. Professor Hazard further opined that, even if there were a violation of 5.6(b), it would be neither significant nor material, and that the futures provisions would not have undercut or impaired the loyalty with which Class Counsel acted on behalf of the class members. Rather, the futures provisions represent sober, sensible, humane professional judgment by the lawyers, reflecting experience in this kind of case, that will redound to the benefit of the lawyers' clients. Hazard 2/25/94 Tr. at 66, 232-34. *See also* Hatten 3/18/94 Tr. at 9-10, 49-50, 67-70; Hatten 3/17/94 at 88 (explaining that he made his own decision not to file pleural cases in the mid-1980s because of his belief that "the plaintiffs' bar needed to file their claims with more discretion and better judgment.").

228. Professor Dash credibly testified, based on his service on the ABA Standing Committee on Ethics and Professional Responsibility, that the policy of this committee "is that if the request [for an ethical opinion] sets forth facts that [are] clearly answered by the rules themselves or by decisional law or prior ethical opinions, they will not write a new opinion. . . . Only in situations where the fact situation as interpreted by the Standing Committee . . . make[s] it unlikely that a lawyer trying to act ethically would be able . . . to correctly apply the Rules of Professional Conduct do they make the decision that an opinion is necessary to clarify the ethical rule in that factual situation." Dash 3/30/94 Tr. at 199-200. Thus, the Court accepts Professor Dash's statement that the fact that the ABA Standing Committee issued Formal Opinion 93-371, which addressed a different but related futures agreement under Model Rule 5.6(b), indicates that the

Standing Committee reached the conclusion that "the factual situation upon which they're opining is not clearly answered by the professional rule and it needs their guidance to lawyers on how to act in the future." Dash 3/30/94 Tr. at 200.

229. In support of their contention that Class Counsel acted unethically when it entered into the inventory settlements agreements with the futures provisions, the Objectors presented the testimony of Professor Cramton (*see* FOF ¶ 200) and Professor Susan P. Koniak. Professor Koniak is a Professor of Law at Boston University School of Law, where she teaches legal ethics. Koniak 3/17/94 Tr. at 105. She formerly was assistant to the President of the American Bar Association, Director of Governance Management for Greater Boston Legal Services, and Director of the Continuing Legal Education Program of the District of Columbia Bar. *Id.* at 106-08. She has taught legal ethics in the past at Catholic University and Georgetown University. *Id.* at 108-09. She is a co-author of *The Law and Ethics of Lawyering* with Professors Hazard and Cramton, and has lectured on the subject of legal ethics. *Id.* at 110-11. Professor Koniak has no litigation or practice experience, is not a class action expert, and was generally unfamiliar with the asbestos litigation prior to the end of December 1993 when she agreed to be an expert witness in this case. *Id.* at 251-53.

230. Professor Cramton testified that the January 14, 1993 Ness, Motley agreement violated Model Rule 5.6 because "the document on its face is a restriction on future practice." Cramton 3/15/94 Tr. at 158-60.[45]

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[45] Professor Cramton also opined that the futures provisions violate Model Rules 1.2(c) and 1.7(b). Cramton 3/15/94 Tr. at 158. Having found that the futures provisions did not constitute binding obligations on Class Counsel, *see* FOF ¶ 233, this Court finds that they could not have been a

231. Professor Koniak testified that even the amended Ness, Motley inventory settlement agreement of June 11, 1993 violates Model Rule 5.6 because Class Counsel are agreeing to restrict their advice to their future clients. Koniak 3/17/94 Tr. at 152, 155.

232. This Court rejects Professor Cramton's and Professor Koniak's conclusion as to the ethical propriety of the futures provisions because: (1) both lack experience in mass tort cases, class actions and asbestos litigation, *see* FOF ¶¶ 200, 229, such that neither understood how such a good faith commitment could reflect sensible professional judgment of lawyers with extensive experience in asbestos litigation; and (2) neither considered the intent of the lawyers and the parties when entering into the inventory settlement agreements.

233. This Court finds that the revised agreements more clearly reflect the parties' intent when entering into the original inventory settlement agreements, that is the parties originally intended that the futures provisions be a good faith commitment on the part of Class Counsel to recommend the *Georgine* medical criteria to their own clients. By "good faith commitment", the Court finds that the parties did not intend that the futures provisions create for Class Counsel a binding obligation not to represent clients who wished to sue CCR but who did not yet meet the *Georgine* medical criteria. Rooney 2/28/94 Tr. at 220, Fitzpatrick 2/16/94 Dep. at 341-42; *see also* Dash 3/30/94 Tr. at 259 (intent is required to find a violation of Model Rule 5.6(b)). Indeed, the revised agreements made clear that Class Counsel had simply reached their own independent professional judgment that the terms of the agreement were in the best interest of their future clients. Dash 3/30/94 Tr. at 256-57.

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violation of Model Rules 1.2(c) and 1.7(b).

(3) Other Issues Relating to Conflict of Interest

234. Other than the issues discussed above, the objectors pointed to certain terms in the Stipulation and certain other issues which they claim supported their argument that Class Counsel was burdened by an impermissible conflict of interest when they negotiated the settlement. The terms in the Stipulation include (a) the provision that results in Class Counsel having continuing supervisory and oversight responsibilities with respect to the administration of the settlement (Cramton 3/15/94 Tr. at 147-48); (b) the provisions that result in Class Counsel having their own significant economic interests in the class in that they will receive a fee, approved by the Court, for their services as counsel for the class (*id.* at 119-21); (c) the provision that permits the AFL-CIO to monitor the administration of the settlement (*Id.* at 151; Koniak 3/17/94 Tr. at 169-70); (d) the provision that permits a deviation from the general rule that payment of claims is based on a first in time priority ("fair allocation of resources provision") (Koniak 3/17/94 Tr. at 166-68); (e) the Preamble to the Stipulation which provides that CCR will undertake to settle the present cases over the next four to five years (*id.* at 170); (f) the definition of the class which provides that class members are those persons who qualify for membership and who had not filed a lawsuit on or before January 15, 1993 (*id.* at 174-75); (g) the fact that there is no provision in the settlement to modify the medical criteria in the future based upon changed beliefs in the scientific community (*id.* at 176-79); and beyond the terms of the Stipulation itself, the Objectors argued that Class Counsel were burdened by an impermissible conflict of interest because (h) Class Counsel delegated the preparation and dissemination of the notice to CCR counsel (*id.* at 196-97); and (i) class representatives were prepared for their depositions in the presence of CCR counsel (*id.* at 197-98).

(a) Class Counsel's Supervisory and Oversight Duties

235. Under the terms of the Stipulation, Class Counsel has various continuing supervisory and oversight responsibilities. They must audit, on an annual basis, the processing and disposition of claims submitted to the CCR. Exhibit SP-300, Part XXIII.A at 97. In connection with these audits, Class Counsel will have the right to examine all books and records maintained by the CCR related to the processing of all claims under the Stipulation.[46] *Id.* Class Counsel also have the right to participate in the selection of: (a) the five Board-Certified pathologists who will resolve disputes concerning pathological issues (Part V.C.1.a.i), (b) the five physicians who will resolve disputes concerning the clinical diagnosis of non-malignant conditions (Part V.C.2.a.i), (c) the members of the Exceptional Medical Panel (Part V.D.1), (d) the members of the Extraordinary Claims Panel (Part IX.D), and (e) the list of arbitrators who will resolve disputes under Parts IV.B, VI.B, and XXVI (Part XXVI.B).[47]

236. The Court concludes that the role of Class Counsel in monitoring and supervising the activities of CCR in carrying out its obligations under the Stipulation is neither unusual nor inappropriate.

237. The Objectors, however, argue that this class action settlement is unique because Class Counsel will have the opportunity to represent individual class members who submit claims to the CCR for compensation under the Stipulation.

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[46] Under the amendment to the Stipulation, the AFL-CIO will have the right to participate in such audits. Exhibit SP-301, Part XXIII.C.

[47] Under the amendment to the Stipulation, the AFL-CIO will participate in the selection all arbitrators and medical panel members. Exhibit SP-301, Part XXIII.D.

See Exhibit SP-300, Part I.F. The Objectors argue that this "dual role" creates an impermissible conflict of interest. The Objectors point out that in fulfilling their monitoring and supervisory duties, Class Counsel will acquire information about the workings of the claim procedure, including the settlement offers made by CCR to qualifying claimants and CCR's willingness to accept offers made by claimants. Such inside information will not be available to other claimants. In addition, the Objectors argue that Class Counsel's role in selecting arbitrators, physicians and pathologists before whom Class Counsel will represent individual claimants creates an impermissible conflict of interest. *See* Post-Hearing Brief of the White Lung Association of New Jersey, et al., at 46-51.

238. The Court finds that because of the "dual role" of Class Counsel under the terms of the Stipulation, there exists a potential for conflict. The Court also finds, however, that this conflict does not render the Stipulation unfair to the members of the class because the Court can and no doubt will exercise its power to appoint additional class counsel who can fulfill the vital monitoring and supervisory responsibilities of class counsel under Parts V.C.1.a.i, V.C.2.a.i, V.D.1, IX.D, XXIII.A, and XXVI.B of the Stipulation, and who would not represent individual class members who submit claims for compensation under the Stipulation.[48]

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[48] *See* Order, Dkt. No. 11 (Jan. 29, 1993) at 3 (Judge Weiner appointed Messrs. Motley, Rice and Locks as class counsel but held that *"[t]he Court may in the future appoint additional counsel if it is deemed necessary and advisable."*) (emphasis added); *see also* Manual for Complex Litigation (2d Ed.) § 30.15 at 215 ("[I]f necessary to assure adequacy of representation, [the Court] may appoint another attorney as class counsel or may condition class certification on the employment of additional counsel.").

(b) Class Counsel's Economic Interest in the Class

239. This Court finds that the fact that Class Counsel will receive a fee for their services for representing the class in this class action, which is to be paid by CCR and approved by the Court, does not create an impermissible conflict of interest. Dash 3/30/94 Tr. at 209-10.

(c) The AFL-CIO's Monitoring Role

240. This Court finds that providing the AFL-CIO with a monitoring role under the Stipulation was consistent with Class Counsel's fiduciary obligations to the class. Dash 3/30/94 Tr. at 205-07. Indeed, this Court finds that inclusion of the AFL-CIO in the Stipulation in this capacity only increases the protection for members of the class.

(d) Fair Allocation of Resources Provision

241. This Court finds that the basis for the "fair allocation of resources provision," was to accommodate the concerns of plaintiffs' counsel with fewer cases such that the largest plaintiffs' firms not be able to control the case flow. Exhibit SP-300, Part VIII.B.3. Thus, the provision was intended to protect class members who are represented by small law firms. Rooney 3/1/94 Tr. at 144; *see* Koniak 3/17/94 Tr. at 211 (did not know the basis for the provision or what impact it would have on the settlement of claims when she testified that it was troublesome). This provision is fair and salutary in that it will benefit an otherwise potentially disadvantaged group of class members. Furthermore, the provision will only come into play if the number of qualifying claims in a given medical category exceeds the maximum number that may be paid in that category.

(e) CCR's Stated Intention to Settle Present Cases

242. In the Preamble to the Stipulation, CCR states that it is its goal and intent to resolve all the approximately 77,000

claims currently pending against the CCR defendants in the tort system. Exhibit SP-300 at 3. This Court finds that CCR's undertaking to settle all present claims did not negatively affect the class members financially or otherwise and does not evidence an inadequacy of Class Counsel.

(f) Definition of the Class

243. This Court finds that the definition of the class, with a cut-off date of January 15, 1993 for inclusion in the class, did not create a conflict of interest between future and present claimants. Any class for future claimants must necessarily be defined with a cut-off date which is a logical method of identifying a class in mass tort litigation. *Ahern* v. *Fibreboard Corp.*, Order Provisionally Certifying Class for Settlement Purposes, No. 93-526, (E.D. Tex. Sept. 9, 1993).

(g) Lack of Provision to Modify Medical Criteria

244. The Objectors argue that Class Counsel was inadequate in that they failed to negotiate a settlement that provided for additional compensation to the class if scientific opinion were to change as to the reasonableness of the existing medical criteria. Koniak 3/17/94 Tr. at 223. This Court finds this argument unpersuasive because the medical criteria are mature, being defined over many decades, and because there was no evidence presented by the Objectors regarding the likelihood of any significant changes in the applicable medical opinions.

(h) Class Counsel's Role in the Notice Plan

245. This Court finds that Class Counsel were actively concerned with the development of the notice plan; sought the advise of counsel with respect to notice; participated in the filing of all notice materials with the Court; and did not abrogate their responsibilities by permitting CCR's counsel to work with the notice expert retained by the Settling Parties. Dash 3/30/94 Tr. at 213-16; Kinsella 2/16/94 Dep. at 69, 126

(testifying that she reported to CCR's counsel in the development of the notice plan).

(i) Class Representatives Preparation for Depositions

246. This Court finds that the fact that Class Counsel permitted CCR counsel to assist in the preparation of class representatives for deposition suggests understandable cooperation concerning the details of the settlement in order to benefit the class as a whole and is not evidence of the inadequacy of Class Counsel. *See* Koniak 3/17/94 Tr. at 235-36.

C. Collusion

(1) Overview

247. The Objectors final argument as to adequacy of counsel is that the settlement in this class action was the product of collusion, *i.e.*, that Class Counsel "sold out" the interests of the class members to benefit themselves and their present clients. This Court already found, without the benefit of the testimony presented at the fairness hearing, that the settlement appeared to be the product of non-collusive negotiations. *Carlough* v. *Amchem Products, Inc.*, 834 F. Supp. at 1466. The following findings of fact are based on the evidence presented at the fairness hearing.

248. As this Court has already found, in the summer and fall of 1992, after it was confident about the settlement negotiations which led to the Stipulation in this case, CCR undertook to settle present cases. To this end, CCR entered into inventory settlements with Greitzer and Locks and Ness, Motley, and settled approximately 9,000 - 10,000 cases with other law firms, unaffiliated with Class Counsel, before the filing of this class action. Rooney 2/28/94 Tr. at 204. *See* FOF ¶ 196.

249. The Court has already found that the simultaneous representation of their present clients and the members of the

Georgine class did not create an impermissible conflict of interest for Class Counsel. FOF ¶¶ 185-212. The Objectors also argue, through the testimony of Professor John C. Coffee, Jr., that the inventory settlements are evidence of that the settlement of this class action is collusive because they argue that: (1) Class Counsel were paid a premium for the settlement of their inventory cases in exchange for an agreement in this class action; (2) class members would have received more of a benefit in the tort system than they do under the Stipulation; and (3) claimants in the inventory settlements received more than they would have under the Stipulation.

250. Professor Coffee is the Adolf A. Berle Professor of Law at Columbia University, where he has been teaching for 14 years. Coffee 3/29/94 Tr. at 4. He has taught courses primarily in the areas of corporations; corporate finance, and securities regulation. *Id.* at 11. Prior to teaching at Columbia, Professor Coffee taught at Georgetown University Law Center and, before that, practiced law from 1970-76 at Cravath, Swaine and Moore. *Id.* at 4. He served as a reporter for the American Law Institute on "Principles of Corporate Governance" and is currently doing a study concerning modern class actions for the Institute for Judicial Administration. *Id.* at 5-6. He has appeared as an expert witness regarding class action issues, particularly at the settlement stage. *Id.* at 7. He has published primarily in the area of securities and antitrust class actions, focusing on economic incentives affecting plaintiffs' attorneys; conflicts of interest within the plaintiffs' camp; and the impact of various attorneys' fee formulas. *Id.* at 8-11. Professor Coffee is a competent expert because he has the knowledge, skill, experience, training and education to form an opinion on issues relating to his field of expertise.

251. Professor Hazard testified that Professor Coffee's view was not soundly based, and that there is no persuasive evidence that the settlement was a product of collusion.

Hazard 2/25/94 Tr. at 36-37; 80. Professor Hazard testified that:

> [Collusion is] a charge that the lawyers sold out the class, that they were not faithful to the interests, that — it's not just that they were — failed in energy, failed in diligence, failed in attention to specifics and details, it is that they wanted to gain for themselves something at the price of their client, that they essentially cheated their clients.

Hazard 2/25/94 Tr. at 67-68.

252. This Court finds that when counsel represent a class they certainly can be in a position to sell out the class. For this and other reasons, courts are called upon to approve settlements of class actions to ensure that they are fair to the class. The opportunity to collude is not enough for a finding of collusion, however, especially given this Court's thorough analysis of the fairness of the terms of the class action settlement pursuant to Fed. R. Civ. P. 23. For this Court to find collusion in this case, the Court must find that there are some indications that Class Counsel did indeed negotiate the class action settlement for their own benefit. That is, this Court must find that Class Counsel would not have settled *Georgine* but for the opportunity to settle their inventory of unresolved cases for historical settlement values.

253. Having found the foregoing, the Court will address each of Professor Coffee's bases for his opinion that the settlement was a product of collusion.

(2) The Value of the Inventory Settlements

254. On January 29, 1993, Judge Weiner granted the Settling Parties' joint motion to appoint Professor Stephen Burbank as Special Master in this case pursuant to Fed. R. Civ. P. 53 and the Court's inherent powers, to assist the Court in its consideration of the proposed Stipulation of Settlement. Order, Dkt. No. 13 (Jan. 29, 1993). Specifically, Professor Burbank was asked to analyze confidential information provided to him by the Settling Parties in order

to evaluate the inventory settlements reached between Class Counsel and the CCR defendants in contemplation of the *Georgine* settlement. *Id.* Professor Burbank compared the value of those inventory settlements with the settlements reached historically between Class Counsel and CCR defendants during the period 1988-92.

255. As a representative sample of the inventory settlements, Professor Burbank determined to analyze the settlement agreements in South Carolina, Ness, Motley's home state, and Pennsylvania, the home state of Greitzer and Locks. Professor Burbank then asked the Objectors' counsel to designate an additional two jurisdictions. The Objectors' chose Illinois for Ness, Motley and New Jersey[49] for Greitzer and Locks. *See* Reports of the Special Master, Dkt. No. 707 (South Carolina and Pennsylvania, Feb. 1, 1994); Dkt. No. 751 (Illinois, Feb. 11, 1994); Dkt. No. 781 (New Jersey, Feb. 15, 1994).

256. With respect to all four states, Professor Burbank received historical data on settlements between either Ness, Motley or Greitzer and Locks and the CCR defendants in each state during the period 1988-92. The data included lists of cases, broken down into four disease categories (mesothelioma, lung cancer, other cancer, and non-malignant).[50] The lists allocated settlement amounts attributed to each category of case. Professor Burbank received lists from CCR and from either Ness, Motley or Greitzer and Locks.

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[49] With respect to the New Jersey analysis, Professor Burbank also received data related to settlements in Kentucky which provided a broader historical context for purposes of comparison.

[50] For South Carolina, Professor Burbank broke the mesothelioma category into "mesothelioma-living" and "mesothelioma-deceased."

257. Professor Burbank reconciled the lists provided and compared the amounts allocated for each disease category by Class Counsel and CCR. Where there were differences between the amounts allocated for a particular disease category by Class Counsel as compared to CCR, Professor Burbank used an amount for the disease category which reflected one-half the difference in the total amounts allocated by Class Counsel (or their affiliate) on the one hand and CCR on the other. Professor Burbank concluded that differences in settlement dollars attributed to the same cases are due primarily to varying practices in the allocation of group settlements.

258. Professor Burbank then calculated the dollar and percentage differences between the Class Counsel/CCR historical averages for each of the four states and the averages reflected in each state's inventory settlement agreement.

259. Based upon this analysis, Professor Burbank concluded that in South Carolina "the inventory settlement averages were lower than the Ness, Motley/CCR historical settlement averages in three categories (Mesothelioma (living), Lung Cancer, and Non-Malignant [between 3.4 and 3.6% lower]) and higher in one category (Mesothelioma (deceased) [6.1% higher])." Report of Special Master, Dkt. No. 707 (South Carolina, Feb. 1, 1994) at 1-2, 5. Since there was only one "other cancer" case in the historical settlement data, no valid comparison could be made with the "other cancer" category of the inventory settlements. *Id.* at 5.

260. With respect to Pennsylvania, based upon the above-described analysis, Professor Burbank concluded that "the inventory settlement averages were lower than the Greitzer and Locks/CCR historical settlement averages in all four disease categories [between 12 - 14.2%]." Report of the Special Master, Dkt. No. 707 (Pennsylvania, Feb. 1, 1994) at 2, 5.

261. With respect to Illinois, Professor Burbank received historical data on settlements between Ness, Motley and their affiliated counsel, The Lakin Law Firm, P.C. and Bono, Goldenberg, Hopkins & Bilbrey, P.C., and the CCR defendants, during the period 1988-92. And, based upon the above-described analysis, Professor Burbank concluded that, with respect to the Lakin agreement "the inventory settlement averages were lower than the Ness, Motley/CCR historical settlement averages in three categories (Lung Cancer, Other Cancer, and Non-Malignant) and higher in one category (Mesothelioma) [3.3% higher]." Report of the Special Master, Dkt. No. 751 (Lakin Agmt., Feb. 11, 1994) at 1-2, 5. With respect to the Bono agreement, "the inventory settlement averages were higher than the Ness, Motley/CCR historical settlement averages in two categories (Mesothelioma [8% higher] and Non-Malignant [18.3% higher]) and lower in one category (Cancer [5.3% lower])." Report of the Special Master, Dkt. No. 751 (Bono Agmt., Feb. 14, 1994) at 2, 5. Professor Burbank also compared the Bono inventory agreement with historical averages, including historical averages for one CCR defendant, GAF, which were not included in the historical averages because the cases were settled before it became a CCR member. Under this analysis, the mesothelioma category for the inventory settlement was 7.4% higher than the historical average and the non-malignant category was 10.9% higher. *Id.* at 5.

262. With respect to New Jersey, based upon the above-described analysis, Professor Burbank concluded that "the inventory settlement averages were lower than the Greitzer and Locks/CCR historical settlement averages in three categories (Lung Cancer, Other Cancer, and Non-Malignant) and higher in one category (Mesothelioma) [30% higher, but 32.3% lower than Kentucky]." Report of the Special Master, Dkt. No. 781 (New Jersey, Feb. 15, 1994) at 1-2, 5.

263. Based upon Professor Burbank's reports and the testimony of Mr. Rooney, the Court finds that the inventory settlements were generally based upon historical settlement value averages with Class Counsel in the applicable jurisdictions, with certain upward and downward adjustments made to take account of the particular circumstances of the claims settled. Rooney 2/28/94 Tr. at 204-05. Professor Burbank's analysis supports that contention, and the Court finds no credible evidence in the record to the contrary.

264. The Objectors' contention that Class Counsel received a "premium" for the settlement of their inventory cases, that is, that the inventory settlement amounts were in excess of current fair market value, was based on the testimony of Professor Coffee. Coffee 3/29/94 Tr. at 34, 52, 54.

265. Professor Coffee's analysis of the value of the inventory settlement relied on four factors. *First*, Professor Coffee testified that the payment of historic settlement values constituted a premium for the inventory settlements because the value of the inventory claims had been devalued in the current market as a result of the stay order applicable to federal cases issued in the Multidistrict Litigation. Coffee 3/29/94 Tr. at 55. *Second*, Professor Coffee testified that the fact that the inventory cases did not have trial dates reduced their value. *Id.* at 57. *Third*, Professor Coffee testified that the fact that the inventory settlements included "a great number" of cases — or at least a "certain number" of cases that were unfiled is further evidence that a premium was paid. *Id.* at 58. *Fourth*, Professor Coffee testified that the fact that Class Counsel did not reduce their fee, giving the CCR defendants a "volume discount," was an indication that a premium was paid. *Id.* at 59.

266. With respect the first factor, this Court finds that the CCR defendants never had a policy to seek a discount for the settlement of federal cases based upon the MDL stay order, and never offered less than historical averages for the

settlement of pending federal cases as a result of the MDL. Rooney 2/28/94 Tr. at 226; Fitzpatrick 2/23/94 Tr. at 24. A portion of the evidence upon which Professor Coffee relied was excluded as inadmissible hearsay (Coffee 3/29/94 Tr. at 79, 80-81). The rest of the evidence upon which Professor Coffee relied either did not implicate the settlement policy of CCR or was not credible to the Court. *See* Exhibit O-15 and Rooney 3/1/94 Tr. at 107-08 (in letter, Mr. Motley referred to the settlement policy of an asbestos defendant that was not one of the CCR defendants); Iola 3/30/94 Tr. at 25, 75 (plaintiff attorney's testimony that cases are "stuck" in MDL not credible because has historically settled only thirty cases with CCR). *See also* Hatten 3/18/94 Tr. at 55 (values in federal court cases were not depressed in 1992 because of the MDL).

267. Thus, this Court finds that there is no credible evidence in the record to support a finding of collusion based upon the theory that Class Counsel were paid a premium for their inventory settlements by receiving undiscounted historical settlement averages for their cases pending in federal court. *See* Coffee 3/29/94 Tr. at 176-78.

268. Professor Coffee's second factor upon which he relied to support his opinion that Class Counsel received a premium for the settlement of the inventory cases was that the lack of federal trial dates reduced the settlement value of the inventory cases. Professor Coffee provided no settlement data at all to support this theory. This Court finds Professor Coffee's analysis on this point unpersuasive given the uncontested testimony that 90% of the Ness, Motley inventory cases, and 70% of the Greitzer and Locks inventory cases were pending in state court. Rooney 3/1/94 Tr. at 78, 80. State cases proceed to trial unaffected by the MDL. Because the CCR defendants had to resolve the state-listed cases, and because federal and state cases were settled together without differentiation, the fact that the federal cases

did not have trial dates had no demonstrable impact on the settlement value of the inventory cases as a whole.

269. The third factor supporting Professor Coffee's opinion that a premium was paid to Class Counsel was that the inventory settlements included some number of unfiled cases. Professor Coffee conceded on cross-examination that he did not know how many unfiled cases were settled. Coffee 3/29/94 Tr. at 188. He was further not aware of CCR past practice with respect to the settlement of certain unfiled cases in group or inventory settlements. *Id.*

270. This Court finds that CCR historically has settled a modest number of claims before a lawsuit had actually been filed. Rooney 2/28/94 Tr. at 191. With respect to inventory settlements, CCR generally would settle all present cases and cases in the pipeline that had not yet been filed, where the cases were ready for filing, with the medical work completed and some product identification established. *Id.* at 201; Fitzpatrick 2/23/94 Tr. at 147; Fitzpatrick 2/16/94 Dep. at 312-13. Class Counsel's inventory settlements with CCR in 1992-93 included a small percentage of unfiled cases, in accordance with CCR's historical practice. Rooney 2/28/94 Tr. at 208. This Court finds that there is no credible evidence in this record reliably supporting Professor Coffee's opinion that the settlement of unfiled cases as part of the inventory settlements constituted a departure from normal behavior, resulted in a premium being paid to Class Counsel for the settlement of their inventory cases, or reflected any collusive conduct.

271. The final factor which Professor Coffee testified supported his opinion that a premium had been paid to Class Counsel with the inventory settlements was that Class Counsel charged their normal fee with the settlement of the inventory cases. Coffee 3/29/94 Tr. at 264. Professor Coffee had no evidence that the practice of reducing attorneys' fees with inventory settlements is typical in asbestos litigation, *id.* at 189, 191, and this Court finds no historical or otherwise

compelling reason for expecting that Class Counsel would reduce their fee under the circumstances.

272. In sum, having considered the reports of Professor Burbank, the testimony of Professor Coffee, and the record evidence, this Court finds that the settlement amounts in the inventory settlements were generally consistent with historical settlement averages for comparable settlements with CCR, were not inflated, did not include a premium paid to Class Counsel in exchange for the *Georgine* settlement, and were not the product of collusion.

(3) Benefits to the Class under *Georgine* vs. the Tort System

273. The second value comparison articulated by Professor Coffee as a basis for his opinion on collusion was a comparison of the value of the benefits to class members under the Stipulation compared to what class members would have received under the tort system. Coffee 3/29/94 Tr. at 34. This Court finds that Professor Coffee's conclusion that class members would be treated better in the tort system than under the procedures and with the payments allowed under the terms of the Stipulation in this class action, is not supported by the record evidence.[51]

274. The evidence upon which Professor Coffee relied for his opinion on this point does not persuade this Court that class members would fare better in the tort system. Professor Coffee relied on the settlement averages of one law firm for the period of 1991-93 (Exhibit O-64), and the fact that eligibility criteria under the Stipulation for immediate cash compensation are somewhat more restrictive than in the tort system. Coffee 3/29/94 Tr. at 87-89, 97.

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[51] This Court has already found that the terms of the Stipulation are fair to the class.

275. Professor Coffee testified that he did not know or consider settlement averages of this law firm during the period 1988-92 which is the period from which the CCR's historical settlement values were taken and upon which the *Georgine* compensation ranges were negotiated and based. Coffee 3/29/94 Tr. at 193-94. And, this Court finds that the settlement averages for 1991-93 for this law firm were not representative of settlements generally during either the narrow period 1991-92 or the relevant period 1988-92. The record shows that the averages of this law firm indeed exceeded the national average. *See* Exhibit SP-502 (Exhibit 0-28) (Chart showing settlement averages by jurisdiction Bates Stamp No. 2000223).

276. Professor Coffee also relied on the more restrictive eligibility criteria of *Georgine* for immediate cash compensation. Coffee 3/29/94 Tr. at 97, 109, 113. However, this Court has already held that those class members who do not qualify for immediate cash compensation will receive a group of benefits under the Stipulation that have significant value. Professor Coffee conceded, however, that he is not qualified, and is therefore unable to value the benefits provided to these class members. *Id.* at 128-29.

277. In sum, this Court finds that Professor Coffee's conclusion that *Georgine* class members would be treated better in the tort system than under the Stipulation and that this state of affairs is evidence of collusion is unpersuasive.

(4) Comparison of Compensation Paid to Inventory Claimants to What They May Have Received Under *Georgine*

278. Professor Coffee's third comparative valuation as a basis for his opinion on collusion was a comparison of the value of the benefits to be received by the *Georgine* class members with the benefits received by similarly situated claimants in the inventory settlements. Coffee 3/29/94 Tr. at 34, 122-24. Professor Coffee argues that the claimants in the

inventory settlements received more than they would have under the Stipulation. This valuation was based upon Exhibit O-170. *Id.* at 137-38.

279. Having reviewed Exhibit O-170, the Court finds that it does not provide sufficient information to support a finding that the claimants in the inventory settlement would not have fared as well under the Stipulation.

280. As to whether Class Counsel "sold out" the class, this Court has already found that the inventory settlements were generally based upon CCR's historical settlement averages with Class Counsel in the applicable jurisdictions, with certain upward and downward adjustments made to take account of the particular circumstances of the claims settled. *See* FOF ¶ 263. This would be so whether or not *Georgine* were approved by this Court.

281. This Court has also found that, during the course of the settlement negotiations in this class action, there were reasons for decreasing the values in the compensation schedules in the Stipulation from CCR's historical averages. These reasons included the fact that the Stipulation involves a waiver of defenses to qualifying claimants by the CCR defendants; that payments under the Stipulation should, in most cases, be made faster than under the tort system at considerably lower transaction costs, including attorneys' fees; and finally, that qualifying claimants with non-malignant conditions will be able to receive additional compensation if and when they contract cancer. Professor Coffee's inquiry into how well the inventory claimants would have fared under the Stipulation ignored these reasons, and thus the Court finds his opinion on this issue unpersuasive.[52]

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[52] It is also important to note that in reaching his conclusion on this issue, Professor Coffee did not review or consider lower settlement averages in other jurisdictions. Coffee 3/29/94 Tr. at 235-38.

282. In sum, the Court finds that an objective review of the record evidence does not persuade the Court that the Stipulation was the product of collusion. This Court finds that the settlement was non-collusive. *See also* Dash 3/30/94 Tr. at 218-19 (testified that, in his opinion "there's no evidence that I have seen, and I've read all the testimony and the transcript, the depositions, and I have seen no evidence in the record before this Court that would lead me to conclude there's any evidence of collusion, fraud or deceit on the part of Class Counsel.").

D. Prior Conduct of Class Counsel

283. As to the adequacy of Class Counsel, the Objectors finally contended that Mr. Locks should be disqualified as Class Counsel because of three prior incidents, unrelated to this class action. Cramton 3/15/94 Tr. at 174-83. This Court rejects the Objectors' accusations of inadequacy as to Mr. Locks as insubstantial, irrelevant and unpersuasive. *See* Hatten 3/17/94 Tr. at 17, 18-19; Freeman 3/10/94 Tr. at 139-41; Hazard 2/25/94 Tr. at 75-77. The Court finds that Mr. Locks' prior conduct did not raise any question as to Mr. Locks' competency, trustworthiness or integrity. Hazard 2/25/94 Tr. at 77.

V. ADEQUACY OF NOTICE

284. The Settling Parties' proposed notice materials contained a comprehensive individual notice, a set of "Questions and Answers" designed to explain the notice in a more conversational manner, a one-half page newspaper ad, a television ad script, camera-ready "clip art" for use in publications by unions and others, and various other materials. The proposed dissemination plan called for a multi-million dollar television and print advertisement campaign, a special 800-number where class members could call to obtain notice materials, and numerous other proposals for disseminating the notice through national and local unions and other groups. Joint Motion of the Settling Parties for

Approval of the Notice to the Class, Dkt. No. 445 (Aug. 16, 1993).

285. Various objections were made to the notice materials themselves and to the Settling Parties' proposal for dissemination of the notice. Some Objectors also argued that the twelve-week opt-out period did not allow class members sufficient time to decide whether to opt out of the class. Other Objectors argued that class members with presently unmanifested medical conditions cannot, by definition, receive notice and opt-out rights sufficient to satisfy the Due Process Clause. Finally, various *Amici* and third-party insurers urged this Court postpone any dissemination of the notice until the Third Circuit or the U.S. Supreme Court had resolved the subject matter jurisdiction and other preliminary jurisdictional issues.

286. At oral argument on October 5, 1993, the Court heard from all Objectors and *Amici* on these and other matters relating to the proposed notice plan. On October 27, the Court, in a 43-page opinion, addressed all the issues raised by the Objectors and *Amici*, and approved, with some changes, the notice materials and dissemination plan proposed by the Settling Parties. This Court ruled at that time "that the extensive plan for dissemination of notice designed by the settling parties, and the contents of the notice materials satisfy the requirements of Rules 23(c)(2) and (2) and the due process clause of the Constitution." Mem., Dkt. No. 512 (Oct. 27, 1993) at 42-43. This Court also ordered that final notice materials be filed on November 1, and that the notice and opt-out period begin that day and continue until January 24, 1994.

287. In its October 27 decision, this Court ordered that the Settling Parties file, on December 6, a Mid-Term Report on implementation of the notice. The Court ordered that one of the main issues to be addressed in the Mid-Term Report was "precisely what efforts the various 'volunteer' organizations [such as labor unions] have made to notify

potential class members." Mem., Dkt. No. 512 (Oct. 27, 1993) at 24-25.

288. The Mid-Term Report filed by the Settling Parties on December 6, showed that the notice plan had been implemented, through that date, fully in accord with the Court's notice decision, and that implementation was on or ahead of the schedule set in the October 27 decision. With respect to the efforts of labor unions and others to help in the dissemination of the notice, the Mid-Term Report explained that, on October 29, AFL-CIO President Lane Kirkland had sent a letter to 48 AFL-CIO unions with retirees or members potentially in the class to urge these unions to help in the notice effort. *See* Exhibit SP-305. The Mid-Term Report also stated that, as of December 6, over 30 national or international unions had agreed to run the court-approved "clip art" in union publications delivered individually through the mail to members and retirees, and that eight unions had agreed to mail or have mailed notice materials to their members. No Objector or *Amici* filed any pleading concerning the Settling Parties' Mid-Term Report.

289. During the twelve-week opt-out period, various motions were made to allow attorneys' signatures on exclusion request forms and to extend the opt-out period. After argument on the issues, the Court denied the motions.

290. On February 16, 1994, the Settling Parties filed a Final Report on implementation of the notice. The Final Report explained in detail how the notice program had been implemented fully in accord with the Court's October 27 decision. This Court incorporates here as credible and reliable the Final Report which stated that 35 national or international unions had run the court-approved "clip art" in the publications delivered individually to the homes of over 6 million union members and retirees, and that nine national or international unions had had notice materials mailed individually to almost 400,000 union members or retirees.

The Final Report, adopted and credited here, also explained the multi-million dollar media campaign undertaken to publicize the class action and proposed settlement, and reported that over 320,000 individual notice packets and over 4,000 copies of the Stipulation had been mailed to potential class members in response to calls to the special 800-number listed in all notice materials. All in all, the Final Notice Report, adopted and credited here, stated, over 6.8 million individuals received individually delivered notice materials, and millions more were notified through media efforts. Settling Parties' Final Report on Implementation of the Notice, Dkt. No. 777 (Feb. 16, 1994). No Objector or *Amici* filed any pleading or factual rebuttal concerning the Settling Parties' Final Notice Report.

291. On May 9, the Settling Parties filed a Report on opt-out requests. The Report stated that approximately 201,654 exclusion requests had been received by the January 24 postmark deadline by or on behalf of exposed individuals, and that approximately 34,669 additional forms had been filed by affiliated family members. Settling Parties' Final Report on Implementation of the Notice, Dkt. No. 777 (Feb. 16, 1994); Supplement to Final Notice Report, Dkt. No. 1128 (Aug. 4, 1994). The Report also stated that approximately 13,773 opt-out forms (11,955 on behalf of exposed individuals and 1,818 by affiliated family members) had been received with postmarks after January 24, 1994, and discussed various issues raised by such late opt-outs. A total of 14,219 opt outs were received on behalf of exposed individuals and 660 by affiliated family members, but were signed by attorneys. *Id.*

292. For the most part, objections that have been raised concerning the notice at this stage of this proceeding reiterate arguments about the notice materials and dissemination plan that were made, or that could have been made, when the notice issues were litigated before this Court in August and September of 1993. The following three objections, however,

raise new issues not addressed by this Court's October 27, 1993 opinion approving the Settling Parties' notice plan.

293. *First*, the Director, Office of Workers' Compensation Programs, United States Department of Labor, asserts that the notice of settlement is "materially defective and incorrect". Mem. of the Director, Office of Workers' Compensation Programs' ("OWCP") in Support of the Motion For Leave To File Objections to Settlement as *Amicus Curiae*, Dkt. No. 734 (Feb. 9, 1994) at 1. The Director argues that the notice does not warn class members covered by the Longshore and Harbor Workers' Act ("LHWCA") that the law interpreting § 33(g) of the LHWCA is unsettled and that there is at least a possibility that LHWCA rights could be forfeited. In the Director's view, this omission constitutes a "material misstatement of law regarding the settlement's affect on third-party tort suits." *Id.* at 11. *See also* Motion to Intervene of Roland Dearborn, Judith Dearborn and Kerwin Butcher and Written Objection, Dkt. No. 641 (Jan. 19, 1994) at 4. This Court addresses and resolves the substance of this objection in the Conclusions of Law below. *See* Conclusions of Law (hereinafter "COL") ¶¶ 94-100.

294. *Second*, the Objectors argue that the notice was inadequate because "[a]n unknown number of class members who called Class Counsel's 1-800 number were erroneously advised by Class Counsel's staff that if they wished not to be bound by the class settlement, they need take no further action," and also received inaccurate information about attorneys' fees in the class action. Wiese Objectors' Objections to Proposed Settlement, Dkt. No. 727 (Feb. 8, 1994) at 10; *see also* Statement of the Asbestos Victims of America and the Trial Lawyers' for Public Justice, as *Amicus Curiae*, in Opposition to the Proposed Class Action Settlement, Dkt. No. 732 (Feb. 7, 1994) at 4-7.

295. The Objectors first raised the issue concerning allegedly erroneous advice to class members given out by operators on Class Counsel's 1-800 number in a motion that

they filed in January 1994 renewing their request for depositions of Class Counsel. Class Counsel filed affidavits concerning the calls at that time. After considering those affidavits and the other evidence in the record at that time, this Court found "that the plan for training and supervision of the telephone answering personnel of co-class counsel Ness, Motley et al. was reasonable," that "the [O]bjectors have shown only that the errors by telephone personnel were very few and were anecdotal and incidental," and hence that the recorded calls did not "breach[] or undermine[]" the notice plan approved by his Court. Order, Dkt. No. 750 (Feb. 14, 1994) at 1. The Objectors have shown no reason for this Court to change that finding at this time.

296. *Third*, the Objectors assert that implementation of the notice was flawed because "[t]he testimony of Robert Wages, Myles O'Malley, and other witnesses will establish that the various unions upon whom the Settling Parties relied to disseminate notice of this class action did not effectively notify class members", and because several of the representative plaintiffs did not see the notice ads on television or in the newspaper. Wiese Objectors' Objections to Proposed Settlement, Dkt. No. 727 (Feb. 8, 1994) at 10-11.

297. The Objectors' assertion that the various unions did not effectively notify class members is not supported by the record evidence. As noted above, the Settling Parties' unchallenged Final Notice Report showed that 35 national or international unions ran some version of the Court-approved "clip art" in union publications delivered individually to approximately 6 million union members and retirees during the notice and opt out period, and that nine national or international unions agreed to mail or have mailed notice materials to almost 400,000 unions members and retirees. Kinsella 2/16/94 Dep. at 98-99 (the Settling Parties' notice expert explained that the level of union cooperation in the notice program was "quite extraordinary").

298. At the fairness hearing, the only witness that the Objectors presented concerning the notice efforts by unions was Robert Wages, who is president of the Oil, Chemical and Atomic Workers International Union ("OCAW"). Wages 3/16/94 Tr. at 200. Mr. Wages explained that his union opposes the proposed settlement on several grounds. *Id.* at 209, 234-37. Mr. Wages testified that he had received the October 29 letter from Lane Kirkland urging that unions participate in the notice effort (*id.* at 263-64), and that, in November, he received a notice packet and a follow-up phone call requesting that OCAW help in the notice campaign. *Id.* at 264-66. *Mr. Wages explained that his union refused to help in the notice effort in this class action at the national level, although he stated that some of the OCAW locals undertook efforts to notify their members and retirees. Id.* at 233-34, 270. This Court finds that Mr. Wages' refusal to cooperate with the notice plan does not support a finding that the level of union cooperation was not adequate.

299. While many of the representative plaintiffs did not see the official Court-approved notice ads on television or in newspapers, most received actual notice of the class action and proposed settlement either because they are class representatives or learned about the proposed settlement otherwise. Mr. Vogt testified that, in December, 1993, he received a six-page letter concerning the class action and proposed settlement from the business manager of his local union. Vogt 2/24/94 Tr. at 152; Exhibit SP-824. Mr. Vogt also received a letter concerning these issues from a local Baltimore lawyer in January 1994. *Id.* at 153. Mr. Murphy similarly received information on the class action and proposed settlement from his union, and a co-worker mentioned to Mr. Murphy that he had seen one of the newspaper ads. Murphy 1/6/94 Dep. at 137, 55-56. Mr. Annas testified that he saw an ad concerning the class action and proposed settlement from a local lawyer, as well as an article that counsel for the Wiese Objectors, Mr. Baron,

published in the *Wall Street Journal*. Annas 2/24/94 Tr. at 268. Mr. Georgine saw one of the television ads and reviewed an individual notice packet. Georgine 2/28/94 Tr. at 120-21. Finally, Mrs. Kekrides testified that her brother-in-law told her about one of the notice ads he had seen on television. Kekrides 1/12/94 Dep. at 41-42.

300. In sum, this Court finds that the notice materials and dissemination plan were more than sufficient to supply the factual predicate necessary to comply with Fed. R. Civ. P. 23 and the Due Process Clause under the applicable law discussed in this Court's October 27, 1993 memorandum opinion. *See Carlough* v. *Amchem Products, Inc.*, 1993 U.S. Dist. LEXIS 15280, *66 (E.D. Pa. Oct. 27, 1993). The Final Notice Report filed with this Court, and other evidence in the record, shows that the notice plan was implemented fully in accord with this Court's October 27, 1993 decision, and that extensive and massive notice of this class action and proposed settlement was given to the class.

CONCLUSIONS OF LAW[53]

Based in part on the foregoing findings of fact, the Court makes the following conclusions of law.

I. CLASS CERTIFICATION

A. Standards for Final Class Certification

1. Federal Rule of Civil Procedure 23 allows a district court conditionally to certify a class action for purposes of considering the fairness of a proposed class settlement, followed by final certification by the district court if the settlement is found to be fair, adequate and reasonable to the members of the class. *Girsh* v. *Jepson*, 521 F.2d 153, 155

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[53] To the extent that these conclusions of law include findings of fact or mixed findings of fact and conclusions of law, those findings and conclusions are hereby adopted by this Court.

n.3 (3d Cir. 1975) ("There is no impediment to determining a class action for the purpose of settlement only."); *Greenfield* v. *Villager Indus., Inc.*, 483 F.2d 824, 826 (3d Cir. 1973) (suit may "'proceed and be maintained as a class action' for settlement purposes only"); *Manual for Complex Litigation Second* § 30.45, at 242-44 (1985); 2 *Newberg on Class Actions* § 11.27 (3d ed. 1992).

2. Federal Rule of Civil Procedure 23(a) provides that a class action may be brought if: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Under Federal Rule of Civil Procedure 23(b)(3), final certification of an opt-out class to resolve claims for money damages is proper if the requirements of Rule 23(a) are satisfied and "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

3. The Rule 23 requirements for class certification apply to all federal class actions; however, they are often more readily satisfied in the settlement context because the issues for resolution by the Court are more limited than in the litigation context. *See In re A.H. Robins Co.*, 85 Bankr. 373, 378 (E.D. Va. 1988) ("[T]he requirements of Rule 23 may be more easily satisfied in the settlement context than in the more complex litigation context."), *aff'd*, 880 F.2d 709 (4th Cir. 1989); *Fisher Bros.* v. *Phelps Dodge Indus., Inc.*, 604 F. Supp. 446, 450 (E.D. Pa. 1985) (same). *See also Manual for Complex Litigation Second* § 30.45, at 243; 2 *Newberg on Class Actions* § 11.28, at 11-57. Indeed, courts have approved settlements and finally certified settlement classes

while at the same time holding that class certification for litigation purposes might be improper. *See, e.g.*, *In re Anthracite Coal Antitrust Litig.*, 79 F.R.D. 707, 713-14 (M.D. Pa. 1978) (court approved class settlement while noting that certification for litigation purposes would be doubtful), *aff'd in part mem. and vacated in part mem. sub nom. Colonial Fuel Co.* v. *Blue Coal Corp.*, 612 F.2d 571, *Wilkes-Barre Steam Heat Co.* v. *Blue Coal Corp.*, 612 F.2d 576, and *Appeal of Wilkes-Barre Steam Heat Co.*, 612 F.2d 576 (3d Cir. 1979).

4. For the reasons set forth fully in the following paragraphs, this Court concludes that the prerequisites for final class certification under Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure are satisfied in this case. The Court concludes that the plaintiff class is so numerous that joinder of all members would be impracticable, and that the claims of the representative plaintiffs are typical of the claims of other class members. *See* FOF ¶¶ 1-12; *see also* Complaint, Dkt. No. 1 (Jan. 15, 1993); Exhibits SP-300 and SP-301. The Court also concludes that questions of law and fact common to the members of the class predominate over questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient resolution of the controversy. Finally, the Court concludes that the representative plaintiffs, through qualified counsel, are, and have been, adequate representatives of the interests of the class throughout the pendency of this litigation. *See* FOF ¶¶ 3-12.

B. Numerosity

5. The numerosity requirement of Rule 23(a) is satisfied. Given the size of the class, joinder of the class members' claims would be impracticable. FOF ¶ 2. *See also* 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 3.05, at 3-23 to 3-24 (3d ed. 1992) (where class numbers in the "hundreds, or thousands, or even millions . . . , the impracticability of bringing all class members before the court

has been obvious, and the Rule 23(a)(1) requirement has been easily met").

C. Commonality and Predominance of Common Questions

6. The requirement that there be questions of law or fact common to the class (Fed. R. Civ. P. 23(a)), and that such common questions predominate over questions affecting only individual class members (Fed. R. Civ. P. 23(b)(3)), is more readily satisfied in the settlement context than in the litigation context. *See Manual for Complex Litigation Second* § 30.45, at 243 ("although 'common questions' may predominate and justify a class if the case is *settled*, the standards of Rule 23(b)(3) may not be met if the case must be *tried*") (emphasis added). Among the predominant issues in the settlement context is whether a proposed settlement is fair, reasonable and adequate for the class. *See* 2 *Newberg on Class Actions* § 11.28, at 11-58 to 11-60.

7. In this case, there are questions of law and fact common to the class, and such questions predominate over questions affecting only individual members. The members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system. Whether the proposed settlement satisfies this interest and is otherwise a fair, reasonable and adequate compromise of the claims of the class is a predominant issue for purposes of Rule 23(b)(3). *See, e.g.*, *Bowling* v. *Pfizer, Inc.*, 143 F.R.D. 141, 160 (S.D. Ohio 1992) (requirements of Rule 23(b)(3) satisfied because "the settling of all class members' claims at once, in like fashion, will allow the class to receive maximum benefits without high attorneys' fees and costs, while at the same time avoiding the trauma of going through litigation").

D. Typicality

8. "[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." 1 *Newberg on Class Actions* § 3.13, at 3-76. The requirement that the claims or defenses of the representative parties be typical of the claims or defenses of the class does not require the representative plaintiffs to have the same particular injuries as all class members. "[T]he typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims." *Id.* at 3-77; *Jenkins* v. *Raymark Indus., Inc.*, 109 F.R.D. 269, 272 (E.D. Tex. 1985) (in asbestos personal injury class action, "[t]he degree of harm may differ between the representatives and members of the class according to the degree of exposure (if any), the effects of the asbestos disease process, and the nature of the disease contracted by the individual"), *aff'd*, 782 F.2d 468 (5th Cir. 1986).

9. Moreover, the typicality requirement is more readily satisfied in the settlement context than in the litigation context. *See Bowling* v. *Pfizer, Inc.*, 143 F.R.D. 141, 159 (S.D. Ohio 1992); 2 *Newberg on Class Actions* § 11.28, at 11-58 ("[T]ypicality of claims in a settlement class context requires proof that the interests of the class representative and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement.").

10. The Court concludes that the claims of the representative plaintiffs are typical of the claims of the class for purposes of Rule 23(a). *See* FOF ¶¶ 3-12; *see also* Complaint, Dkt. No. 1 (Jan. 15, 1993); Exhibits SP-300 and SP-301.

E. Superiority

11. As set forth in the Court's findings of fact and conclusions of law addressing the fairness and adequacy of the proposed settlement, the proposed settlement will provide

class members with fair compensation for their claims while reducing the delays and transaction costs endemic to the asbestos litigation process as it occurs presently in the tort system. *See generally* FOF ¶¶ 13-29, 37-176. Thus, for purposes of Rule 23(b)(3), the proposed class action settlement is superior to other available methods for the fair and efficient resolution of the asbestos-related personal injury claims of class members. *See, e.g.*, *Jenkins* v. *Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986) (class action superior to case by case litigation of asbestos claims); *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 418-19 (J.P.M.L. 1991).

F. Adequacy of Representation

12. The Court of Appeals for the Third Circuit has set forth the following two-part test for determining adequacy of representation under Rule 23(a):

> "Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the [representative] plaintiff must not have interests antagonistic to those of the class."

Weiss v. *York Hosp.*, 745 F.2d 786, 811 (3d Cir. 1984) (quoting *Wetzel* v. *Liberty Mutual Ins. Co.*, 508 F.2d 239, 247 (3d Cir.), *cert. denied*, 421 U.S. 1011, 95 S. Ct. 2415, 44 L. Ed. 2d 679 (1975)).

13. It is not a requirement that representative plaintiffs have specific knowledge of the claims and issues in the action, or that they play a personal role in the direction and management of the action. *See Lewis* v. *Curtis*, 671 F.2d 779, 789 (3d Cir. 1982) ("The adequacy-of-representation test is not concerned whether plaintiff personally derived the information pleaded in the complaint or whether he will personally be able to assist his counsel. . . . [T]he requirements in *Wetzel* are sufficient to insure adequate representation. . . .") (class representative in derivative suit

found adequate even though he "displayed a complete ignorance of facts concerning the transaction that he was challenging"); *Snider* v. *Upjohn Co.*, 115 F.R.D. 536, 541 (E.D. Pa. 1987) ("[t]he third circuit has recognized that class counsel, not the named plaintiff, directs and manages the class action," it is therefore irrelevant whether "plaintiff is a nominal plaintiff who has given unfettered discretion to her attorney and lacks knowledge about many of the most basic matters at stake").

14. It is also well settled that adequacy of representation under Rule 23(a) does not require the representative plaintiffs to prove the elements of their individual cases, or even to demonstrate a likelihood of success on the merits. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) ("'[T]he question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.'") (citation omitted); 1 *Newberg on Class Actions* § 3.29, at 3-149 to 3-150. This is particularly true where certification is for purposes of settlement. *See, e.g.*, *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14, 101 S. Ct. 993, 998 n.14, 67 L. Ed. 2d 59 (1981) (courts approving settlements "do not decide the merits of the case . . . ").

G. Consistency of Interests of Representative Plaintiffs and the Class

15. To the extent that there are factual differences in the claims and circumstances of the representative plaintiffs and of the class, such differences do not render the class representatives inadequate. "The key question is whether their interests are *antagonistic*." *Steiner* v. *Equimark Corp.*, 96 F.R.D. 603, 610 (W.D. Pa. 1983) (emphasis in original). *See also Wetzel* v. *Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975). "[S]o long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not

antagonistic for representation purposes." *In re Corrugated Container Antitrust Litig.*, 1980-1 Trade Cas. (CCH) ¶ 63,163, at 77,788 n. 10, 1979 WL 1751 (S.D. Tex. Dec. 21, 1979), *aff'd*, 643 F.2d 195 (5th Cir. 1981).

16. The Court concludes that there is a consistency of interests between the representatives plaintiffs and the members of the class, and that there interests are not antagonistic. *See generally*, FOF ¶¶ 2-12; Complaint, Dkt. No. 1 (Jan. 15, 1993); Exhibits SP-300 and SP-301. It is clear that the class representatives and the members of the class are united in seeking the maximum possible recovery for their asbestos-related claims. *See Jenkins* v. *Raymark Indus., Inc.*, 109 F.R.D. 269, 274 (E.D. Tex. 1985) (In class certified for litigation of asbestos personal injury claims, court held, "class representatives here present a spectrum of varying exposures to asbestos containing products and stages in the disease process. That cross-section of interests is substantially similar to the class as [a] whole so as to meet the requirements of 23(a)(4)."), *aff'd*, 782 F.2d 468 (5th Cir. 1986).

17. Although class members may fall into different medical categories under the Stipulation and may be subject to various compensability criteria and compensation schedules, there is no antagonism of interest between persons in various categories, or between persons with and without currently manifest asbestos conditions. First, the assets of the defendants do not constitute a limited fund, and so Class Counsel was able to negotiate compensation schedules for varying diseases without competition between medical categories for the same dollars. FOF ¶¶ 142-170. *See In re Asbestos School Litig.*, Master File No. 83-0268, slip op., 1986 WL 13882 (E.D. Pa. Dec. 3, 1986) (no conflict of interest and class counsel could represent both class members and opt-outs in asbestos property damage class action because defendants' assets not a limited fund); *see also In re Amatex Corp.*, 755 F.2d 1034, 1042-43 (3d Cir. 1985). Further,

representative plaintiffs with no currently manifest asbestos condition, or with only non-impairing pleural changes, may in the future develop a condition in any one or more of the compensable medical categories. *See* FOF ¶ 172. These representative plaintiffs, through Class Counsel, therefore have a strong interest that recovery for *all* of the medical categories be maximized because they may have claims in *any*, or several categories. *See Bowling* v. *Pfizer, Inc.*, 143 F.R.D. 141, 158-59 (S.D. Ohio 1992) (named plaintiffs adequate to represent recipients of allegedly defective heart valves who were subject to a variety of emotional and physical injuries); *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1435-36 (2d Cir. 1993) (interests of present and future claimants against settlement fund not antagonistic and no subclasses required).

18. Although the Court's conclusion as to adequacy of representation firmly rests on the factors discussed above, the representation of the class has been enhanced by the AFL-CIO's involvement in this litigation and its agreement to participate, along with Class Counsel, in auditing and supervising the compensation system established under the settlement. *See* FOF ¶¶ 38, 47, 52, 53, 91, 139-140, 240. *Cf. Alaniz* v. *California Processors, Inc.*, 73 F.R.D. 269, 276 (N.D. Cal. 1976) (interests of class members in Title VII class action brought by private plaintiffs' counsel received extra protection by virtue of the approval and participation of the EEOC in proposed settlement).

H. No Need for Subclasses

19. Creation of subclasses is left to the discretion of the trial court and is appropriate "only when the court believes it will materially improve the litigation." *Clark Equip. Co.* v. *International Union, Allied Indus. Workers of America*, 803 F.2d 878, 880 (6th Cir. 1986). Further, "[s]ubclassing is not encouraged," because of the potential to "compound confusion and cost." *County of Suffolk* v. *Long Island Lighting Co.*, 710 F. Supp. 1428, 1447 (E.D.N.Y. 1989)

(citing *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 407-08, 100 S. Ct. 1202, 1214-15, 63 L. Ed. 2d 479 (1980)). The burden of persuasion lies with the proponent of subclassing. *Geraghty*, 445 U.S. at 407-08, 100 S. Ct. at 1214-15.

20. As outlined above, this Court has concluded that there is no antagonism of interest between class members with various medical conditions, or between persons with and without currently manifest asbestos impairment. Subclassing is therefore unnecessary in this action to protect antagonistic interests because there are only common interests. *See* FOF ¶¶ 2-12; Complaint, Dkt. No. 1 (Jan. 15, 1993); Exhibits SP-300 and SP-301.

21. Moreover, because asbestos conditions often have a long latency period and are in many cases progressive, subclasses based on asbestos conditions, as some Objectors suggest, would be illusory. Class members with no current asbestos-related condition may develop serious conditions in the future. *See* FOF ¶ 172. Similarly, a class member who claims to have an asbestos-related condition but who does not satisfy the medical criteria for compensation may in the future be compensated if the medical criteria become satisfied. *See* FOF ¶¶ 171-176. Class members share a common interest in receiving maximum compensation for whatever condition, or conditions, they may ultimately develop. There is no divergence of interest sufficient to warrant the creation of the subclasses urged by Objectors. *See In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1436 (2d Cir. 1993) (Second Circuit affirmed district court's rejection of separate subclasses for present and future claimants).

22. Finally, although it is not dispositive, federal courts have also found subclasses to be less useful in Rule 23(b)(3) opt-out class actions because class members who are dissatisfied with the terms of a proposed settlement may exclude themselves from the class. *See, e.g.*, *In re Joint E. & S. Dist. Asbestos Litig. (Findley* v. *Blinken)*, 982 F.2d 721, 744 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993).

23. This Court concludes that creating subclasses is unnecessary and would create unwarranted complication and expense while providing little, if any, benefit to the class. Thus, the Court concludes that it is proper to grant final certification to the following settlement class:

> (a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant, or passenger ships), either occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or death in any state or federal court against the defendant(s) (or against entities for whose actions or omissions the defendant(s) bear legal liability).
>
> (b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph (a) above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) above in any state or federal court against the defendant(s) (or against entities for whose actions or omissions the defendant(s) bear legal liability).

24. Excluded from the settlement class are those persons who have submitted valid and timely requests for exclusion.

II. FAIRNESS OF THE SETTLEMENT

A. Introduction

25. Federal Rule of Civil Procedure 23(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the court . . . . " Fed. R. Civ. P. 23(e). As numerous courts have recognized, Rule 23(e) thus requires a determination by this Court concerning whether the proposed settlement here is "fair, adequate and reasonable." *Girsh* v. *Jepson*, 521 F.2d 153, 157 (3d Cir. 1975).

26. In making this fairness determination, the district court has broad discretion. *See Girsh* v. *Jepson*, 521 F.2d 153, 156 & n.7 (3d Cir. 1975). However, the Court's choice is simply whether or not to approve the settlement; it may not alter the proposed settlement in any way. *See Harris* v. *Pernsley*, 654 F. Supp. 1042, 1049 (E.D. Pa.) ("The court may either approve or disapprove the settlement; it may not rewrite it."), *aff'd*, 820 F.2d 592 (3d Cir. 1987).

27. In deciding the fairness issue, the court must primarily balance the strength of the claims of the class against the benefits to be provided under the settlement. In other words, "[t]he court must be assured that the settlement secures an adequate advantage for the class in return for the surrender of litigation rights against the defendants." 2 *Newberg on Class Actions* § 11.46, at 11-105 to 11-106 (footnote omitted). In this regard, "[c]ash as well as noncash consideration is appropriate, as long as the total consideration is sufficient." 2 *Newberg on Class Actions* § 11.46, at 11-106. *See also Bogosian* v. *Gulf Oil Corp.*, 621 F. Supp. 27, 1985-1 Trade Cas. (CCH) ¶ 66,510, at 65,547 (E.D. Pa. 1985) (district court rejected Objectors' argument that certain non-cash consideration given by defendant as part of a class settlement was "purely illusory").

28. In *Girsh* v. *Jepson*, 521 F.2d 153, 157 (3d Cir. 1975), the Court of Appeals listed several factors that may be considered by a district court in deciding whether to approve

a settlement as fair.[54] While the list of factors in *Girsh* is a long one, most of the factors listed point to the same issue: an evaluation of the benefits received by the class in exchange for the settlement. *See also Shlensky* v. *Dorsey*, 574 F.2d 131, 147 (3d Cir. 1978) ("principal factor" in fairness determination is "extent of the benefit to be derived from the proposed settlement"). *Girsh* also lists two other subsidiary factors that a court should consider in deciding fairness — the maturity of the underlying litigation (*i.e.*, "the stage of the proceedings and the amount of discovery completed"), and the "reaction of the class" to the proposed settlement. 521 F.2d at 157.

29. Other courts have identified another subsidiary factor that should go into a court's calculation concerning fairness: who negotiated the settlement and how the negotiations

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[54] The factors listed in *Girsh* are as follows:

"'(1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class action through the trial . . . ; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. . . .'" 521 F.2d at 157 (citing *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)). A similar list of factors is found in other cases. *E.g.*, *Malchman* v. *Davis*, 706 F.2d 426, 433-34 (2d Cir. 1983); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 312 (N.D. Ga. 1993).

proceeded. Thus, in *Weinberger* v. *Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982), the court noted that it would look at the "negotiating process by which the settlement was reached" in deciding whether to approve a proposed settlement as fair. Similarly, in *Kusner* v. *First Pa. Corp.*, 74 F.R.D. 606, 608 (E.D. Pa. 1977), *aff'd mem.*, 577 F.2d 726 (3d Cir. 1978), the court noted that, in evaluating a class settlement, "'[t]he opinion and judgment of experienced counsel, whose labors produced the settlement, should . . . receive due consideration.'" (Citation omitted.) Thus, this Court may have more confidence in the fairness of a settlement that it finds was negotiated by experienced counsel in a long, deliberative process.

30. In sum, in evaluating the fairness of the settlement proposed here, this Court has looked primarily at the benefits received by class members in exchange for the settlement of their rights against the CCR defendants. This Court has looked and will look, however, at the subsidiary issues identified in *Girsh* and by other courts — namely, 1) the maturity of the underlying litigation; 2) how and by whom the settlement was negotiated; and 3) the reaction of the class to the settlement.

31. In addition to these general considerations regarding the evaluation of the fairness of a class settlement, three other important principles apply. First, a class settlement is not required to "achieve some hypothetical standard constructed by imagining every benefit that might someday be obtained in contested litigation." *United States* v. *Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 850 (5th Cir. 1975). *See also Cotton* v. *Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("compromise is the essence of a settlement"). Rather, as the Court of Appeals for the Second Circuit has noted:

> [I]n any case there is a range of reasonableness with respect to a settlement — a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion — and the judge will not be reversed if the appellate court concludes that the settlement lies within that range.

Newman v. *Stein*, 464 F.2d 689, 693 (2d Cir. 1972). *See also Alaniz* v. *California Processors, Inc.*, 73 F.R.D. 269, 278 (N.D. Cal. 1976) ("Nor should a court attempt to determine whether the proposed settlement is the best possible or even whether a better agreement might have been negotiated.").

32. Second, and closely related, a class settlement must be evaluated *as a whole*, and not term-by-term or plaintiff-by-plaintiff. As one court has explained:

> The Court's primary concern is whether a settlement, taken as a whole, is fundamentally fair, adequate and reasonable to all concerned. . . . [T]he essence of settlement is compromise. Compromise involves the moderation of lofty and idealized hopes and the relinquishment of unyielding and absolute positions.

In re Wash. Pub. Power Supply Sys. Sec. Litig., 720 F. Supp. 1379, 1387 (D. Ariz. 1989), *aff'd sub nom. Class Plaintiffs* v. *City of Seattle*, 955 F.2d 1268 (9th Cir. 1992).

33. Finally, the fairness of any settlement cannot be measured in a vacuum. Instead, the settlement must be evaluated in light of the practical realities of the litigation from which the settlement arose:

> In conducting its analysis and making its determinations, the Court must take into consideration any unique facts and circumstances. [The court must] . . . contemplate the particular circumstances that surrounded [the] settlement[].

In re Wash. Pub. Power Supply Sys. Sec. Litig., 720 F. Supp. 1379, 1387-88 (D. Ariz. 1989), *aff'd sub nom. Class Plaintiffs* v. *City of Seattle*, 955 F.2d 1268 (9th Cir. 1992) (citation omitted). *Accord In re Armored Car Antitrust Litig.*,

472 F. Supp. 1357, 1369 (N.D. Ga. 1979) (where full scale litigation might outlive many of the persons involved, its costs might consume any final recovery, and individual or statewide actions would burden the judiciary and the parties, settlement was favored).

34. The legal conclusions concerning fairness of the settlement are divided into several parts: (1) the context or background in which this settlement arose; (2) how and by whom this settlement was negotiated; (3) specific provisions of the settlement itself; and (4) the reaction of this class to the proposed settlement.

B. Background of the Settlement

(1) Maturity of the Litigation

35. In evaluating a proposed settlement of a class action, courts have emphasized that "'the stage of the proceedings and the amount of discovery completed'" should be considered. *Girsh* v. *Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) (quoting *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)). Thus, this Court must consider whether there has been sufficient discovery and development of the claims and defenses so that the Court is confident that the parties and the Court could have intelligently evaluated the proposed settlement. The courts and commentators have made clear that this assessment may be undertaken by looking either at the proceedings in the class action at issue, or in related proceedings. *See* 2 *Newberg on Class Actions* § 11.45, at 11-102 n. 247 (citing *West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970) (relying upon discovery taken in prior Patent Commission proceeding in approving class settlement)); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 180 (5th Cir. 1979) (in evaluating fairness, district court properly considered discovery in certain long-pending companion cases); *City of Detroit* v. *Grinnell Corp.*, 356 F. Supp. 1380, 1386 (S.D.N.Y. 1972), *settlement aff'd, rev'd on other grounds*, 495 F.2d 448 (2d Cir. 1974) (relying upon discovery taken in prior government action).

36. This Court concludes that the discovery in this case was extensive, especially when compared to other reported class action cases. *See* Mem. Op., *supra*, at 9 & n.9. *See, e.g.*, *In re General Tire & Rubber Co. Securities Litigation*, 726 F.2d 1075, 1084 n.6 (6th Cir. 1984) (Objectors "are not automatically entitled to discovery or 'to question and debate every provision of the proposed compromise.'"); *Cotton* v. *Hinton*, 559 F.2d 1326, 1332-33 (5th Cir. 1977) (district judge had discretion to limit scope of discovery where lack of formal discovery into merits of underlying class action did not hinder his evaluation of fairness of settlement); *Robertson* v. *National Basketball Ass'n*, 72 F.R.D. 64, 70-71 (S.D.N.Y. 1976) ("There is no requirement that every objector be allowed to have discovery concerning the settlement itself so that he can personally assure its reasonableness."), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

37. Furthermore, as this Court has already found, the asbestos litigation is probably the most "mature" mass tort litigation in this country. *See* FOF ¶ 36. As a result, an enormous amount of discovery has taken place with the liability issues involving the defendant companies and the medical issues concerning asbestos related disease having been explored in great detail. *Id.* The CCR defendants have all been involved in asbestos claims for at least the past decade, and some of the CCR members have been involved since the early 1970s. *Id.* at ¶¶ 15, 21. Because of the maturity of the asbestos litigation, this Court concludes that the underlying facts and law are plainly at a stage where the proposed settlement to this class action may be intelligently evaluated even though there was no merits discovery in this action seeking certification of a settlement class.

(2) Asbestos Litigation in the Present Tort System

38. As explained above, this Court should not consider the proposed settlement in a vacuum. Its fairness is to be evaluated in light of the alternatives available to class members in the tort system.

39. This Court has also made findings concerning how asbestos victims presently fare in the tort system. *See* FOF ¶¶ 13-14, 18-20, 94. New filings continue unchecked, there is much uncertainty as to liability and verdict results, claims are often resolved only after long delays, transaction costs are high, and victims receive only a fraction of the funds expended. *Id.* In the face of this crisis, many companies have gone bankrupt. *Id.* at 17.

40. This Court has also found that the litigants and others have been searching for solutions to the asbestos crisis since at least the mid-1980s. FOF ¶¶ 21-34. This Court concludes that it is against this backdrop, including the maturity of the litigation and the prior efforts to find a resolution to the asbestos litigation crisis, that the proposed settlement must be evaluated.

(3) Negotiation of the Settlement

41. As set forth above, several courts have explained that how and by whom a settlement was negotiated is important to the evaluation of fairness. A court will and should have more confidence in the reasonableness and adequacy of a settlement if the evidence shows it was negotiated by experienced counsel in an extensive and deliberative negotiation.

42. This Court has found all three Class Counsel are highly experienced in the asbestos litigation, and in the issues raised by this proposed settlement, and were well qualified to represent the class and negotiate the proposed settlement on their behalf. *See* FOF ¶¶ 177-283; COL ¶¶ 58-91. This Court has also found that the negotiations leading to the

proposed settlement were long in duration, extensive in scope, and deliberative in nature. FOF ¶¶ 40-45.

C. Specific Terms of the Stipulation

(1) Compensation Schedule and Procedures, Eligibility and Overview

43. This Court has extensively recited and evaluated the key provisions of the proposed settlement and has made factual findings as to whether these provisions are fair and reasonable to the class. *See* FOF ¶¶ 37-176. Based on the foregoing analysis and these factual findings, the Court concludes that the Stipulation as a whole is fair to the class and clearly falls within the zone of reasonableness required for approval of the settlement under Fed. R. Civ. P. 23(e). Specifically, the Court concludes that the following provisions of the Stipulation are fair and reasonable to the class:

(1) the asbestos exposure requirements and waiver of all other liability defenses by the CCR defendants, FOF ¶¶ 46, 47-48;

(2) the medical criteria, FOF ¶¶ 49-88, including:

(a) the quality control aspects, FOF ¶¶ 62, 83-84, 87-88; and

(b) the line drawn between those claimants who qualify for immediate cash compensation because they are impaired and those who do not qualify for immediate cash compensation because they are non-impaired, FOF ¶¶ 64-70, 87-88;

(3) the compensation procedures, FOF ¶¶ 89-119, including:

(a) the compensation schedule, FOF ¶¶ 90-100;

(b) the Case Flow Maximums, FOF ¶¶ 101-108; and

(c) the alternative compensation procedures, FOF ¶¶ 109-111, 115-119;

(4) the agreement to share responsibility for the payment of claims in the absence of joint and several liability among the CCR defendants, FOF PP 131-133;

(5) the CCR defendants' withdrawal rights, FOF ¶¶ 134-135; and

(6) the release and contribution and indemnity provisions, FOF ¶¶ 120-128.

(2) Releases, Contribution and Indemnity Provisions

(a) General Principles

44. This Court has found that release and contribution and indemnity provisions in the Stipulation factually do not unfairly prejudice the rights of non-settling asbestos manufacturers or suppliers to contribution and indemnity against the CCR defendants. FOF ¶¶ 120-128. As this Court found, the Stipulation leaves the rights of non-settling manufacturers to be determined, if and when they may arise, under whatever law applies to them in the fora in which they may be asserted.

45. A proposed settlement that does not cognizably prejudice the formal legal rights of non-settling defendants vis-a-vis the Settling Parties is not unfair as to those non-settling defendants. *In re School Asbestos Litig.*, 921 F.2d 1330, 1332 (3d Cir. 1990) (non-settling manufacturer must show "cognizable prejudice to a legal relationship between it and the settling parties").[55]

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[55] The case law addresses fairness to non-settling defendants in terms of their standing to object rather than in substantive terms. In other words, if they cannot show "cognizable prejudice" to their formal legal rights vis-a-vis the Settling Parties, the *Amici* have no standing to object to any aspect of the Stipulation. The underlying principle remains the same, however, whether the issue is framed in

46. Claims that a proposed settlement will merely make it factually more difficult for non-settling defendants to litigate, *i.e.*, that they will incur additional expense, expend additional effort, or suffer a tactical disadvantage, allege nothing more than "factual injury." Such factual injury does not rise to the level of "cognizable prejudice to a legal relationship." *See Quad/Graphics, Inc.* v. *Fass*, 724 F.2d 1230, 1233 (7th Cir. 1983) (disadvantage or injury in fact to non-settling defendants is "bound to occur" as result of partial settlement but only plain legal prejudice justifies judicial interference); *Waller* v. *Financial Corp. of America*, 828 F.2d 579, 583-84 (9th Cir. 1987) (partial settlement placing non-settling defendant at a "tactical disadvantage" does not amount to "plain legal prejudice"). Thus, the *Amici* in this case at this time are left to litigate what the CCR defendants have chosen to settle. They must then accept the consequences of their decision.[56]

(b) Severance of Contribution Claims

47. As this Court has found, Part XIII.A provides that, in limited situations, class members are required to "move jointly" with the CCR defendants "for severance and continuance of the trial of such contribution or indemnity claims." Exhibit SP-300, Part XIII.A at 81; FOF ¶ 124. The *Amici* contend that this provision will prejudice them if the joint severance motion is granted by a court in which it is

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jurisdictional or substantive terms.

[56] In applying these principles to the *Amici's* claims, it is helpful to remember what is *not* before this Court. The *Amici* are not parties to this litigation; the class members in this proceeding have asserted no claims against these *Amici*, and these *Amici* have not, and could not, assert contribution or indemnity claims against the CCR defendants at this time in this case.

made. This Court has found, however, that courts routinely sever third-party contribution actions. FOF ¶ 127. Moreover, it is within a trial court's discretion to order severance of such claims. *See Didio* v. *Philadelphia Asbestos Corp.*, 434 Pa. Super. 191, 642 A.2d 1088 (1994); *Noecker* v. *Johns-Manville Corp.*, 355 Pa. Super. 463, 513 A.2d 1014, 1017-18 (1986). The severance provision itself is no guarantee that any court would grant such a joint motion by class members and CCR defendants. Thus, this Court concludes that the *Amici* assert nothing more than speculative, factual injury which does not rise to the level of "cognizably prejudice" to their formal legal rights under any applicable law.

(c) Release Provisions

48. This Court has recited and reviewed the Stipulation's release provisions, under which the CCR defendants will receive "deemed releases" from the non-impaired claimants in certain types of jurisdictions but not in others. FOF ¶¶ 120-122. Based on this Court's finding that the non-impaired claimants will receive a valuable group of benefits, *see* FOF ¶¶ 171-176, this Court concludes that these releases given by these class members are supported by valuable consideration.

49. The *Amici* contend that the release provisions strip the non-settling asbestos manufacturers or suppliers of their contribution and set-off rights under state law.[57]

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[57] These *Amici* do not complain that the Stipulation's release provisions strip them of any rights in those ,dictions that have abolished joint and several liability. At the time the Stipulation was signed, examples of jurisdictions that had abolished joint and several liability included Alaska, Arizona, Colorado, Idaho, Kansas, Kentucky, North Dakota, Utah, and Vermont. *See* Exhibit SP-300, Part XII.A at 77.

50. This Court finds that the deemed releases, whether labeled as such or not, are not uncommon in class action settlements. *See, e.g.*, *In re Granada Partnership Sec. Litig.*, 803 F. Supp. 1236, 1242, 1245 (S.D. Tex. 1992); *In re Silicone Gel Breast Implant Prods. Liab. Litig. (Lindsey* v. *Dow Corning Corp.)*, C.A. No. CV-94-P-11558-S, 1994 WL 114580 (N.D. Ala. Mar. 22, 1994), Breast Implant Litigation Settlement Agreement, Part VIII, at 42. Furthermore, as this Court has found, the *Amici* fail to show that the Stipulation's release provisions conclusively and adversely resolve their formal legal rights under the law of a single jurisdiction. FOF ¶ 126. This is so because the rights of the non-settling asbestos manufacturers or suppliers will be determined under whatever state law may apply if and when claims for contribution or indemnity are made by these companies against the CCR defendants.[58] If anything, these releases may only place the non-settling asbestos manufacturers at some sort of tactical disadvantage. Thus, the Court concludes that the release and contribution and indemnity provisions are fair and reasonable and that any factual injury or inconvenience to the non-settling asbestos manufacturers does

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[58] The Stipulation thus differs significantly from the Manville settlement that the Second Circuit declined to approve in *In re Joint E. & S. Dist. Asbestos Litig. (Findley* v. *Blinken)*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993). The Manville settlement attempted to "establish national rules of joint and several liability and pro tanto (*i.e.*, dollar for dollar) setoff for the Manville liability share . . . ," even where state or other applicable law provided differently. *Id.* at 731. By contrast, the Stipulation leaves all matters of joint and several liability, contribution bars, and calculation of set-offs to be resolved pursuant to state or other applicable law.

not rise to the level of legal prejudice which requires judicial interference.[59]

D. Reaction of the Class

51. One final legal consideration in the fairness assessment is the "reaction of the class" to the proposed settlement. This consideration is somewhat less important than the others this Court has already discussed. Thus, courts have approved settlements involving significant opposition within the class. *E.g.*, *Bryan* v. *Pittsburgh Plate Glass Co.*, 494 F.2d 799, 803 (3d Cir. 1974) (confirming approval of a class action settlement despite objections to the settlement from some 20% of the class); *Grant* v. *Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987) (approving class action settlement where between 36% to 48% of class objected to settlement, and citing cases where settlements were approved despite objections ranging from 15% to 56% of the class).

52. This class action is highly unusual, in that a combined notice was given under Rule 23(c) and (e) and class

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[59] The co-defendant Amici have also asserted that various provisions of the Stipulation will leave them responsible for a substantial number of cases in the tort system, and that the value of these claims will be significant. Provisions challenged by the *Amici* on this ground include the provision for no joint and several liability among the settling defendants, the case flow maximums, and certain other features of the Stipulation. *Id.* This Court discusses the overall reasonableness of virtually all of these provisions in this memorandum opinion. In any event, the co-defendant *Amici's* contention that each of these provisions will prejudice them is purely speculative, and does not rise to the level of "cognizable prejudice" to their rights sufficient to render the Stipulation unfair. *In re School Asbestos Litig.*, 921 F.2d 1330, 1332 (3d Cir. 1990).

members were given information about the settlement at the same time that they had to decide whether or not to exclude themselves from the class. Thus, unlike many class actions, the opponents of the settlement here had the option of removing themselves from the class entirely. Hence, this Court places less weight on the fact that class members excluded themselves from the class action because they will not be bound by its terms. None of the class members who opted out participated in the fairness hearing.

53. There were few actual objectors to the settlement compared to the size of the class. Objecting counsel at the fairness hearing represented less than a dozen individual objectors, and a few victims' organizations. Other than Mr. Wages, no Objectors testified at the fairness hearing. A very small number of additional objectors filed written objections.[60]

54. The national AFL-CIO, representing some 13 million union members and a "substantial percentage" of those with occupational exposure to asbestos, endorsed the settlement. Mem. Op., *supra*, at 8 n.7.[61]

55. The Settling Parties' Supplemental Final Notice Report states that 201,654 exclusion requests were received on behalf of individuals claiming exposure to asbestos products (with 34,669 additional forms for affiliated family

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[60] The docket shows that, in total, there were only approximately 500 purported class members who entered their appearance as objectors to the settlement. Of this total, 419 individuals were submitted as *one* group represented by *one* law firm.

[61] Only one union member, Robert Wages, President of the Oil, Chemical and Atomic Workers, testified at the fairness hearing in opposition to the proposed settlement. Wages 3/16/94 Tr. at 209.

members) by the January 24, 1994 deadline. FOF ¶ 291. This number does not significantly impact this Court's assessment of fairness. *First*, as stated above, those class members who opted out of the class will not be bound by the Stipulation, of which presumably they either do not approve or in which they are disinterested, because they are no longer members of the settlement class.[62] *Second*, the Objectors have, at various times, estimated the size of the class at issue here as ranging from 20 to 30 million.[63] Baron, May 28, 1993 Hearing, Tr. at p. 51, line 15, p. 58, lines 19-20; Wiese Parties' Mem. of Law in Opposition to the Settling Parties' Joint Motion for Approval of the Notice to the Class, Dkt. No. 93-0215 (Sept. 16, 1993), at 1; Dec. 17, 1993 Hearing, Tr. at p. 153, lines 9-12. Even if the class is significantly smaller, and whatever the unknown basis for any individual decision to opt out, the number of opt-outs in question does not, in all likelihood, represent significant or material opposition to the settlement from the class. While not determinative, the CCR defendants have chosen not to exercise their right to withdraw from this settlement on the basis of excessive opt outs as permitted by Part XXI of the Stipulation. Exhibit SP-301, Part XXI.

56. This Court concludes that the reaction of the class to this settlement, on balance, further supports approval of the settlement under Rule 23(e).[64]

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[62] Also, there has been no evidence presented that the persons who filed opt-out forms were in fact members of the class; the exclusion request forms merely make that assertion.

[63] This Court has found that the class in this action consists of many tens of thousands of class members. *See* FOF ¶ 2.

[64] A motion to certify a California mesothelioma opt-out class has been filed by three objectors to this settlement based on perceived advantages mesothelioma victims have in California state courts. Motion, Dkt. No. 598 (Jan. 6, 1994). This Court concludes that the substance of the objectors' motion does not impact on this Court's evaluation of the fairness of the proposed settlement in that this Court has considered the differences in California law, and has concluded that the settlement is fair and reasonable to the class as a whole. Formal and final resolution of this motion is deferred.

E. Conclusion

57. In consideration of all the factors discussed above, this Court concludes that the proposed settlement is fair, adequate, and reasonable to the class within the meaning of Rule 23(e).

III. ADEQUACY OF COUNSEL

A. Legal Standard

58. Fed. R. Civ. P. 23(a)(4) provides that a class action may be maintained only if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This prerequisite to maintenance of a class action, and ultimately the entry of a final judgment, is essential to meet the due process standards that must be satisfied at all stages of a class action. 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 3.21, at 3-125 (3d ed. 1992).

59. Adequacy of representation requires that "the party's attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that [a representative] plaintiff has interests antagonistic to those of the remainder of the class." *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 562

(2d Cir. 1968). *See also In re Fine Paper Antitrust Litigation*, 617 F.2d 22, 27 (3d Cir. 1980).

60. In deciding whether Class Counsel adequately represented the class here, and accordingly whether the class settlement should be approved, this Court must determine whether Class Counsel were burdened by an impermissible conflict of interest as they negotiated the *Georgine* Stipulation of Settlement or whether the settlement itself was the product of collusion. *See e.g.*, *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 207-09 (5th Cir. 1981); *Mars Steel Corp.* v. *Continental Illinois Nat'l Bank & Trust Co. of Chicago*, 834 F.2d 677 (7th Cir. 1987).

61. "The ethical standards imposed upon attorneys in federal court are a matter of federal law." *Bell Atlantic Corp.* v. *Bolger*, 2 F.3d 1304, 1316 (3d Cir. 1993). In the Third Circuit, the courts look to the Model Rules of Professional Conduct to furnish the appropriate ethical standard. *Id.*

62. As many courts have recognized in a variety of different contexts, however, "courts cannot mechanically transpose to class actions the rules developed in the traditional lawyer-client setting context . . . " *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J. concurring); *Rand* v. *Monsanto Co.*, 926 F.2d 596, 601 (7th Cir. 1991) (vacating a district court ruling that plaintiff was an inadequate class representative because he refused to advance the costs of litigation in violation of the Model Code); *In re Agent Orange Prod. Liab. Litig.*, 800 F.2d 14, 18 (2d Cir. 1986) (refusing to disqualify two appellate attorneys who had represented parties supporting the class settlement in the district court and then represented Objectors on appeal, on the ground that "[a]utomatic application of the traditional principles governing disqualification of attorneys on grounds of conflict of interest" would have a serious adverse effect on class actions.) *See also* 3 *Newberg on Class Actions*, § 15.01 at 15-3 ("The class action device was

designed to serve unique purposes. Categorical application of ethical precepts developed for the individual action, without accommodation of the fundamental goals of the class action rule, dilutes both the ethical standards and the effectiveness of class litigation.")

63. Thus, it is appropriate for this Court to consider the Model Rules in determining the adequacy of representation, but ultimately it is this Court's task to determine whether, in the context of this litigation, Class Counsel were vigorous and diligent in negotiating the *Georgine* Stipulation, unburdened by any conflicts of interest or collusion. *See* FOF ¶¶ 177-283, 40-45.

B. Conflict of Interest

64. In this case, Objectors contend that Class Counsel had an impermissible conflict of interest, in violation of Model Rule 1.7(b), which adversely affected the *Georgine* settlement. Model Rule 1.7(b) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

65. Model Rule 1.7(b) proscribes any concurrent representation where that representation "may be materially limited by an" ongoing representation. As set forth in the comments to the Model Rule:

> A possible conflict does not itself preclude the representation. The critical questions are the likelihood

> that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

ABA Model Rules at 28. *See also* Hazard and Hodes, *The Law of Lawyering* § 1.7:301, at 246 (Supp. 1993) ("[S]ince only 'material' limitations trigger operation of the bar, Rule 1.7(b) forces a case-specific inquiry into the precise effect that a particular combination of conflicting responsibilities might engender. It is for this reason that Rule 1.7(b) can be said to contemplate a balancing process, rather than a firm rule.")

66. As discussed in the above Findings of Fact, five expert witnesses have testified in this proceeding as to whether Class Counsel were burdened by any impermissible conflicts of interest in negotiating the *Georgine* settlement. Professors Hazard, Freeman, and Dash testified that there were none. Professors Cramton and Koniak testified to the contrary. *See generally* FOF ¶¶ 185-246. Because the issue is a mixed question of fact and law for the Court to decide, this Court may be guided by the expert testimony, but is not bound by it. *See e.g.*, *In re Solerwitz*, 848 F.2d 1573, 1578 (Fed. Cir. 1988) (in a disciplinary proceeding, court "reviewed the testimony of the three experts and their conclusions regarding the propriety of [the attorney's] conduct," but court made clear "it is this court and not [the attorney's] experts that must determine whether [the attorney's] conduct was improper.")

67. At the time that Class Counsel negotiated what became the *Georgine* settlement, there was no attorney-client relationship between Class Counsel and the unformed *Georgine* class. Class Counsel nevertheless had a fiduciary responsibility to this putative class, that is, a duty of loyalty

and a duty of due care. *See* 2 *Newberg on Class Actions*, § 11.65, at 11-183 ("The general rule is that the named plaintiff and counsel bringing the action stand as fiduciaries for the entire class, commencing with the filing of a class complaint."). *See also Greenfield* v. *Villager Industries, Inc.*, 483 F.2d 824, 832 (3d Cir. 1973) ("Class action counsel possess, in a very real sense, fiduciary obligations to those not before the court."). Thus, whether or not Model Rule 1.7(b) technically applies to this Court's determination, this Court concludes that the general principles of loyalty and due care are applicable here.

68. Having carefully considered the testimony of Professors Hazard, Freeman, and Cramton, *see* FOF ¶¶ 185-212, and the record in this case as a whole, this Court concludes that Class Counsel's representation of the *Georgine* class was not materially limited by their representation of present clients with pending claims against the CCR defendants. Thus, the concurrent representation of present claimants, while negotiating the *Georgine* settlement, ultimately resulting in settlement terms for present clients that differed from the terms of *Georgine*, did not create an impermissible conflict of interest under Model Rule 1.7(b), or otherwise, and Class Counsel were not burdened with any such conflict throughout the negotiation of the *Georgine* settlement.

69. The settlement philosophy adopted by the CCR defendants in 1992 was an outgrowth of years of experience in the tort system and rational defense concerns about the growth and character of the litigation. There was nothing impermissible in the effort of CCR to reach a global solution of the asbestos litigation encompassing both present and future claims. In fact, CCR's settlement position was consistent with the urging of the federal judiciary that private parties seek to find a global solution to the litigation.

70. The settlement position of CCR was not unlike that of the defendant railroad in *Holden* v. *Burlington Northern*,

Inc., 665 F. Supp. 1398 (D. Minn. 1987). *Holden* was an employment discrimination class action lawsuit in which class counsel had been litigating against the defendant, in other employment litigation, for "approximately ten years." *Id.* at 1426-27. There the "objectors contend[ed] the resolution of matters other than *Holden*, along with *Holden*, evidences a conflict of interest." *Id.* at 1426. The *Holden* Court noted that there, as here, the fact that the defendant was interested in a global resolution of all the litigation was no secret to the parties, the Objectors, or to the Court. *Id.* The Court then held that it found "no necessary conflict in resolving matters other than *Holden* concurrently with *Holden*. Early on in the negotiation process the Court recognized that any settlement of *Holden*, if one could be attained, would have had to include a global settlement of all matters involving [class counsel and [the defendant railroad]. . . . [A] proposed settlement consisting of anything less than a settlement of all matters . . . could never have been accomplished." *Id.* at 1426-27.

71. In this case, as in *Holden*, the CCR defendants' settlement posture was well-known to the plaintiffs' and defense bars and the courts. Further, given the history of this litigation, as in *Holden*, CCR's settlement position was not unreasonable. *Id.* at 1427. Accordingly, Class Counsel did not have an inherent conflict of interest in seeking to negotiate a futures settlement while concurrently settling their present inventory of cases with CCR provided they, as experienced asbestos litigators, reasonably believed the settlements were fair, reasonable and in the best interests of both the putative class and their present clients. This Court concludes that Class Counsel did indeed make these reasoned judgments and reasonably decided in favor of settling.

72. Class Counsel were not required to withdraw from the representation of their current clients in order to undertake the *Georgine* negotiations, as suggested by Professor Cramton. Such a step was not only not feasible,

but would have prejudiced the representation of the present clients. Moreover, it was the very fact that Class Counsel represented such a substantial number of present clients, as leaders of the asbestos bar, that made them credible and appropriate counsel to negotiate on behalf of an inchoate futures class. *Cf. Bowling* v. *Pfizer, Inc.*, 143 F.R.D. 141, 160 (S.D. Ohio 1992) (Objectors complained that class counsel had insufficient experience in litigating heart valve cases, and, as a result, additional counsel were named who had substantial experience in the litigation. On this basis the Court concluded that the interests of the class were adequately protected.).

73. The negotiations of the *Georgine* settlement and the present inventory settlements were both the product of arm's length, good faith bargaining. *See* FOF ¶¶ 40-45. In hindsight, those not participating in the negotiation process can always criticize specific settlement terms or assert that other terms should have been included in the settlement. The fact, however, that a settlement did not achieve all that others may have hoped for does not support the conclusion that the lawyers were burdened by an impermissible conflict of interest in negotiating that settlement. In the words of the Fifth Circuit:

> It is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance.

In re Corrugated Container Antitrust Litig., 643 F.2d 195, 212 (5th Cir. 1981).[65]

74. Thus, for example, whether the settlement might have provided an adjustment for inflation over time or revision of medical criteria based upon changes in scientific thought are issues relating to the fairness of the settlement. *See, e.g.*, FOF ¶¶ 99. The fact that such provisions were not included in the Stipulation is not evidence that Class Counsel had a conflict which impaired their ability to represent the class.

75. Similarly, the fact that the *Georgine* class is defined as persons with occupational exposure who had not filed claims prior to January 15, 1993 does not create an impermissible conflict of interest by permitting class counsel to prefer certain claimants over others. *See* FOF ¶ 243. There is no evidence in this record that Class Counsel themselves actually used their knowledge of the forthcoming class action suit to file premature claims to avoid the class, or to refrain from filing and settling appropriate cases in order to ensure the viability of the class representatives.

76. The fact that the inventory settlements included terms that differed from the terms of the *Georgine* settlement also does not reveal an impermissible conflict of interest. Present clients in the tort system are not identically situated to future claimants. They already have engaged a lawyer, they already have made or committed to expenditures, have a place in the trial queue and have expectations of a certain course of proceedings. The relevant question is not whether the terms

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[65] *See also In re Chicken Antitrust Litig.*, 669 F.2d 228, 236 n.15 (5th Cir. Unit B 1982) ("Although there may be the potential for a conflict of interest to arise, it is best to avoid second guessing the judgment of counsel in settlement negotiations absent an actual conflict of interest which renders effective representation impossible.")

of the *Georgine* settlement are identical to the terms of settlements in the past, but whether, given all the circumstances, the terms of *Georgine* are fair and reasonable. *See, e.g.*, *M. Berenson Co.* v. *Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 824 (D. Mass. 1987) (approving class action settlement that provided different terms for present tenants than for former tenants, and holding that "I find that the division of the plaintiff class set out in the agreement . . . was reasonable and appropriate, and fairly reflects the reality of the business situation presented by this lawsuit").

77. The Objectors cite to two cases in support of their contention that Class Counsel were burdened by an impermissible conflict of interest: *Fiandaca* v. *Cunningham*, 827 F.2d 825 (1st Cir. 1987) and *Lewis* v. *National Football League*, 146 F.R.D. 5 (D.D.C. 1992). These cases are distinguishable from this case. In *Fiandaca*, lawyers for a class of female prisoners were seeking a new facility for their incarceration. The state offered to provide a facility which was then housing another class of individuals also represented by the same counsel. It was not in the interest of the second class for the female inmates to inhabit their building, thus creating a direct conflict of interest for the class counsel. No such conflict is presented in this case where present and future claimants are both seeking compensation for their injuries from the defendants, but there is no limited fund from which this compensation is to be paid. Similarly, in *Lewis*, a law firm was found to have a conflict of interest where it sought to represent a putative class of football players while the law firm, at the same time, was representing the player's association in a lawsuit against at least 20 individual members of the plaintiff class. In *Lewis*, there was direct adversity creating the impermissible conflict. There is no such adversity here.

78. The fact that, in 1992, CCR approached Mr. Motley, Mr. Rice, and Mr. Locks to see whether they were willing to

embark again on an effort to reach a global settlement, after the dissolution of the MDL negotiations, does not support the conclusion that Class Counsel had a conflict of interest. Given the history of the asbestos litigation and the prior settlement efforts, there was nothing about this procedure that created a conflict of interest here. Mr. Motley and Mr. Locks were the Co-chairs of the Plaintiffs' Steering Committee in the MDL. All three Class Counsel were unquestionably experienced, highly respected leaders of the plaintiffs' asbestos bar. FOF ¶¶ 178-184. Indeed, counsel for Objectors forthrightly stated that they were not challenging the qualifications or experience of Class Counsel. If CCR wanted to succeed in reaching a global settlement that a Court would approve, they had no choice but to hope to negotiate with such counsel.

79. The procedure followed here was not unlike the settlement procedure reviewed by the Court of Appeals for the Third Circuit in *Ace Heating & Plumbing Co.* v. *Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971). *Ace Heating* involved a settlement of a nationwide class of plumbing, mechanical and general contractor claimants in antitrust litigation. The defendants there attempted to negotiate a settlement with an ad-hoc plaintiffs' committee. After that effort reached an impasse, the defendants began settlement talks with another plaintiffs' attorney. The Court recognized that this procedure, where a lawyer "unofficially represents the class during settlement negotiations," can result in plaintiffs' counsel being "under strong pressure to conform to the defendants' wishes." *Id.* In these circumstances, where a settlement is not negotiated by a "court designated class representative the court must be doubly careful in evaluating the fairness of the settlement to plaintiff's class." *Id.* In *Ace Heating*, the Court, applying this heightened scrutiny, nevertheless concluded that the plaintiffs' negotiating counsel had effectively represented the class and that the settlement was fair. *Id.* at 35. Thus, applying the *Ace Heating* analysis

to the *Georgine* settlement, this Court concludes that the fact that CCR chose to negotiate with Messrs. Locks, Motley and Rice, who had not yet been designated as class counsel but who were publicly known to be accountable as co-lead counsel in the MDL proceedings or in other high profile cases, does not support a claim of ineffective representation or conflict of interest. *See also Bowling* v. *Pfizer*, 143 F.R.D. 141, 157 (S.D. Ohio 1992) (a settlement was not "flawed because settlement preceded class certification").

C. The Futures Provisions in the Inventory Settlements

80. Model Rule 5.6 (b) provides:

> A lawyer shall not participate in offering or making:
>
> . . . . .
>
> (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

81. Objectors contend that the futures provisions in the inventory settlement agreements violate this Model Rule and that this violation is evidence that Class Counsel had an impermissible conflict of interest.

82. The January 14, 1993 agreement and the August, October, and December 1992 letter agreements were superseded by the June 11, 1993 agreement and the July 9, 1993 letter agreement, respectively. FOF ¶¶ 220-221. This Court has already found that counsel intended to act ethically and that these agreements do not violate Model Rule 5.6(b) in that they do not factually create a binding obligation on the part of Class Counsel not to represent clients who may wish to sue CCR but who did not yet meet the *Georgine* medical criteria. FOF ¶¶ 214, 219, 232-233. Rather, the provisions represent a good faith commitment on the part of Class Counsel to recommend the *Georgine* medical criteria to their

clients while retaining their independence to conclude otherwise in an appropriate case. *Id.* at 233.

83. This Court need not decide, however, whether or not a state bar disciplinary board would conclude that these provisions technically violated Rule 5.6, since that issue is not before this Court in determining the adequacy of counsel. *See, e.g.*, *Rand* v. *Monsanto Co.*, 926 F.2d 596, 600, 601 (7th Cir. 1991); *Coles* v. *Marsh*, 560 F.2d 186, 189 (3d Cir. 1977) (both held that while various provisions of the Model Rules are useful as guides in assessing adequacy of counsel, they should not be so rigidly applied as to subvert the use of the class action device).

84. What is significant for this proceeding is that the futures provisions did not have any adverse or improper impact on the *Georgine* class. Based on the Findings of Fact, this Court concludes that the futures provisions did not restrict Class Counsel's negotiation of the *Georgine* Stipulation, they were superseded by subsequent provisions which did not restrict Class Counsel in their practice of law in any way, and they did not create an impermissible conflict of interest for Class Counsel. *See* FOF ¶¶ 213-233.

D. Collusion

85. Objectors here contend, based upon the testimony of Professor Coffee, that the *Georgine* settlement was the product of collusion. Professors Hazard and Dash testified to the contrary. FOF ¶¶ 251, 282.

86. Collusion is defined as follows:

> An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. *It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose.* A secret combination, conspiracy or concert of

> action between two or more persons for fraudulent or deceitful purpose.

Point Pleasant Canoe Rental, Inc. v. *Tinicum Township*, 110 F.R.D. 166, 169 (E.D. Pa. 1986) (emphasis added) (quoting *Black's Law Dictionary* 240 (5th ed. 1979).

87. Thus, in order for this Court to conclude that the *Georgine* settlement was the product of collusion, it would have to find that Class Counsel and the CCR defendants "sought to accomplish an improper purpose, perpetrated a fraud," and acted "secretively." *Id.* Acting secretly, moreover, does not mean "out of the public eye." *Id.* at 170. Intense negotiations necessarily must proceed with a limited number of actors; that does not make the negotiations collusive. *Id.* *See also Bowling* v. *Pfizer*, 143 F.R.D. 141, 156 (S.D. Ohio 1992) (holding "no requirement exists that either Class Counsel or the Defendants must inform other attorneys . . . about their negotiations").

88. Having carefully considered the testimony of Professors Coffee, Hazard, and Dash, the Report of Special Master Burbank, *see* FOF ¶¶ 251, 254-263, 282, and the record as a whole, this Court concludes that the *Georgine* settlement was not the product of collusion. Class Counsel did not receive a premium in settling their inventory cases, nor did they "sell out" the *Georgine* class. Also, there is no evidence that Class Counsel or CCR attempted to keep the fact of their negotiations secret. The terms of the *Georgine* settlement, including the definition of the class, compensation ranges, medical criteria, case flow provisions, and eligibility criteria reflect neither "improper" nor "fraudulent" conduct on behalf of Class Counsel or CCR.

89. Further, the Court concludes that the fact that the lawsuit and settlement were filed simultaneously, or the fact that defendant CCR members were searching for a global solution to the asbestos litigation, including the settlement of present cases if a solution could be found for the future, does

not support the conclusion that the *Georgine* settlement was the product of collusion. *See Bowling* v. *Pfizer, Inc.*, 143 F.R.D. 141, 154 n.13 (S.D. Ohio 1992) (holding that it is not collusion for the defendants to have a "yen for peace from the numerous lawsuits that [the defendant] had coped with since the mid-1980's").

E. Prior Conduct of Class Counsel

90. Objectors contend that Mr. Locks should be disqualified from serving as Class Counsel because of past conduct. Having considered the testimony of Professors Cramton, Hazard, and Freeman on this point, and the resulting findings of fact, *see* FOF ¶ 283, as well as the record as a whole, this Court concludes that the three instances referred to have no legal relevance to this proceeding. *See, e.g., Uniondale Beer Co.* v. *Anheuser-Busch, Inc.*, 117 F.R.D. 340, 343 (E.D.N.Y. 1987) (rejecting defendants' attempts to challenge plaintiff representatives "adequacy based on allegations of misconduct in unrelated actions," finding such a challenge to be "grasping at straws.")

F. Conclusion

91. This Court concludes that Class Counsel as highly competent, skilled and experienced members of the plaintiffs' asbestos bar, were exceedingly well qualified to serve as Class Counsel in this case and, based upon the foregoing findings of fact and conclusions of law, that they acted ethically and appropriately in negotiating the *Georgine* settlement, unburdened by any conflicting interests; that the *Georgine* settlement was not the product of fraud or deceit and, therefore, was not the product of collusion; and that Class Counsel vigorously and diligently negotiated this class action settlement in the best interests of the *Georgine* class members.

IV. ADEQUACY OF NOTICE

A. General Notice to Class

92. In a decision issued on October 27, 1993, this Court has already held, after extensive briefing and argument, that the notice materials and dissemination plan approved in this case satisfy the requirements of Fed. R. Civ. P. 23(c)(2) and (e) and the Due Process Clause of the Constitution. *Carlough* v. *Amchem Products, Inc.*, 1993 WL 472812, *20, U.S. Dist. LEXIS 15280, *66 (E.D. Pa. Oct. 27, 1993). *See also* FOF ¶¶ 284, 287-291. Nothing has occurred since that time to change this Court's prior conclusion which is incorporated herein.

93. As this Court held when approving the notice plan:

> Fed. R. Civ. P. 23(c)(2) requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). . . . Rule 23 does not require the parties to exhaust every *conceivable* method of identifying the individual class members. For those whose names and addresses cannot be determined by reasonable efforts, notice by publication will suffice under Rule 23(c)(2) and under the due process clause.
>
> . . . . .
>
> Rule 23(c)(2) requires that the notice "advise each member that (a) the court will exclude the member from the class if the member so requires by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if the member desires, enter an appearance through counsel."
>
> . . . . .

> Rule 23(e) simply states that "notice of the proposed . . . compromise shall be given to all members of the class in such manner as the court directs."

Carlough, 1993 WL 472812 at *7, *14-15, *15, 1993 U.S. Dist. LEXIS at *22-23, *48, *49 (citations omitted).

B. Notice to Longshoremen and Related Class Members

94. The Court rejects the argument made by some Objectors or *Amici* that the notice materials respecting the impact of the Stipulation of Settlement on the rights of class members covered by the LHWCA were materially misleading. The LHWCA provides benefits to employees in shipbuilding, repair and shipbreaking industries and longshoring operations who become disabled as a result of occupational injury. *See* 33 U.S.C. § 903(a). The LHWCA does not constitute the exclusive remedy for the occupational injury. Rather, the LHWCA permits a covered employee, in addition to making a claim against his employer, to bring suit against a third party alleging that the third party is also liable for his occupational injury, § 933. The affected employer is entitled to set-off any monies received by its employee in the third-party action against the LHWCA benefits that the employee would otherwise receive, § 933(f). In this regard, this Court concludes that the LHWCA requires that a line of distinction be drawn between judgments of the court against third parties and settlements with third parties. A LHWCA-covered employer must merely be given notice of a third-party claim resolved by *judgment*, § 933(g). In contrast, the LHWCA requires an employee to notify his employer and to secure the employer's written approval prior to accepting a monetary *settlement*, § 933(g)(1); 20 C.F.R. § 702.281(b) (1993).

95. This Court has conducted an extensive fairness hearing to determine whether the Stipulation of Settlement is fair and adequate to the class. This Court concludes that an

Order of this Court approving the Stipulation of Settlement, which represents its "independent finding of the value of the claim after full presentation of the evidence," *Morauer & Hartzell, Inc.* v. *E.D. Woodworth*, 439 F.2d 550, 553 (D.C. Cir. 1970) (per curiam), *cert. dismissed*, 404 U.S. 16, 92 S. Ct. 170, 30 L. Ed. 2d 136 (1971), constitutes a judgment. *See Grimes* v. *Vitalink Communications Corp.*, 17 F.3d 1553, 1557-58 (3d Cir. 1994) (where objecting class members have been provided with the "opportunity to address the court as to the reasons the proposed settlement is unfair or inadequate . . . [and] the court then rules as to the adequacy and fairness of the settlement," the settlement and release of claims "is not simply a contract entered into by private parties, but is one that has been given a stamp of approval by the court," and class members are bound by this judgment). This Court further concludes that the LHWCA requirement of employer notice of judgments is satisfied where the settling defendants provide notice of the Court's Final Order, within ninety (90) days, to all insurance carriers providing coverage for LHWCA covered employers who have registered with the United States Department of Labor for fiscal year 1994.

96. Some Objectors argue that there is a possibility that a subsequent tribunal may, in the future, conclude that this Court's Order constitutes a "settlement" and that, in such an event, this Order may act to work a forfeiture of LHWCA benefits available to class members. This Court considers this possibility to be quite remote. The LHWCA provides for employer notice of and consent to private third-party settlements in order to protect employers against potentially collusive or imprudent private settlements that may unfairly increase the employers' burden in paying LHWCA benefits. *Cretan* v. *Bethlehem Steel Corp.*, 1 F.3d 843, 846 (9th Cir. 1993). In accordance with this public policy, these concerns are not triggered here. Pursuant to Fed. R. Civ. P. 23(e), this Court has independently scrutinized this Stipulation of Settlement and has concluded that it is non-collusive and is

fair and reasonable to the plaintiff class. That being so, the Stipulation does not constitute a privately negotiated release between two private parties. It is for this reason that the authority cited to this Court interpreting § 933(g) requiring employer consent to unilateral private party monetary settlements is not on point here.

97. The LHWCA settlement provision concerns the settlement of a claim covered by that Act for a sum certain. This Court concludes that the Stipulation of Settlement will not affect a settlement of any claim by any class member for an asbestos-related injury for a sum certain.

98. To the contrary, the Stipulation of Settlement establishes an alternative dispute mechanism under which class members with qualifying claims may, in the future, seek to receive monetary compensation in settlement from the settling defendants.

99. For these added reasons, this Court concludes that its approval of the Stipulation of Settlement does not constitute a "settlement" as contemplated by § 933(g) or 20 C.F.R. § 702.281(b).

100. This Court further concludes that the employer notice and consent requirements of the LHWCA shall be triggered only when a class member presents a qualifying claim to the CCR. This Court concludes that class members will be adequately informed and reminded of these notice and consent requirements because these requirements shall be set forth by the settling defendants on the claim form that must be used to present all claims to the CCR. In the unlikely event a subsequent tribunal rules that this Court's Order does constitute a settlement with the effect of working a forfeiture of LHWCA rights of a class member, well settled law establishes that a class member would have a right to relief in an appropriate forum at that time.

C. Conclusion Regarding Notice to Class

101. The Final Notice Report filed with the Court in February 1994 showed that over 6.8 million persons, including individuals who were likely class members, received individually-delivered notice materials, and that millions more persons, including likely class members, were notified through media efforts. As this Court has found, FOF ¶ 300, the Final Notice Report and other evidence shows that the notice plan was implemented fully in accord with this Court's October 27, 1993 Order, and that extensive notice of the class action and proposed settlement was given to the class. Accordingly, the requirements of Rule 23 and the Due Process Clause have been wholly satisfied.

V. FINAL OMNIBUS CONCLUSIONS OF LAW REGARDING PROPOSED SETTLEMENT

102. In sum, this Court concludes that: (1) this Court has subject matter jurisdiction over this class action, *see* Memorandum Opinion, *supra*, at 1 & n.2; (2) the prerequisites for final class certification of the class as defined in the findings of fact are satisfied, *see* COL ¶¶ 1-24; (3) the terms of the Stipulation of Settlement are fair to the class as a whole pursuant to Fed. R. Civ. P. 23(e), *see* COL ¶¶ 25-57; (4) Class Counsel were qualified to represent the class and acted without conflict of interest, without collusion, and appropriately in negotiating the Stipulation of Settlement, *see* COL ¶¶ 58-91; and (5) the notice materials, the plan for and the actual dissemination of the notice satisfied the requirements of Fed. R. Civ. P. 23(c)(2) and (e) and the Due Process Clause of the Constitution, *see* COL ¶¶ 92-101.

103. The provisions of the Stipulation of Settlement will hereafter be made a part of the record in this case and will have the full force and effect of an Order of this Court.

CLOSING DISCUSSION[66]

No one disputes the notion that settlement is a preferred alternative to costly time-consuming litigation. This Court has been presented with an intricate comprehensive settlement plan on behalf of a nationwide opt-out class. The members of the class total conservatively in the tens of thousands and possibly as many as several hundred thousand or more. They are defined as workers or their family members who have been occupationally or secondarily exposed to asbestos products manufactured by at least one of the twenty settling defendants.

Unlike the tort system, the settlement provides certain and prompt cash compensation to all class members who have suffered impairment or death as a result of their exposure to asbestos. The CCR defendants, in exchange, have waived all liability defenses except proof of exposure to one of their asbestos products. To all those class members who do not suffer an impairing asbestos-related disease, the settlement provides certain benefits, including the right to certain cash compensation if and when they become sick.

Also unlike the tort system, the claim procedures under the Stipulation are essentially non-adversarial; most qualifying claims of persons actually disabled from demonstrable asbestos disease will be settled for sums within a range of dollar values similar to the historical values paid by CCR over recent years. These settlements will include limitations on claimants' counsel fees and binding arbitration for most exceptional and extraordinary claims. A small number of unusually exceptional and difficult claims will be allowed to return to the tort system.

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[66] This closing discussion and its commentary does not amend or change any of the foregoing Findings of Fact or Conclusions of Law. It is intended to supplement and support them.

The CCR defendants have committed to the payment of a likely $1.289 billion (plus $317 million in costs) to settle anticipated claims under the Stipulation over the first ten years of its operation. And, because CCR was able to reach the settlement in this class action, it has further committed an additional $1.626 billion over the next four years to settle the inventory of cases presently pending in the tort system.

This case has received a great deal of attention from the press and from the asbestos bar and has been the subject of much debate. However, this Court has been determined to decide the fairness and jurisdictional issues assigned to it fairly and objectively and to stay removed from the fray. This Court has been constantly aware of whose interests are ultimately at stake in this lawsuit: the class members and the defendants. And, this Court has been deliberate in its case management, allowing unprecedented discovery and pre-hearing procedures to take place over many months in preparation for the fairness hearing and has been appropriately expansive in the receipt of evidence.

The competent, comprehensive and hard-pressed advocacy of all of the objectors' counsel has indeed aided and improved this Court's analysis of the fairness of the settlement. The absence of such advocacy might have prevented this Court's thorough review of the objectors' concerns. This advocacy has been especially important because this settlement is not convention at all but rather is innovative and seeks a partial solution to a crisis that has plagued and overextended the Courts.

The extensive analysis by prestigious scholars and quasi-judicial bodies of the problem with asbestos litigation in the tort system, as well as the research and writing all outlined in the findings of fact above, have convinced this Court that the usually adequate conventional tort system, state and federal, must adopt far from conventional methods to compensate victims of disease and death as a result of

asbestos exposure. These methods, of course, must protect the rights of the parties concerned. The thoughtful distinguished authors, groups, panels, committees and the Judicial Panel on Multidistrict Litigation itself, have all encouraged the parties to proffer forms of all-encompassing settlement methods for present and future claims. This Court has concluded that the settlement plan presented to it in this case is fair and goes a long way toward meeting the goals sought to be achieved.

The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease. Indeed, this unimpaired victims have, in many states, been forced to assert their claims prematurely or risk giving up all rights to future compensation for any future lung cancer or mesothelioma. The plan which this Court approves today will correct that unfair result for the class members and the CCR defendants.

It might appear, as the objectors argue, that the financial stability and potential future profitability of the settling defendants in this case would augur against the need for, or approval of, any group settlement of the future claims of the asbestos victims exposed to their products. This Court has concluded to the contrary because of the series of bankruptcies of similarly viable companies which have succumbed to the onslaught of asbestos claims. The time to prevent bankruptcies is before they occur. This settlement allows reliable business and financial planning by the CCR defendants, designed to reasonably assure the availability of funds for the payment of these claims in the future. This not

only benefits the businesses but assures the victims that their claims will be paid.

This Court is convinced that the terms of the settlement before it were the result of arms-length adversarial negotiations by extraordinarily competent and experienced attorneys. The attorneys for the plaintiff class are highly respected members of the plaintiffs' asbestos bar, and it is clear to this Court that they intended to negotiate this settlement in compliance with the ethical rules governing the conduct of attorneys. This determination is based upon the evidence of the negotiations themselves, the testimony of the ethics experts and the legal conclusions recited above. Furthermore, the result of the negotiations, that is the settlement itself, is evidence that the attorneys involved were competent representatives of the class. This Court has determined that the terms of the settlement are fair and reasonable to the class and that the settlement itself is an innovative solution to a long-standing problem. The settlement calls for non-adversarial claims resolution procedures, sophisticated recognition of discreet asbestos-related diseases, and has been determined by some of the best medical experts in the field to cover almost all victims who are disabled or die as a result of their exposure to CCR asbestos products.[67]

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[67] This Court has recited in its findings of fact the detailed terms of the large sums of money which CCR has agreed to pay in settlement of Class Counsel's inventory of pending claims. Since CCR had determined to settle these claims for historical values, Class Counsel had a duty to their existing clients to resolve those claims. There is no persuasive evidence that these settlement agreements influenced the substance of the settlement presently before this Court for consideration.

This Court is also satisfied that the claims resolution procedures will be carried out fairly. While it is true that representatives of CCR will receive the medical data and make the settlement offers, liability has been virtually conceded and there is no basis for CCR to reject a qualified claim and no routine procedures for medical rebuttal by CCR. Under the Stipulation, if CCR does dispute a medical claim, it must meet a heavy burden of proving that the diagnosis was "clearly erroneous." CCR will be motivated to administer the plan fairly because CCR's performance is subject to audit by unencumbered separate class counsel and leaders of the AFL-CIO. CCR has agreed that these same auditors shall also have influence over the appointment of arbitrators and medical panel members. Beyond internal oversight, the incentive to act fairly is strong because of CCR's interest that the settlement succeed. Their plan to extend the settlement terms into the future as authorized by the Stipulation will be for naught if it does not. Finally, this Court will retain jurisdiction over the settlement by its approval of the settlement and incorporation of its terms into the final Order of this Court. Accordingly, the Court will have supervisory power to enforce the agreement.

This Court is confident that due process has been and will be given to the class victims covered by this settlement. As a result of the extensive and expensive notice procedure carried out by the settling parties and cooperating union leaders, over six million union members and retirees and members of the general population received actual notice materials. A national television and print media campaign costing millions of dollars reached millions more people. In short, a very large class received notice of this class action and of the settlement by a massive effort.

Those class members who were either disinterested in the settlement or who opposed the settlement, were given the opportunity to opt out of the class. Those persons who have properly opted out of this class will no longer be a concern

of this settlement and their rights and remedies are not changed.[68] Another group, the unimpaired class members, do not currently impact significantly upon the case flow predictions under this settlement. While many of them may qualify for benefits in the future, their deferral from entry into the case flow procedures unless and until they become ill will tend to insure that the case flow predictions and maximums will be achieved. Thus this Court is convinced that the large numbers of cases settled by or commenced against the CCR defendants since 1992 is in no way a prediction of the numbers of claims which will be made under this settlement and any argument to the contrary is not supported by the record.

In sum, this settlement is a fair solution for these parties to a problem that left alone would cause unfair results for the asbestos victims and predictably unfortunate financial downfall for these defendants. Just as the CCR defendants have an interest in the fair compensation of all victims of asbestos disease as a result of exposure to their products, asbestos victims who are in this class have an interest in the continued financial viability of the defendant companies so that they will receive historically-based values for their claims. The settlement approved here resolves these concerns.

An appropriate Order follows.

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[68] Although over two hundred thousand opt-out requests were received, the record is silent as to whether these persons are actually members of the class, are or ever will be qualified for damages in the tort system, or thus will ever enter the tort system.

EXHIBIT B

COMPENSATION SCHEDULE

Qualifying Claims

Compensable Medical Category	*Minimum*	*Negotiated Average Value Range*	*Maximum Value*
Mesothelioma	20,000	37,000-60,000	200,000
Lung Cancer	10,000	19,000-30,000	86,000
Other Cancer	5,000	9,500-12,500	32,000
Non-Malignant	2,500	5,800-7,500	30,000

Extraordinary Claims

Compensable Medical Category	*Negotiated Average Value*
Mesothelioma (3%)	300,000
Lung Cancer (3%)	125,000
Other Cancer (3%)	50,000
Non-Malignant Conditions (1%)	50,000

ORDER

AND NOW, this 16th day of August, 1994, pursuant to the Order of the Honorable Charles R. Weiner that this Court determine the issues related to the fairness of the proposed Stipulation of Settlement and the Rule to Show Cause issued by this Court on March 1, 1993 (Document No. 131), having held hearings and received evidence as to whether the class should be finally certified pursuant to Fed. R. Civ. P. 23(b)(3) and whether the Stipulation of Settlement of this class action (Document No. 5), as amended (Document No. 495), should be approved by the Court pursuant to Fed. R. Civ. P. 23(e), having concluded that the appointment of additional class counsel is necessary to conduct the oversight and supervisory responsibilities of class counsel under the Stipulation of Settlement, and based on the attached

memorandum opinion including findings of fact and conclusions of law, this Court concludes that: (1) the Court has subject matter jurisdiction over this class action, (2) the prerequisites for final class certification of the class as defined in the findings of fact are satisfied, (3) the terms of the Stipulation of Settlement, as amended, are fair to the class as a whole pursuant to Fed. R. Civ. P. 23(e), (4) Class Counsel were qualified to represent the class and acted without conflict of interest, without collusion, and appropriately in negotiating the Stipulation of Settlement, and (5) the notice materials, the plan for and the actual dissemination of the notice satisfied the requirements of Fed. R. Civ. P. 23(c)(2) and (e) and the Due Process Clause of the Constitution, and accordingly it is hereby **ORDERED** that an opt-out settlement class is finally **CERTIFIED** pursuant to Fed. R. Civ. P. 23(b)(3) as follows:

1. All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant or passenger ships), either occupationally or through occupational exposure of a spouse or household member, to asbestos or to asbestos containing products for which one or more of the defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury or damage, or death in any state or federal court against the defendant(s) (or against entities for whose actions or omissions the defendant(s) bear legal liability).

2. All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph 1 above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph 1 above in any state or federal court against the defendant(s) (or against entities for

whose actions or omissions the defendant(s) bear legal liability).

It is **FURTHER ORDERED** that the Stipulation of Settlement, as amended, is hereby **APPROVED** as fair to the class as a whole pursuant to Fed. R. Civ. P. 23(e).

It is **FURTHER ORDERED** that the provisions of the Stipulation of Settlement, as amended, are hereby made part of the record in this case and as such shall have the full force and effect of an Order of this Court.

Because there are pending matters and motions which may affect the final resolution of this class action, this is not a final appealable Order.

LOWELL A. REED, JR., J.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOS. 94-1925, 94-1927, 94-1928, 94-1929, 94-1930, 94-1931, 94-1932, 94-1960, 94-1968, 94-2009, 94-2010, 94-2011, 94-2012, 94-2013, 94-2066, 94-2067, 94-2068, 94-2085, 95-1705

ROBERT A. GEORGINE; LAVERNE WINBUN, EXECUTRIX OF THE ESTATE OF JOSEPH E. WINBUN, DECEASED, AND IN HER OWN RIGHT; AMBROSE VOGT, JR.; JOANNE VOGT, HIS WIFE; CARLOS RAVER; DOROTHY M. RAVER, HIS WIFE; TIMOTHY MURPHY; GAY MURPHY, HIS WIFE; TY T. ANNAS; ANNA MARIE BAUMGARTNER, EXECUTRIX OF THE ESTATE OF JOHN A. BAUMGARTNER, DECEASED; NAFSSICA KEKRIDES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF PAVLOS KEKRIDES, DECEASED; WILLIAM H. SYLVESTER, EXECUTOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF FRED A. SYLVESTER, DECEASED

v.

AMCHEM PRODUCTS, INC.; A.P. GREEN INDUSTRIES, INC.; ARMSTRONG WORLD INDUSTRIES, INC.; ERTAINTEED CORPORATION; C.E. THURSTON & SONS, INC.; DANA CORPORATION; FERODO AMERICA, INC.; FLEXITALLIC, INC.; GAF BUILDING MATERIALS, INC.; I.U. NORTH AMERICA, INC.; MAREMONT CORPORATION; **ASBESTOS CLAIMS MANAGEMENT CORP; NATIONAL SERVICES INDUSTRIES, INC.; NOSROC CORPORATION; PFIZER, INC.; QUIGLEY COMPANY, INC.; SHOOK & FLETCHER INSULATION COMPANY; T&N, PLC; **UNION CARBIDE CORPORATION; UNITED STATES GYPSUM COMPANY

v.

ADMIRAL INSURANCE COMPANY; AFFILIATED FM INSURANCE COMPANY; AIU INSURANCE COMPANY; ALLIANZ INSURANCE COMPANY; ALLIANZ UNDERWRITERS INSURANCE COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO ALLIANZ UNDERWRITERS, INC.; ALLSTATE INSURANCE COMPANY, AS SUCCESSOR TO NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY; AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA; AMERICAN CENTENNIAL INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; AMERICAN MOTORISTS INSURANCE COMPANY; AMERICAN RE-INSURANCE COMPANY; APPALACHIAN INSURANCE COMPANY OF PROVIDENCE; ARGONAUT INSURANCE COMPANY; ATLANTA INTERNATIONAL INSURANCE COMPANY; CAISSE INDUSTRIELLE D'ASSURANCE MUTUELLE; C.E. HEATH COMPENSATION AND LIABILITY INSURANCE COMPANY AS SUCCESSOR TO EMPLOYERS' SURPLUS LINE INSURANCE COMPANY; CENTENNIAL INSURANCE COMPANY; CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA; CHICAGO INSURANCE COMPANY; CITY INSURANCE COMPANY; COLONIA VERSICHERUNG, AKTIENGESELLSCHAFT; COLUMBIA CASUALTY COMPANY; COMMERCIAL UNION INSURANCE COMPANY, AS SUCCESSOR TO COLUMBIA CASUALTY COMPANY, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY OF AMERICA, AND EMPLOYERS' LIABILITY ASSURANCE CORPORATION LIMITED; COMPAGNIE EUROPEENNE DE REASSURANCES; THE CONSTITUTION STATE INSURANCE COMPANY; CONTINENTAL CASUALTY COMPANY; EMPLOYERS MUTUAL CASUALTY COMPANY; EVANSTON INSURANCE COMPANY; EXECUTIVE REINDEMNITY INC., AS SUCCESSOR TO AMERICAN EXCESS INSURANCE COMPANY; FEDERAL INSURANCE COMPANY; GENERAL REINSURANCE CORPORATION; GIBRALTAR CASUALTY COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY; GRANITE STATE INSURANCE COMPANY; HIGHLANDS INSURANCE COMPANY; THE HOME INDEMNITY COMPANY; THE HOME INSURANCE COMPANY; HOUSTON GENERAL INSURANCE

COMPANY; HUDSON INSURANCE COMPANY; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; INTERSTATE FIRE & CASUALTY COMPANY; JEFFERSON INSURANCE COMPANY OF NEW YORK; LANDMARK INSURANCE COMPANY; LA PRESERVATRICE FONCIERE TIARD, INDIVIDUALLY AND AS SUCCESSOR TO LA FONCIERE ASSURANCES TRANSPORTS ACCIDENTS AND LA PRESERVATRICE; LE SECOURS; LEXINGTON INSURANCE COMPANY; LILLOISE D'ASSURANCES, AS SUCCESSOR TO LILLOISE D'ASSURANCES ET DE REASSURANCES; LUMBERMENS MUTUAL CASUALTY COMPANY; MARYLAND CASUALTY COMPANY; MICHIGAN MUTUAL INSURANCE COMPANY; MUTUELLE GENERALE FRANCAISE; NATIONAL AMERICAN INSURANCE COMPANY OF CALIFORNIA, AS SUCCESSOR TO THE STUYVESANT INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; NORTHBROOK INDEMNITY COMPANY; NORTH STAR REINSURANCE CORPORATION; OLD REPUBLIC INSURANCE COMPANY; PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY; THE PROTECTIVE NATIONAL INSURANCE COMPANY OF OMAHA; PRUDENTIAL REINSURANCE COMPANY; PURITAN INSURANCE COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO THE MANHATTAN FIRE AND MARINE INSURANCE COMPANY; RANGER INSURANCE COMPANY; REPUBLIC INSURANCE COMPANY; SAFECO INSURANCE COMPANY OF AMERICA; SAFETY NATIONAL CASUALTY CORPORATION, AS SUCCESSOR TO SAFETY MUTUAL CASUALTY CORPORATION; ST. PAUL FIRE AND MARINE INSURANCE COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO BIRMINGHAM FIRE INSURANCE COMPANY; ST. PAUL GUARDIAN INSURANCE COMPANY; STONEWALL INSURANCE COMPANY; STONEWALL SURPLUS LINES INSURANCE COMPANY; SUN ALLIANCE AND LONDON INSURANCE PLC; TOKIO MARINE & FIRE INSURANCE COMPANY, LIMITED; THE TRAVELERS INDEMNITY COMPANY; THE TRAVELERS INSURANCE COMPANY; UNIGARD SECURITY INSURANCE COMPANY, AS SUCCESSOR TO UNIGARD MUTUAL

INSURANCE COMPANY; UNION DES ASSURANCES DE PARIS; YOSEMITE INSURANCE COMPANY; EURINCO ALLEGEMEINE VERSICHERUNGS, A.G.; F&M INSURANCE COMPANY, LTD.; LA CONCORDE; LEXINGTON INSURANCE COMPANY, LTD.; L'UNION ATLANTIQUE S.A. D'ASSURANCES; N.V. ROTTERDAMSE ASSURANTIEKAS PER MEES & ZOONEN; NATIONAL CONTINENTAL INSURANCE COMPANY AS SUCCESSOR TO AMERICAN STAR INSURANCE COMPANY; NEWFOUNDLAND AMERICAN INSURANCE CO., LTD.; NEW HAMPSHIRE INSURANCE COMPANY, LTD.; PHOENIX ASSURANCE; RELIANCE INSURANCE COMPANY; SIRIUS (UK) INSURANCE COMPANY, PLC; TRIDENT GENERAL INSURANCE COMPANY; GREAT AMERICAN INSURANCE COMPANY; AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY, AS AUTHORIZED AGENT ON BEHALF OF TRANSPORT INDEMNITY COMPANY

*George Windsor; Constance Windsor, Michael Windsor and Karen Windsor,

Appellants in Nos. 94-1925/2009

*White Lung Association of New Jersey, National Asbestos Victims Legal Action Organizing Committee, the Oil, Chemical, and Atomic Workers International Union, The Skilled Trades Association, Myles O'Malley, Marta Figueroa, Robert Fiore, Roh Maher, and Lynn Maher, (in her own behalf and as next friend for her minor children, Jessica Marie Maher, Jamie Marion Maher, and Jennifer Megan Maher),

Appellants in Nos. 94-1927/1968

*Richard R. Preston, Sr. and Louis C. Anderson,

Appellants in Nos. 94-1928/2013

*Albert and Margaret Hertler,

Appellants in No. 94-1929

*Richard E. Blanchard, D.D.S., Jack S. Boston, James L. Anderson, Personal Representative of Robert L. Anderson and Harrison O. McLeod,

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*Joe and Lynne Dominguez,

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*Kathryn Toy, individually, and as representative of the estate of Edward Toy,

Appellants in Nos. 94-2068

*John Paul Smith,

Appellant in No. 94-2085

*Casimir Balonis, Margaret Balonis and Shepard A. Hoffman,

Appellants in No. 95-1705

*(Pursuant to F.R.A.P. Rule 12(a))

**(Pursuant to Clerk's Order dated 11/9/94)

On Appeal From the United States District Court
For the Eastern District of Pennsylvania

D.C. Civ. No. 93-cv-00215

Before: BECKER, GREENBERG, and WELLFORD,

Circuit Judges.[*]

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel November 21, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court certifying the plaintiff class dated August 16, 1994 and entered on the docket August 17, 1994, be, and the same is hereby vacated and the cause remanded to the said District Court with direction to decertify the class. It is further ordered and adjudged that the injunction granted by the said District Court by order dated September 21, 1994 and entered on the docket September 22, 1994 is also vacated. Each party to bear its own costs. All of the above in accordance with the opinion of this Court.

ATTEST

/s/ P. Douglas Sisk
Clerk

Dated: May 10, 1996

[*] Honorable Harry W. Wellford, United States Circuit Judge for the Sixth Circuit, sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 94-1925, 94-1927, 94-1928, 94-1929, 94-1930, 94-1931, 94-1932, 94-1960, 94-1968, 94-2009, 94-2010, 94-2011, 94-2012, 94-2013, 94-2066, 94-2067, 94-2068, 94-2085, 95-1705

ROBERT A. GEORGINE; LAVERNE WINBUN, EXECUTRIX OF THE ESTATE OF JOSEPH E. WINBUN, DECEASED, AND IN HER OWN RIGHT; AMBROSE VOGT, JR.; JOANNE VOGT, HIS WIFE; CARLOS RAVER; DOROTHY M. RAVER, HIS WIFE; TIMOTHY MURPHY; GAY MURPHY, HIS WIFE; TY T. ANNAS; ANNA MARIE BAUMGARTNER, EXECUTRIX OF THE ESTATE OF JOHN A. BAUMGARTNER, DECEASED; NAFSSICA KEKRIDES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF PAVLOS KEKRIDES, DECEASED; WILLIAM H. SYLVESTER, EXECUTOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF FRED A. SYLVESTER, DECEASED

v.

AMCHEM PRODUCTS, INC.; A.P. GREEN INDUSTRIES, INC.; ARMSTRONG WORLD INDUSTRIES, INC.; CERTAINTEED CORPORATION; C.E. THURSTON & SONS, INC.; DANA CORPORATION; FERODO AMERICA, INC.; FLEXITALLIC, INC.; GAF BUILDING MATERIALS, INC.; I.U. NORTH AMERICA, INC.; MAREMONT CORPORATION; **ASBESTOS CLAIMS MANAGEMENT CORP; NATIONAL SERVICES INDUSTRIES, INC.; NOSROC CORPORATION; PFIZER, INC.; QUIGLEY COMPANY, INC.; SHOOK & FLETCHER INSULATION COMPANY; T&N, PLC; **UNION CARBIDE CORPORATION; UNITED STATES GYPSUM COMPANY

v.

ADMIRAL INSURANCE COMPANY; AFFILIATED FM INSURANCE COMPANY; AIU INSURANCE COMPANY; ALLIANZ INSURANCE COMPANY; ALLIANZ UNDERWRITERS INSURANCE COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO ALLIANZ UNDERWRITERS, INC.; ALLSTATE INSURANCE COMPANY, AS SUCCESSOR TO NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY; AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA; AMERICAN CENTENNIAL INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; AMERICAN MOTORISTS INSURANCE COMPANY; AMERICAN RE-INSURANCE COMPANY; APPALACHIAN INSURANCE COMPANY OF PROVIDENCE; ARGONAUT INSURANCE COMPANY; ATLANTA INTERNATIONAL INSURANCE COMPANY; CAISSE INDUSTRIELLE D'ASSURANCE MUTUELLE; C.E. HEATH COMPENSATION AND LIABILITY INSURANCE COMPANY AS SUCCESSOR TO EMPLOYERS' SURPLUS LINE INSURANCE COMPANY; CENTENNIAL INSURANCE COMPANY; CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA; CHICAGO INSURANCE COMPANY; CITY INSURANCE COMPANY; COLONIA VERSICHERUNG, AKTIENGESELLSCHAFT; COLUMBIA CASUALTY COMPANY; COMMERCIAL UNION INSURANCE COMPANY, AS SUCCESSOR TO COLUMBIA CASUALTY COMPANY, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY OF AMERICA, AND EMPLOYERS' LIABILITY ASSURANCE CORPORATION LIMITED; COMPAGNIE EUROPEENNE DE REASSURANCES; THE CONSTITUTION STATE INSURANCE COMPANY; CONTINENTAL CASUALTY COMPANY; EMPLOYERS MUTUAL CASUALTY COMPANY; EVANSTON INSURANCE COMPANY; EXECUTIVE RE INDEMNITY INC., AS SUCCESSOR TO AMERICAN EXCESS INSURANCE COMPANY; FEDERAL INSURANCE COMPANY; GENERAL REINSURANCE CORPORATION; GIBRALTAR CASUALTY COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY; GRANITE STATE INSURANCE COMPANY; HIGHLANDS INSURANCE COMPANY; THE HOME INDEMNITY COMPANY; THE HOME INSURANCE COMPANY; HOUSTON GENERAL INSURANCE

COMPANY; HUDSON INSURANCE COMPANY; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; INTERSTATE FIRE & CASUALTY COMPANY; JEFFERSON INSURANCE COMPANY OF NEW YORK; LANDMARK INSURANCE COMPANY; LA PRESERVATRICE FONCIERE TIARD, INDIVIDUALLY AND AS SUCCESSOR TO LA FONCIERE ASSURANCES TRANSPORTS ACCIDENTS AND LA PRESERVATRICE; LE SECOURS; LEXINGTON INSURANCE COMPANY; LILLOISE D'ASSURANCES, AS SUCESSOR TO LILLOISE D'ASSURANCES ET DE REASSURANCES; LUMBERMENS MUTUAL CASUALTY COMPANY; MARYLAND CASUALTY COMPANY; MICHIGAN MUTUAL INSURANCE COMPANY; MUTUELLE GENERALE FRANCAISE; NATIONAL AMERICAN INSURANCE COMPANY OF CALIFORNIA, AS SUCCESSOR TO THE STUYVESANT INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; NORTHBROOK INDEMNITY COMPANY; NORTH STAR REINSURANCE CORPORATION; OLD REPUBLIC INSURANCE COMPANY; PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY; THE PROTECTIVE NATIONAL INSURANCE COMPANY OF OMAHA; PRUDENTIAL REINSURANCE COMPANY; PURITAN INSURANCE COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO THE MANHATTAN FIRE AND MARINE INSURANCE COMPANY; RANGER INSURANCE COMPANY; REPUBLIC INSURANCE COMPANY; SAFECO INSURANCE COMPANY OF AMERICA; SAFETY NATIONAL CASUALTY CORPORATION, AS SUCCESSOR TO SAFETY MUTUAL CASUALTY CORPORATION; ST. PAUL FIRE AND MARINE INSURANCE COMPANY, INDIVIDUALLY AND AS SUCCESSOR TO BIRMINGHAM FIRE INSURANCE COMPANY; ST. PAUL GUARDIAN INSURANCE COMPANY; STONEWALL INSURANCE COMPANY; STEONEWALL SURPLUS LINES INSURANCE COMPANY; SUN ALLIANCE AND LONDON INSURANCE PLC; TOKIO MARINE & FIRE INSURANCE COMPANY, LIMITED; THE TRAVELERS INDEMNITY COMPANY; THE TRAVELERS INSURANCE COMPANY; UNIGARD SECURITY INSURANCE COMPANY, AS SUCCESSOR TO UNIGARD MUTUAL

INSURANCE COMPANY; UNION DES ASSURANCES DE PARIS; YOSEMITE INSURANCE COMPANY; EURINCO ALLEGEMEINE VERSICHERUNGS, A.G.; F&M INSURANCE COMPANY, LTD.; LA CONCORDE; LEXINGTON INSURANCE COMPANY, LTD.; L'UNION ATLANTIQUE S.A. D'ASSURANCES; N.V. ROTTERDAMSE ASSURANTIEKAS PER MEES & ZOONEN; NATIONAL CONTINENTAL INSURANCE COMPANY AS SUCCESSOR TO AMERICAN STAR INSURANCE COMPANY; NEWFOUNDLAND AMERICAN INSURANCE CO., LTD.; NEW HAMPSHIRE INSURANCE COMPANY, LTD.; PHOENIX ASSURANCE; RELIANCE INSURANCE COMPANY; SIRIUS (UK) INSURANCE COMPANY, PLC; TRIDENT GENERAL INSURANCE COMPANY; GREAT AMERICAN INSURANCE COMPANY; AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY, AS AUTHORIZED AGENT ON BEHALF OF TRANSPORT INDEMNITY COMPANY

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*Richard R. Preston, Sr. and Louis C. Anderson,

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Appellants in No. 94-1929

*Richard E. Blanchard, D.D.S., Jack S. Boston, James L. Anderson, Personal Representative of Robert L. Anderson and Harrison O. McLeod,

Appellants in Nos. 94-1930/2066

*Iona Cunningham, as representative of the estate of Charles Cunningham, and Twila Sneed,

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*William J. Golt, Sr. and Phyllis Golt,

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*Joe and Lynne Dominguez,

Appellants in No. 94-2067

*Kathryn Toy, individually, and as representative of the estate of Edward Toy,

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*John Paul Smith,

Appellant in No. 94-2085

*Casimir Balonis, Margaret Balonis and Shepard A. Hoffman,

Appellants in No. 95-1705

*(Pursuant to F.R.A.P. Rule 12(a))

**(Pursuant to Clerk's Order dated 11/9/94)

(D.C. Civ. No. 93-cv-00215)

Present: BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, SAROKIN, *Circuit Judges* and WELLFORD,[1] *District Judge*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition of plaintiffs/appellees Robert A. Georgine, et al., on behalf of themselves and all others similarly situated, and of defendants/appellees Amchem, Products, Inc. Ltd. (other than GAF Corporation) for rehearing having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

Judge Scirica would grant rehearing.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

Dated: June 27, 1996

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[1] As to panel rehearing only.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 94-1925, 1927, 1928, 1929, 1930, 1931, 1932, 1960, 1968, 2009, 2010, 2011, 2012, 2013, 2066, 2067, 2068, 2085, and 95-1705

Re: *Georgine et al.* v. *Amchem Products et al.*

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until August 19, 1996.

/s/ Edward R. Becker
Circuit Judge

Dated: July 3, 1996

APPENDIX G

RULE INVOLVED

Federal Rule of Civil Procedure 23 provides in pertinent part:

(a) **Prerequisites to a Class Action**. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable**. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

APPENDIX H

Petitioners are Amchem Products, Inc., A.P. Green Industries, Inc., Armstrong World Industries, Inc., Certainteed Corporation, C.E. Thurston & Sons, Inc., Dana Corporation, Ferodo America, Inc., Flexitallic, Inc., GAF Building Materials, Inc., I.U. North America, Inc., Maremont Corporation, Asbestos Claims Management Corporation, National Services Industries, Inc., Nosroc Corporation, Pfizer Inc., Quigley Company, Inc., Shook & Fletcher Insulation Company, T&N, plc, Union Carbide Corporation, and United States Gypsum Company.

Respondents are the parties objecting to the settlement —

George Windsor Constance Windsor, Michael Windsor, Karen Windsor, White Lung Association of New Jersey, National Asbestos Victims Legal Action Organizing Committee, the Oil, Chemical, and Atomic Workers International Union, The Skilled Trades Association, Myles O'Malley, Marta Figueroa, Robert Fiore, Roh Maher, and Lynn Maher, (in her own behalf and as next friend for her minor children, Jessica Marie Maher, Jamie Marion Maher, and Jennifer Megan Maher), Richard R. Preston, Sr. and Louis C. Anderson, Albert and Margaret Hertler, Richard E. Blanchard, D.D.S., Jack S. Boston, James L. Anderson, Personal Representative of Robert L. Anderson and Harrison 0. McLeod, Iona Cunningham, as representative of the estate of Charles Cunningham, Twila Sneed, Aileen Cargile, Betty Francom, John Wong, John Soteriou, Harold Hans Emmerich and Thomas Corey, William J. Golt, Sr. and Phyllis Golt, Joe and Lynne Dominguez, Kathryn Toy, individually, and as representative of the estate of Edward Toy, John Paul Smith, Casimir Balonis, Margaret Balonis and Shepard A. Hoffman

the named plaintiffs --

Robert A. Georgine; Laverne Winbun, Executrix Of The Estate Of Joseph E. Winbun, Deceased, And In Her Own Right; Ambrose Vogt, Jr.; Joanne Vogt, His Wife; Carlos Raver; Dorothy M. Raver, His Wife; Timothy Murphy; Gay Murphy, His Wife; Ty T. Annas; Anna Marie Baumgartner, Executrix Of The Estate Of John A. Baumgartner, Deceased; Nafssica Kekrides, Individually And As Administratrix Of The Estate Of Pavlos Kekrides, Deceased; William H. Sylvester, Executor And Personal Representative Of The Estate Of Fred A. Sylvester, Deceased;

and the defendants in a third party insurance claim --

Admiral Insurance Company; Affiliated FM Insurance Company; AIU Insurance Company; Allianz Insurance Company; Allianz Underwriters Insurance Company, Individually and as successor to Allianz Underwriters, Inc.; Allstate Insurance Company, As successor to Northbrook Excess and Surplus Insurance Company; American Bankers Insurance Company of Florida; American Centennial Insurance Company; American Home Assurance Company; American Motorists Insurance Company; American Re-Insurance Company; Appalachian Insurance Company of Providence; Argonaut Insurance Company; Atlanta International Insurance Company; Caisse Industrielle d'Assurance Mutuelle; C.E. Heath Compensation and Liability Insurance Company as successor to Employers' Surplus Line Insurance Company; Centennial Insurance Company; Central National Insurance Company of Omaha; Chicago Insurance Company; City Insurance Company; Colonia Versicherung, Aktiengesellschaft; Columbia Casualty Company; Commercial Union Insurance Company, as successor to Columbia Casualty Company, Employers Commercial Union Insurance Company, Employers Commercial Union Insurance Company of America, and Employers' Liability

Assurance Corporation Limited; Compagnie Europeenne de Reassurances; The Constitution State Insurance Company; Continental Casualty Company; Employers Mutual Casualty Company; Evanston Insurance Company; Executive Re Indemnity Inc., As successor to American Excess Insurance Company; Federal Insurance Company; General Reinsurance Corporation; Gibraltar Casualty Company; Government Employees Insurance Company; Granite State Insurance Company; Highlands Insurance Company; The Home Indemnity Company; The Home Insurance Company; Houston General Insurance Company; Hudson Insurance Company; Insurance Company Of the State of Pennsylvania; Interstate Fire & Casualty Company; Jefferson Insurance Company Of New York; Landmark Insurance Company; La Preservatrice Fonciere Tiard, Individually and as successor to La Fonciere Assurances Transports Accidents and La Preservatrice; Le Secours; Lexington Insurance Company; Lilloise d'Assurances, as sucessor to Lilloise d'Assurances et de Reassurances; Lumbermens Mutual Casualty Company; Maryland Casualty Company; Michigan Mutual Insurance Company; Mutuelle Generale Francaise; National American Insurance Company Of California, as successor to the Stuyvesant Insurance Company; National Union Fire Insurance Company Of Pittsburgh, PA; Northbrook Indemnity Company; North Star Reinsurance Corporation; Old Republic Insurance Company; Pennsylvania Manufacturers' Association Insurance Company; The Protective National Insurance Company of Omaha; Prudential Reinsurance Company; Puritan Insurance Company, individually and as successor to The Manhattan Fire And Marine Insurance Company; Ranger Insurance Company; Republic Insurance Company; Safeco Insurance Company of America; Safety National Casualty Corporation, as successor to Safety Mutual Casualty Corporation; St. Paul Fire and Marine

Insurance Company, individually and as successor to Birmingham Fire Insurance Company; St. Paul Guardian Insurance Company; Stonewall Insurance Company; Steonewall Surplus Lines Insurance Company; Sun Alliance and London Insurance PLC; Tokio Marine & Fire Insurance Company, Limited; The Travelers Indemnity Company; The Travelers Insurance Company; Unigard Security Insurance Company, as successor to Unigard Mutual Insurance Company; Union des Assurances de Paris; Yosemite Insurance Company; Eurinco Allegemeine Versicherungs, A.G.; F&M Insurance Company, Ltd.; La Concorde; Lexington Insurance Company, Ltd.; L'union Atlantique S.A. d'Assurances; N.V. Rotterdamse Assurantiekas Per Mees & Zoonen; National Continental Insurance Company as successor to American Star Insurance Company; Newfoundland American Insurance Co., Ltd.; New Hampshire Insurance Company, Ltd.; Phoenix Assurance; Reliance Insurance Company; Sirius (UK) Insurance Company, PLC; Trident General Insurance Company; Great American Insurance Company; American Empire Surplus Lines Insurance Company, as authorized agent on behalf of Transport Indemnity Company.

Petitioners' parent companies and nonwholly owned subsidiaries are described in the following chart:

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
Amchem Products, Inc.	Rhone-Poulenc Group	None
A.P. Green Industries, Inc.	None	1. A.P. Green de Mexico S.A. de C.V. 2. Lanxide ThermoComposites, Inc. 3. INTOGREEN Co. 4. Empresa de Refractarios Colombianos, S.A. 5. Palmetto Lime LLC
Armstrong World Industries, Inc.	None	1. DAL Tile
Asbestos Claims Management Corp. (formerly known as National Gypsum Co.)	None	None

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
CertainTeed Corporation	Compagnie de Saint Gobain (Paris, France)	North American Entities: 1. Bell-Foster Glass Container Co., LLC 2. Brunswick Technologies, Inc. 3. Carborundum Corporation (Norton) 4. Carborundum Caribbean, Inc. 5. Carborundum Ceramic Holdings, Inc. 6. Carborundum Resistant Materials Ltd. 7. Carborundum Specialty Products Inc. 8. Exel Limited 9. GRP Inc. 10. Insulate LLC 11. N E Technology Inc. (Norton) 12. Norton Advanced Materials Corporation 13. Norton-Alcoa Proppants 14. Norton Chemical Process Products Corporation 15. Norton Company (Cont'd)

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
CertainTeed Corporation (Cont'd)		16. Norton Company Foundation, Inc. 17. Norton East Asia, Inc. 18. Norton Foreign Affiliates Holding Corporation 19. Norton International, Inc. 20. Norton Performance Plastics Corporation 21. Norton Process Services, Inc. 22. Norton Proppants, Inc. 23. Penhall Diamond Products Company (Norton) 24. SCT-B, Incorporated (Norton) 25. Saint-Gobain Advanced Materials Corporation (Norton) 26. Saint-Gobain/Norton Industrial Ceramics Corporation 27. Thoratec Laboratories Corporation 28. Vitesse Electronics Corporation 29. Vitesse Semiconductor Corporation (Cont'd)

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
CertainTeed Corporation (Cont'd)		30. Wavemat, Inc. 31. XL Insurance Company Limited Foreign Entities: 1. Bioron Products Prebatt Limited (India) 2. Bioron Vertriebs GmbH (Germany) 3. Carborundum Abrasives 4. Carborundum Advanced Ceramics Company (Japan) 5. Carborundum Realty Pty. Ltd. (Australia) 6. Christensen Roder Produtos Diamantados Ltda. (Brazil) 7. Cora Abrasives, Inc. (Canada) 8. CRML Superannuation Pty. Ltd. (Norton-Australia) 9. Duck River Properties Pty., Ltd. (Australia) (Cont'd)

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
CertainTeed Corporation (Cont'd)		10. Field Norton Ltd. (Zimbabwe) 11. Grindwell Norton Ltd. (India) 12. Hamilton Porcelains Ltd. (Canada) 13. Kure-Norton Co., Ltd. (Japan) 14. Lincoln Helios (India) Ltd. 15. Nippon Bioron (Japan) 16. Norton Advanced Ceramics of Canada Inc./Norton Ceramiques Avancees du Canada Inc. (Canada) 17. Norton (FSC) B.V. (Netherlands) 18. Norton Canada Inc. (Canada) 19. Norton Capital Inc. (Canada) 20. Norton Company de Mexico, S.A. de C.V. (Mexico) 21. Norton Co. Ltd. (Korea) 22. Norton Insurance Limited (Bermuda) 23. Norton Kabushiki Kaisha (Norton KK) (Japan) 24. Norton New Zealand Ltd. (New Zealand) 25. Nortonmas Sdn. Bhd. (Malaysia) (Cont'd)

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
CertainTeed Corporation (Cont'd)		26. Norton Performance Plastics Co. Ltd. (Taiwan, Republic of China) 27. Norton Performance Plastics (Shanghai) 28. Norton Pte. Ltd. (Singapore) 29. Norton Pty. Ltd. (Australia) 30. Payema Holdings Limited (New Zealand; formerly Norton (New Zealand) (Ltd.) 31. PT Norton Hampias Industries (Indonesia) 32. Polyfluoro Private Limited (India) 33. Productos Mexalk, S.A. 34. Shanghai Norton Abrasives Company Ltd. (Peoples Republic of China) 35. Toshiba-Monofrax Co. Ltd. (Japan)
C.E. Thurston and Sons, Inc.	None	None

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
Dana Corporation		Domestic: 1. Elastomeric Actuators, Inc. 2. Albarus, Inc. 3. GemStone Gasket Company 4. CID Partnership, L.P. 5. Warner Bernstein Sentec Company 6. Expo Service Corporation 7. Pumley Marugo, Ltd. 8. DSA of America, Inc. 9. Perfect Circle Valve Seals, L.L.C. 10. Midwest Housing Investments J.V., Inc. 11. Britannia Properties, Inc. 12. Hickory Pointe Developer 13. Lance Pointe Developers 14. Springdale Park 15. BAT Pamers, L.P. 16. Blue Diamond Limited Partnership 17. D.C.L. Leasing Partners Limited Partnership, Ltd.-IV 18. D.C.L. Leasing Partners Limited Partnership, Ltd.-VI (Cont'd)

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
Dana Corporation (Cont'd)		19. Linden Owner Partnership 20. Lomas Mortgage Partnership, L.P. 21. LUZ Solar Partners, IV Ltd. 22. Ogden Martin Systems of Onondaga Limited Partnership 23. SAM Terabac Limited Partnership 24. Scrubgrass Generating Company, L.P. 25. Terabac Investors Limited Partnership 26. Express Stop Financing 27. Graybar Financial Services 28. Pleasant View of North Vernon, L.P. 29. Prestwick Square of Jeffersonville, L.P. 30. Stonegate Apartments of Cambridge City Associates, L.P. International: 1. Formtech, Inc. 2. Spicer, S.A. 3. Autometales, S.A. de C.V. C.V. (Cont'd)

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
Dana Corporation (Cont'd)		4. Autopar Distribuidors S.A. de C.V. 5. Autoprecisa, S.A. de C.V. 6. Cardanes, S.A. de C.V. 7. Corporacion Immobilliaria 8. D.M. Nacional, S.A. de C.V. 9. Commercial D.M. National 10. Industrial Ruiz Galindo 11. Plataformas y Automotriz, S.A. de C.V. 12. Mayoreo Indusrial y Automotriz, S.A. de C.V. 13. Dimset D.M., S.A. de C.V. 14. Immobillaria Industrial deAragon, S.A. de C.V. 15. DirecSpicer, S.A. de C.V. 16. Ejes Tractivos, S.A. de C.V. 17. Engranes Conicos, S.A. de C.V. 18. Forjes Spicer, S.A. de C.V. 19. Servispicer Vallejo, S.A. de C.V. 20. T.F. Victor S.A. de C.V. 21. Transmisiones Para Servicio Pesado, S.A. de C.V. (Cont'd)

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
Dana Corporation (Cont'd)		22. Velcon, S.A. de C.V. 23. Villa Industrial 24. Centro de Desarrollo Industrial, S.A. de C.V. 25. Transmission y Equipos Mecanicos, S.A. de C.V. 26. Industrias Sibesa, S.A. de C.V. 27. Air Refiner de Mexico S.A. de C.V. 28. Tianjin Wix Filter Corp. 29. Shenyang Spicer Driveshaft Co. Ltd. 30. Najico Spicer Co., Ltd. 31. Nippon Reinz Co. Ltd. 32. Korea Spicer Corporation 33. R.O.C. Spicer Ltd. 34. Taiway Ltd. 35. ROC - Keeper Ltd. 36. Timing Investments Limited 37. Talyin Enterprise Ltd. 38. ROC Spicer Investment Co., Ltd. 39. Shenyang Spicer Limited (Cont'd)

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
Dana Corporation (Cont'd)		40. Dana Asia (Taiwan) APD Co., Ltd. 41. Danteen Co., Ltd. (f.k.a. Spicer Tailand) 42. Dana Asia (Thailand) Ltd. 43. Spicer Asia (Thailand) Ltd. 44. Floquet Monopole S.A. 45. Societe Industrielle de Precision Marti, S.A. 46. Societe de Reconditionnement Industriel de Moteurs S.A. (S.R.I.M.) 47. Autoclavite S.A. 48. Perfect Circle Victor, Ltd. 49. Perfect Circle Victor Exports Limited 50. Spicer India Limited 51. Reinz Talbros Ltd. 52. Reinz Gasket Limited 53. Stieber Precision Pvt. Ltd. 54. Industrias Serva S.A. 55. Glaser Serva S.A. 56. E. Daneri, I.C.S.A. (Cont'd)

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
Dana Corporation (Cont'd)		57. AROS Daneri, S.A. 58. Danargen, S.A.I.C. 59. Centrust S.A. 60. Farlock S.A. 61. Estampados Argentinos Sociedad Anonima (EASA) 62. Albarus, S.A. Industrial E Comerico 63. Pellegrino Autopecas Industrial e Comerico Ltda. 64. CIDAP - Industrial e Distribuldora de Aurtopecas Ltda. (Dormant) 65. Albarus Sistemas Hidrauilcos Ltda. 66. ATH - Albarus Trasnmissoes Homocineticas Ltda. 67. Albarus S.A. Comercial e Exportadora 68. Cirane Industria e Comercio Ltda. 69. Previalbarus Societe de Providencia 70. SIMESC 71. MSP Limited (Cont'd)

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
Dana Corporation (Cont'd)		72. Industria De Ejes Y Transmissiones S.A. (Transejes) 73. TH de Columbia S.A. 74. Repsa S.A. 75. Transejes C.D. Ltda. 76. Transcar Ltda. 77. Transmotor Ltda. 78. Manufacturas Victor Gaskets de Colombia, S.A. 79. Comercializadora Victor Ltda. (Comvicol) 80. Blenville, S.A. 81. Trinasa 82. ECASOL 83. NORBILC+O S.A. 84. UBALI S.A. 85. Metalmecanica Consolidads, C.A. (Metalcon) 86. C.A. Danaven 87. Tuboauto (Cont'd)

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
Dana Corporation (Cont'd)		88. Metalmechanic Supply & Equip. S.A. (Panama) 89. Gates de Venezuela S.A. 90. Distributora S.H. S.A. 91. Wix de Venezuela C.A. 92. Inversiones Industriales 93. United Insurance Company 94. ACE Insurance 95. Wrenford Insurance Company Limited
Ferodo America, Inc.	T&N, plc.	1. Ferodo Holdings, Inc. 2. Ferodo Automotive Products, Inc.
Flexitallic, Inc.	T&N, plc.	
GAF Building Materials Corp.	G I Industries Corp., G-I Holdings, Inc., GAF Corp.	None
I.U. North America, Inc.	EnviroSource, Inc.	None

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
Maremont Corp.	Arvin Industries, Inc.	1. Cadia S.A. (Peru) 2. Fric Rot Argentina 3. Gabriel de Venezuela 4. Gabriel de Mexico 5. Gabriel India, Ltd.
National Service Industries, Inc.	None	None
Nosroc Corporation	EnviroSource, Inc.	None

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
Pfizer Inc.	None	USA: None International: 1. Pfizer Biogal L.L.C. 2. Pfizer Holding Mexico, S. de R.L. de C.V. 3. Laboratoires Pfizer S.A. 4. Pfizer European Service Center N.V. 5. N.V./S.A. 6. Pfizer Internationl Bank Europe 7. Pfizer Egypt S.A.E. 8. Pfizer Limited (Ghana) 9. Pfizer Limited (India) 10. PT Pfizer Indonesia 11. Livestock Feeds PLC 12. Pfizer Products PLC 13. Pfizer Laboratories Limited 14. Pfizer Korea Limited (Cont'd)

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
Pfizer Inc. (Cont'd)		15. Pfizer Holding Und Verwaltungs G.m.b.H. 16. Pfizer Holdings Ireland 17. Howmedica Iberica S.A. 18. Pfizer Pharm Algeria SPA 19. Bioindustria Farmaceutici S.p.A. 20. Restiva S.r.l. 21. SudFarms S.r.l. 22. Pfizer S.A. 23. Pfizer Pharmaceuticals Ltd.
Quigley Company, Inc.	Pfizer, Inc.	None
Shook & Fletcher Insulation Co.	None	None

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
T&N, plc.	None	USA: None Worldwide: 1. Yoosung Pm Industrial Company Ltd. 2. Equtter SA de CV 3. Goetze (Asia)(Pte) Ltd. 4. T&N Holdings Limited 5. AE Pistons (Pty) Ltd. 6. T&N Friction Products (Pty) Ltd. 7. AE Bearings (Pty) Ltd. 8. AE Engine Parts (Pty) Ltd. 9. Payen Components South Africa Ltd. 10. Fhe Automotive Technologies (Pty) Ltd. 11. Silverton Engineering (Pty) Ltd. 12. Silverton Services Ltd. 13. T&N Dereli Holdings A.S. 14. Goetze Istanbul Segman 15. Istanbul Motor Pistons 16. Goetze Istanbul Motor Pistons (Cont'd)

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
T&N, Plc. (Cont'd)		17. Flexitallic de Venezuela CA 18. Baileys Roofing (Pvt) Ltd. 19. AE Goetze & TP Limited 20. AE Goetze (Argentina) 21. Buxton SA 22. König KG 23. Varga Ferodo AS 24. Nanchang Payen Limited Liability Company 25. Anqing TP Goetze Piston Ring Company Limited 26. Central China Ferodo Friction Materials Company Limited 27. Ferodo A.S. 28. Elko Motorenteile Gmbh 29. Eriks Metal Gaskets B.V. 30. Brico Goetze (India) Limited 31. Ferodo India Pvt Limited 32. India Pistons Limited 33. Goetze (India) Limited 34. Aeip Precision Products Limited (Cont'd)

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
T&N, plc. (Cont'd)		35. Talbros Automotive Components Limited 36. Pars Washer Industrial Manufacturing Company Limited 37. Ghods Chemical Industries Ltd. 38. Catai Srl 39. Japan Brake Industrial Company Limited 40. Sanwa Packing Industry Company Limited 41. Korea Beral Ltd. 42. Dongsuh Industrial Company Limited

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
Union Carbide Corp.	None	1. ACM Services Inc. 2. American Acetyls 3. Asia Pacific Phenolics Sdn. Bhd. 4. Asian Acetyls Co., Ltd. 5. C&M Finance and Trading B.V. 6. Equate Marketing Company E.C. 7. Equate Petrochemical Co. K.S.C. 8. Katallstiks International, Inc. 9. International Diagnostic Systems Corp. 10. Keran Limited 11. Nippon Unlear Company Limited 12. Pollmari Europe S.R.L. 13. Polypropylene Partnership 14. RC Development Associates Limited 15. Seadrift Polypropylene Company 16. Tenngasco Gas Gathering Company 17. UCAR Interam EXXON 18. Union Carbide Argentine S.A.I.C.S. 19. Union Carbide Benelux N.V. 20. Union Carbide Italia S.R.L. 21. Union Carbide Lanka Limited (Cont'd)

PETITIONER	PARENT	NON-WHOLLY OWNED SUBSIDIARIES
Union Carbide Corp. (Cont'd)		22. Union Carbide Marble Care, Inc. 23. Union Carbide Pakistan (Private) Limited 24. Union Polymers Sdn Bhd 25. Vicking do Brasil S.A. 26. World Ethanol Company
United States Gypsum Co.	USG Corporation	None

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No. 96-270

In the Supreme Court of the United States

OCTOBER TERM 1995

AMCHEM PRODUCTS, INC. *et al.*,
Petitioners

v.

GEORGE WINDSOR, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS GEORGE WINDSOR, *et al.*

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September 30, 1996

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PARTIES TO THE PROCEEDING

The parties below are listed in the appendix at 292a. The respondents who were appellants below and who are represented in this Brief in Opposition are George, Constance, Michael and Karen Windsor, Richard R. Preston, Sr., Louis C. Andersen, Albert and Margaret Hertler, Richard E. Blanchard, Jack J. Boston, James Anderson, Harrison O. McLeod, William J. Golt, Sr. and Phyllis Golt, Joe and Lynne Dominguez, Kathryn Toy, and John Paul Smith.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents George Windsor, *et al.*, hereby oppose the petition for writ of certiorari filed by Amchem Products, *et al.*

STATEMENT OF THE CASE

This case involves an unprecedented "settlement class action" seeking to resolve the present and future unaccrued claims of millions of largely unidentifiable individuals who have been exposed to the asbestos products of the twenty companies known as the Center for Claims Resolution (CCR). Most notably, the settlement would extinguish asbestos-related causes of action of individuals who currently suffer no physical injuries but who may, in the future, develop possibly fatal diseases caused by asbestos. The settlement would impose what the Third Circuit deemed a quasi-legislative measure (*see* App. 18a, 58a-59a)[1] to extinguish "futures claims" by "exposure-only" plaintiffs even though those claims have not yet accrued and even though those plaintiffs may not know who they are.

The Court of Appeals properly held that the instant class action could not meet the requirements of Rule 23. The Court of Appeals also expressed "serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction over absent class members." App. 19a. The Third Circuit explained that it was compelled to reject the settling parties' radical proposal:

> [I]n doing so, we avoid a serious rend in the garment of the federal judiciary that would result from the Court, even with the noblest motives, exercising power that it

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[1] Citations to the Appendix to the Petition for Certiorari are styled "App. __." Citations to the Petition for Certiorari are styled "Pet. __." Citations to the Joint Appendix in the Court of Appeals are styled "J.A. __."

> lacks. We thus leave legislative solutions to legislative channels.

App. 20a. The Court of Appeals was plainly correct, and its judgment should not be disturbed.

1. Background Facts and Procedural History. This unprecedented proceeding began in an extraordinary fashion. After judicially sponsored attempts to negotiate settlements of *pending* asbestos cases had stalled (Pet. 4), petitioners "approached" class counsel (not the other way around) in an effort to resolve *future* asbestos claims *before they accrued*. J.A. 1237. Petitioners later testified that they "decided to target" Gene Locks and Ron Motley, the plaintiffs' attorneys who eventually became class counsel in this case. J.A. 1191. As CCR's chief executive officer put it, "We picked them." *Id.* Prior to suit, petitioners agreed to pay class counsel's fees as part of the stipulation of settlement (J.A. 421) — in effect agreeing to pay the fees of a supposed opponent for instituting a class action against them.

While putative class counsel were negotiating on behalf of the as-yet-unformed class of future claimants, they simultaneously represented about 14,000 plaintiffs who had already filed lawsuits against petitioners. Before the class negotiation concluded, class counsel settled those "present" cases with petitioners for a total of $215 million in cash, including attorneys fees of approximately $70 million. J.A. 1399. Also prior to suit, class counsel entered into fallback side agreements, enforceable if the class action settlement fell through, that would contractually prevent class counsel from filing "exposure-only" or other claims against petitioners that did not meet the stringent medical criteria ultimately included in the class action settlement. J.A. 1197-98, 1394-98.

On Jan. 15, 1993, petitioners and counsel for the putative class simultaneously filed a class action complaint, an answer by the defendants, a joint motion by the parties to certify the case as a class action "for settlement purposes only," and the

proposed settlement that petitioners had previously negotiated with their own hand-picked attorneys for the plaintiff class. There were no motions, no discovery requests, and no preliminary litigation of any kind. In a very real sense, this case was settled before it was filed.

The class that the plaintiffs purport to represent, described by the Third Circuit as "humongous" (App. 42a), includes all persons (and present and future family members) who were occupationally exposed to petitioners' asbestos products but who (whether injured or not) had not filed suit as of Jan. 15, 1993. The selection of that date as an artificial boundary allowed class counsel to gerrymander the class to exclude their then-existing inventories of asbestos plaintiffs, whose cases were settled outside the class action on dramatically different terms. *See* Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1051-64 (1995); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1393-95 (1995). The class comprises both individuals who currently have asbestos-related illnesses (and survivors of persons who have already died of asbestos-related diseases), and other individuals (probably numbering in the millions)[2] who were occupationally exposed to asbestos but who have not yet developed, and may never develop, any physical injuries related to the exposure.

Five of the nine named plaintiffs alleged that they had sustained physical injuries as a result of petitioners' asbestos products. Four of the named plaintiffs, however, expressly alleged that, although they had been exposed to petitioners' asbestos-containing products, they had not yet sustained an asbestos-related "condition." J.A. 270-77. These exposure-

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[2] *See Jackson v. Johns Manville Sales Corp.*, 750 F.2d 1314, 1323 (5th Cir. 1985) (en banc) (estimated 21 million Americans have been exposed to asbestos).

only representative plaintiffs conceded in discovery and in sworn testimony at the fairness hearing that "absent the settlement, they did not intend to pursue the claims in the class complaint. They claimed *no damages* and *no present injury*." App. 66a (Wellford, J., concurring)(emphasis added).

The settlement would resolve all claims for asbestos-related physical injuries that have occurred or may occur in the future by channelling the claims to an administrative claims process to be established and operated by petitioners. The administrative process requires that claimants satisfy strict medical criteria (more stringent than otherwise applicable state law) in order to qualify for payment of compensation. Petitioners will then offer compensation to qualifying claimants in amounts within a predetermined range, but the settlement caps both the number of claims that can be paid in any given year and the amount that can be paid to individual claimants.

The Court of Appeals catalogued the salient features of the settlement. Payment under the settlement is not adjusted for inflation. App. 25a, 50a. The settlement theoretically allows claimants dissatisfied with the compensation offered by petitioners to "exit" to the tort system, but drastically limits the number who can do so to "a few persons per year." App. 49a. Further, although the plaintiffs are bound to the settlement in perpetuity, the defendants are not: each defendant is free to withdraw from the settlement after ten years. *Id.* at 25a-26a.

Moreover, the claims asserted by the exposure-only plaintiffs — claims for increased risk of cancer, fear of future asbestos-related injury, and medical monitoring — receive no payment under the stipulation of settlement. App. 49a. In addition, "pleural" claims, which involve asbestos-related plaques on the lungs, "receive no cash compensation, even though such claims regularly receive substantial monetary payments in the tort system." App. 26a.

Unrebutted evidence indicates that approximately half the claims that are filed in state and federal court, and paid by

petitioners, would not qualify for payment under the exposure and medical criteria contained in the settlement. J.A. 1363, 1379. In addition, the stipulation of settlement is much stingier than the "inventory settlements" paid by petitioners to plaintiff class counsel in the $215 million side agreement just prior to the commencement of the instant action. App. 24a, 30a-31a, 48-49a. Individual clients in the inventory settlements received a 54% premium over the maximum average payment under the class action.[3] And the terms of the inventory settlement provided for cash payments to many present clients who would not have qualified for any compensation under the terms of the class settlement. J.A. 1248-49, 1300-01.

2. The District Court's Decision. Two weeks after suit was filed, the district court conditionally certified the proposed class without any notice to putative class members, without a hearing, and without the receipt of evidence. J.A. 452.

Respondents and other absent class members challenged the class action and settlement under Fed.R.Civ.P. 23, the "case or controversy" requirement of Article III, standing, due process, 28 U.S.C. § 1332 (relating to amount-in-controversy subject-matter jurisdiction), and on other grounds. Joined by labor unions, asbestos victims' groups, and the States of Texas and Alabama, respondents also vigorously challenged the fairness of the proposed settlement. Thirty-seven law professors who teach or write in the area of professional responsibility submitted an amicus brief contending that insuperable conflicts of interest existed within the plaintiff class and between class counsel and their supposed clients.[4]

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[3] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1397 (1995).

[4] Dist. Ct. Dkt. No. 991 (Apr. 4, 1994). The district court refused to permit the brief to be filed. Dkt. No. 1010 (Apr. 11, 1994). For further criticisms of the settlement's fairness, see Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV.

For their part, petitioners conceded on the record that "this case cannot meet the various requirements of Rules 23(a) and 23(b) when viewed as a litigation class." J.A. 456-57. Petitioners acknowledged that the case had not been "brought for the purpose of litigation" nor had it been "actually litigated for some period of time," but was instead "brought for purposes of settlement only." Fourth Supp. App. in Ct. App. 23-24. Indeed, petitioners averred that "asbestos claims cannot be fairly handled in mass proceedings" because "each claim is different with respect to most elements of each plaintiff's cause of action." Second Supp. App. in Ct. App. 45. Petitioners also admitted that the "claim" asserted in the class action was "not a 'claim' of the usual kind," and the settlement "did not resolve any previously asserted claim ... [but] was in substance an agreement structuring the future resolution of as yet unasserted claims." *Id.* at 18.

The district court denied all objections to jurisdiction and certification, ruled that the settlement was fair to the class, and tentatively approved the settlement. The court did not enter a final, appealable judgment, in part because of the pendency of a third-party action by petitioners against their insurers seeking a declaration that their settlement did not violate any provision of their insurance policies. App. 24a n.4, 276a. The district court did, however, enter a preliminary injunction prohibiting class members from filing asbestos-related damages suits against petitioners in the state or federal courts, effectively requiring class members to pursue any asbestos-related claims against petitioners under the terms of the settlement.

3. The Court of Appeals' Decision. On appeal, respondents and other objecting class members could challenge only the preliminary injunction; attacks on the district court's non-final determination under Rule 23(e) that the settlement

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1045 (1995); Roger Parloff, *The Tort That Ate the Constitution*, AMERICAN LAWYER, July/August 1994, at 75.

was fair were reserved for any appeal from a final judgment. Hence, petitioners' attempt to attach significance to the fact that the district court's fairness decision "was not challenged" in the appeal from the injunction (Pet. 5, 8) is a canard.

The Third Circuit vacated the injunction and remanded the case to the district court with instructions to decertify the class. It expressed "serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction," but elected to pass over these issues because it deemed the class certification question dispositive. App. 19a. The Third Circuit held that the class could not meet the Rule 23(a) requirements of typicality and adequacy of representation, or the Rule 23(b)(3) requirements of predominance and superiority. The court explained that "the class members' claims vary widely in character." App. 41a. Class members were exposed to "different asbestos-containing products, for different amounts of time, in different ways, and over different periods." *Id.* The court concluded that:

> These factual differences translate into significant legal differences. Differences in amount of exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff.

Id. The court also noted that the application of at least 50 different sets of state laws in this nationwide diversity class action would "exponentially" compound the problem. *Id.* at 41a-42a.

With respect to adequacy of representation, the Court of Appeals held that "serious intra-class conflicts preclude this class from meeting the adequacy of representation requirement" of Rule 23(a)(4). App. 49a. The court explained that "the settlement makes numerous decisions on which the interests of different types of class members are at odds." *Id.* For example, "under the settlement many kinds of claimants (*e.g.*,

those with asymptomatic pleural thickening) get no monetary award at all." *Id.*

> The settlement makes no provision for medical monitoring or for payment for loss of consortium. The back-end opt out is limited to a few persons per year. The settlement relegates those who are unlucky enough to contract mesothelioma in ten or fifteen years to a modest recovery, whereas the average recovery of mesothelioma plaintiffs in the tort system runs into the millions of dollars.

Id. Moreover, the settlement exacerbates conflicts between "exposure-only" plaintiffs whose claims will arise in the future, and currently injured victims:

> [T]hose who are not yet injured would want reduced current payouts (through caps on compensation awards and limits on the number of claims that can be paid each year). The futures plaintiffs should also be interested in protection against inflation, in not having preset limits on how many cases can be handled, and in limiting the ability of defendant companies to exit the settlement. Moreover, in terms of the structure of the alternative dispute resolution mechanism established by the settlement, they should desire causation provisions that can keep pace with changing science and medicine, rather than freezing in place the science of 1993. Finally, because of the difficulty in forecasting what their futures hold, they would probably desire a delayed opt out....

Id. at 50a. On each of these points, the interests of "exposure-only" plaintiff class members were diametrically opposed to those of currently injured class members.

Further, the Court of Appeals found that Rule 23(b)(3)'s requirement that the class action be "superior to other available methods for the fair and efficient adjudication of the controversy" was not satisfied in part because the settlement's denial of delayed opt-out rights to currently uninjured class members raised "serious fairness concerns." App. 57a. In making this determination, the court explicitly cited the relevant provisions of the settlement denying class members opt-out rights if and when they developed an asbestos-related injury. *Id.* at 56a n.16.[5]

In a concurring opinion, Judge Wellford "fully subscribe[d]" to the panel's decision "that the plaintiffs in this case have not met the requirements of Rule 23," App. 60a, but wrote separately to express the view that the exposure-only plaintiffs, who "claimed no damages and no present injury ... had no standing to pursue this class action suit" and hence could not be bound by the result. *Id.* at 66a.

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[5] Petitioners assert that "all class members were afforded a reasonable opportunity to opt out of the class." Pet. 6. But the Third Circuit expressed "serious doubts" as to the adequacy of notice in this case (App. 19a, 33a) and opined that the "[p]roblems in adequately notifying and informing exposure-only plaintiffs of what is at stake in this class action may be insurmountable." *Id.* at 55a. Specifically, the court pointed out that because asbestos-related illnesses like mesothelioma may be caused by slight and incidental exposure to asbestos, many currently uninjured class members may not know that they have been exposed to asbestos within the terms of the class definition. *Id.* Even if they know of their exposure, the court added, such as yet uninjured class members "may pay little attention to class action announcements" and are "unlikely to be on notice that they can give up causes of action that have not yet accrued." *Id.* And even if those currently uninjured class members find out about the class action and realize that they fall within the class definition, the court noted, "they may lack adequate information to properly evaluate whether to opt out of the settlement." *Id.* at 56a. The court declined to rule on the "powerful three-pronged argument" that the notice provided by the settling parties in this case "did not meet the requirements of Rule 23 or the Constitution," *id.* at 31a, because it found the class certification issues dispositive. *Id.* at 33a-34a.

REASONS FOR DENYING THE WRIT

Petitioners rely heavily on misdirection. They allege that the Third Circuit ignored the existence of the settlement in deciding whether the requirements of Rule 23 were satisfied, when precisely the opposite is true. Once petitioners' smokescreen is cleared away, it is plain that the Third Circuit's judgment is correct and should not be disturbed.

I. PETITIONERS DO NOT CHALLENGE THE COURT OF APPEALS' JUDGMENT, BUT SEEK ONLY TO REVISE THE COURT OF APPEALS' OPINION.

As petitioners would have it, the Question Presented is whether a district court considering a settlement-only class action "must ... ignore the existence of the settlement in determining whether class certification is appropriate." Pet. at i. But far from ignoring the settlement, the Court of Appeals expressly considered it in applying several of Rule 23's requirements. The court carefully examined the settlement's terms in the course of holding that the class failed the Rule 23(a)(4) requirement of adequacy of representation, and the Rule 23(b)(3) requirement that the class action be "superior" to other available methods for the "fair" adjudication of the controversy.

Those holdings constitute independent grounds for the judgment below that the Question Presented simply does not encompass. However this Court might resolve that question, the answer would not alter the judgment below. Petitioners' request for an advisory opinion regarding the Third Circuit's analysis of *other* requirements of Rule 23, which arguably did not consider the settlement, is therefore foreclosed by the principle that this Court's "power is to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945); *see also Texas v. Hopwood*, 116 S.Ct. 2581,

2581 (1996) (Ginsburg, J., joined by Souter, J., respecting the denial of certiorari).

Petitioners contend that:

> [T]he Third Circuit's insistence on applying all of the Rule 23 factors "without taking into account the settlement" (App. 48a-51a) equally infected its conclusion that class members hypothetically had different interests in pursuing their claims, thereby rendering class counsel inadequate.

Pet. 29. This quotation that petitioners purport to extract from the opinion below is, to be blunt, a rank fabrication. That language about not "taking into account the settlement" simply does not appear on the pages cited, nor anywhere else in the Third Circuit's discussion of adequacy of representation.[6] In truth, the very centerpiece of the Third Circuit's analysis under Rule 23(a)(4) is a searching examination of the settlement's terms that reveals insuperable structural conflicts of interest within the class. The Court of Appeals' opinion describes the

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[6] Petitioners may be quoting (but misciting) App. 39a. Petitioners also perpetrate other misrepresentations of the record and opinions below. At page 29 of their petition they invoke supposedly "unchallenged factual findings" by the district court that "there is no antagonism of interest" among class members. But what petitioners cite (App. 230a) was not an "unchallenged" finding of fact at all, but a *conclusion of law* about adequacy of representation that was simply *reversed* by the unanimous Third Circuit holding that the class was rife with structural conflicts. The Court of Appeals did not question the district court's findings on the qualifications of class counsel (App. 49a); but those findings were irrelevant to the *structural* conflicts of interest within the class that the Third Circuit deemed fatal. *See* App. 49a-52a. The other district court findings cited by petitioners (Pet. 29) pertain *not* to adequacy of representation, but to the supposed substantive fairness of the settlement itself. *See* App. 115a-176a, 234a-248a. Petitioners apparently believe that they can bootstrap a determination of fairness under Rule 23(e) into a determination of adequate representation under Rule 23(a)(4). They are wrong. Rule 23's requirements are cumulative and independent, not alternative. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974).

multiple ways in which the interests of various segments of the class in this case conflict with respect to the settlement's allocation of recovery — in particular, the ways that the interests of future claimants are adverse to those of presently injured class members. App. 49a-51a. The failure of the proposed class to meet the representation requirement is an independent basis for the judgment below that is beyond the scope of the Question Presented.

The Third Circuit also concluded, again as an independent ground for its judgment, that this case does not satisfy the "superiority" requirement of Rule 23(b)(3), which involves tests of both efficiency (the manageability of the class action) and fairness to the absent class members. App. 54a. The court expressly considered the fairness component of Rule 23(b)(3) in light of the settlement. App. 54a-57a. The Court of Appeals held that the superiority requirement could not be met because of the patent unfairness of the settlement's release of future claims: "some plaintiffs would be bound despite a complete lack of knowledge of the existence or terms of the class action." App. at 57a.

In sum, far from ignoring the settlement, the court discussed its terms in detail, and those terms provided the basis for its holdings that the class failed both the Rule 23(a)(4) adequacy-of-representation test and the Rule 23(b)(3) superiority test. Because the petitioners' Question Presented asks only whether the court could permissibly ignore the settlement in considering the class certification criteria, no answer to their question could alter the Third Circuit's *judgment*, even if it might offer this Court an opportunity to revise *part* of the Third Circuit's *opinion*. The petition should therefore be denied.[7]

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[7] Ironically, petitioners contend that one of the reasons for this Court's denial of certiorari in *In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) (*GM Trucks*), was that the Third Circuit had included an "alternative and independent ground" for its decision — its conclusion that the settlement was unfair. Pet. at 16 n.12. However, in *GM Trucks*, unlike this case, the petitioners sought review by this Court of *both* of the Third Circuit's holdings. *See* Cert. Petition in No. 94-2137 at i. Thus, while in *GM Trucks* this Court might have altered the lower court's judgment by granting certiorari on both of the questions presented by the petitioners, a grant in this case *cannot* affect the Third Circuit's judgment because the petition does not encompass all of that court's independent rationales for vacating class certification.

II. REVIEW SHOULD BE DENIED REGARDLESS OF HOW THIS COURT MIGHT DECIDE THE QUESTION PRESENTED, BECAUSE THE PLAINTIFF CLASS HAS ABANDONED THIS CLASS ACTION.

This class action no longer involves a plaintiff class. No class representatives have sought certiorari. No plaintiffs' class counsel has joined the asbestos defendants' petition, nor has any separate petition on behalf of the plaintiff class been served on respondents. Thus, the named plaintiffs have acquiesced in the judgment of the Third Circuit. Only the defendant asbestos manufacturers seek certiorari in an attempt to defend class certification, yet with respect to that issue the defendants have no legal duties to the class whose interests are at stake. Consequently, the defendants' plea for judicial intervention to save a settlement that they are promoting as a panacea for docket congestion is entirely divorced from any actual class action. The defendants are flying solo.

As objectors in the courts below, the respondents challenged, *inter alia*, the typicality of the class representatives' claims and the adequacy of their representation of the class's interests. The Court of Appeals validated these challenges and decertified the class. These prerequisites for class certification under Rule 23 are of course designed to protect the absent members of the plaintiff class, rather than the defendants. These requirements are therefore the responsibility not of the

defendants who appear as petitioners here, but of the plaintiff class representatives and their class counsel, *who do not appear here in any capacity*.

It is unclear whether the defendants are purporting to represent the absent class, or whether the defendants are simply asking this Court to reinstate the class action for defendants' sake, without regard to whether it serves the interests of the plaintiff class and without regard to whether that class is adequately (or indeed *at all*) represented here. Now that the class counsel and the class representatives have abandoned the responsibility of acting as guardians of the plaintiff class — in the wake of the Third Circuit's ruling that they were incapable of adequately performing that role — the fox seems eager to take over the job of guarding the henhouse. This the petitioning asbestos company defendants surely may not do.

Even if the petitioners were to prevail before this Court on the narrow Rule 23 question they have presented, their victory celebration would be the sound of one hand clapping, because the class representatives and their class counsel appear to have flown the coop. If this orchestrated class action was ever adversarial — which the court below doubted, *see* App. 19a, 30a-31a — it certainly isn't anymore. It takes two to tango, and the defendant petitioners cannot sue themselves. *See Keene Corp. v. Fiorelli*, 14 F.3d 726 (2d Cir. 1993). Nor can they assume the role of policing and auditing their own operation of the settlement's administrative claims process, a task that the settlement expressly accorded not to them but to the now absent class counsel. App. 200a. Simply put, the defendants cannot foist their longed-for class action and their cherished settlement proposal on a plaintiff class that has abandoned the case.[8]

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[8] Respondents have been informed by one of the former class counsel that class counsel no longer support the settlement. Whatever class counsel's motivation for refusing to join the defendants' petition, and whatever the class representatives' own reasons for deciding not to seek review, the fact remains that this is now a "class action" without a "class."

The issues lurking in this case, while not squarely presented for review here, are far too important to be considered by this Court in a vacuum. Yet the absence of the erstwhile plaintiff class representatives and their class counsel has created just such a void and has rendered this case wholly unsuitable for addressing the supposed uncertainty in the law of class actions that petitioners believe the decision below has fostered. The Court should await a better, less contingent, less hypothetical and less bizarre case in which to address Rule 23 in the settlement class context.

III. REVIEW IS UNWARRANTED BECAUSE THE COURT OF APPEALS' JUDGMENT IS PLAINLY CORRECT.

Review is inappropriate for the further reason that the Court of Appeals' judgment is demonstrably correct. The Third Circuit properly held that the putative class could not meet the predominance requirement of Rule 23(b)(3), the adequacy of representation requirement of Rule 23(a)(4), the typicality requirement of Rule 23(a)(3), or the superiority requirement of Rule 23(b)(3).

1. The Third Circuit's application of the adequacy of representation and superiority requirements is not in serious dispute. Petitioners' only argument is that the Third Circuit should have considered the settlement in applying those requirements. But the Court of Appeals did precisely that.

Nor did the Court of Appeals err with respect to the typicality and predominance requirements. There is only one version of Fed.R.Civ.P. 23. As the Court of Appeals observed, "'[t]here is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes.'" App. 38a. That omission explains the current effort

by some members of the Judicial Conference's Advisory Committee on Civil Rules to create new, relaxed criteria for settlement classes. App. 58a.

The plain language of the typicality and predominance requirements in the current Rule 23 — which petitioners carefully avoid quoting[9] — strongly supports the Third Circuit's view. The typicality standard of Rule 23(a)(3) requires a court to examine "the claims or defenses of the representative parties" and "the claims or defenses of the class." This language obviously refers to *legal claims* and defenses that class members could assert in court against an opposing litigant — not to abstract or generalized *interests* that class members might have in a settlement. Similarly, the predominance requirement refers to "questions of law or fact common to the members of the class." As the Court of Appeals noted (App. 43a-44a), this language has always been interpreted — beginning with the Advisory Committee Notes to the 1966 amendment of Rule 23(b)(3) — as pertaining to legal or factual questions arising from an in-court, Article III controversy, not to questions of bargaining strategy arising from a negotiated settlement. Focusing on actual, triable legal claims is hardly "artificial" or "hypothetical," as petitioners insist (Pet. 18, 21, 27) — unless, of course, the claims themselves are "artificial," as they were here.

Petitioners' reliance on *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) (*see* Pet. 22), is misplaced, because that decision supports the judgment below. The very passage they cite explains that the commonality and typicality requirements of Rule 23 serve to determine *both* whether the class procedure will promote judicial economy *and* whether

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[9] Instead of addressing the language of the predominance and typicality requirements, petitioners discuss only the text of the superiority standard of Rule 23(b)(3) (Pet. 22). But the Third Circuit expressly considered the terms of the settlement in applying the superiority requirement. *See* Part I, *supra*.

"the named plaintiff's *claim* and the class *claims* are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." 457 U.S. at 157 n.13 (emphasis added). As a result, "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's *cause of action*." *Id.* at 160 (emphasis added) (internal quotations omitted). This Court's unanimous decision in *Falcon* thus confirms that these class certification criteria require a district court to analyze the *claims* alleged in the class complaint, rather than simply the terms of the settlement, to assess the propriety of certification.

2. Petitioners prefer to ignore Rule 23's focus on triable legal claims. They instead make a naked plea for a novel "rule of pragmatism" (Pet. 25), arguing that "the certification inquiry must be directed to the *actual* status of the proceeding." Pet. 22. But that is just our point: no certification under Rule 23 is possible when the "actual status" of a proceeding reveals that it could never qualify for litigation. The contrary view would effectively enable *any* class action, no matter how non-adversarial and unsuited for litigation, to be submitted via settlement to a federal court for an adjudicated resolution. As the Third Circuit has previously warned, such a rule would convert a federal court into a "mediation forum." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 799 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) (*GM Trucks*).

Thus, it is highly revealing that petitioners unabashedly refer to the "hypothetical litigation" in this case "that assuredly *never* will occur." Pet. 22 (emphasis in original). They seem to forget that the federal judicial power is confined to the adjudication of *triable* cases and controversies. *See, e.g., Muskrat v. United States*, 219 U.S. 346, 353-63 (1911); *Gordon v. United States*, 117 U.S. 697, 699-706 (1865); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.† (1792).

3. Petitioners also contend that:

> [T]he court of appeals' underlying concern — the danger that class counsel will feel pressure to enter into inequitable settlements — is addressed in a settlement class action by the searching review of the fairness of settlements that courts routinely undertake pursuant to Rule 23(e).

Pet. 27. But neither the structure of Rule 23 nor the constitutional guarantees of due process permit this cart-before-the-horse approach to class certification.

Under the structure of Rule 23, the provisions of subdivisions (a) and (b) are independent requirements that must be satisfied, quite apart from the additional barrier created by Rule 23(e), which requires court approval of any settlement. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). "[T]he inquiry into the settlement's fairness cannot conceptually replace the inquiry into the propriety of class certification." *GM Trucks*, 55 F.3d at 795. Class members are entitled to *all* of the safeguards provided by Rule 23 and due process, and courts may not pick and choose which of those protections to apply in a particular case. To state that class members are united in interest in maximizing overall recovery begs the question whether the named plaintiffs are constitutionally adequate representatives of the absentees' claims. A myopic focus on the settlement terms ignores the possibility of collusion or intra-class conflicts that should preclude class certification, as the Third Circuit found here.

Indeed, to relax Rule 23's standards in settlement class actions would erode the safeguards of the rule precisely when they are needed most. In the settlement class context, there is an increased danger of collusion or undue pressure. As Chief Judge Posner has explained:

> The danger of a premature, even a collusive, settlement is increased when as in this case the status of the action as a class action is not determined until a settlement has been negotiated, with all the momentum that a settlement agreement generates.

Mars Steel Corp. v. Continental Illinois National Bank, 834 F.2d 677, 680 (7th Cir. 1987). If a case never triable in class form could nonetheless be settled in class form, then any defendant facing mass tort liabilities could hand-pick purported plaintiffs' counsel for settlement "negotiations," as occurred in this case.[10] A reverse auction would ensue, in which defendants could "sell" the lucrative right to be plaintiff class counsel to the lowest bidding attorney:

> [B]ecause the court does not appoint a class counsel until the case is certified, attorneys jockeying for position might attempt to cut a deal with the defendants by underselling the plaintiffs' claims relative to other attorneys.

GM Trucks, 55 F.3d at 788. Such escapades would shred the protection afforded absent class members by Rule 23 and make a mockery of the judicial process.

4. Petitioners forecast heavy federal docket congestion from asbestos cases if settlement class actions are required to comply with Rule 23 — and, we might add, with Article III. But such exigencies cannot excuse violating fundamental principles of federal litigation. In the end, petitioners' appeals to "pragmatism" (App. 25a) and "practicalit[y]" (27a) are nothing more than a prayer for the Article III judiciary to rush in where Congress has feared to tread. This Court has heard — and rejected — this siren song before: "The plea is for a resulting power to deal with a crisis or an emergency according

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[10] *See* J.A. 1191, 1237. *See also* Koniak, 80 CORNELL L. REV. at 1053 ("CCR approached Messrs. Locks, Motley, and Rice, who agreed to serve as class counsel in such an action").

to the necessities of the case, the unarticulated assumption being that necessity knows no law." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring). Yet even supposed "necessity" must bow to the law when the Constitution's structural limitations on governmental power are at stake, because "the Framers ranked other values higher than efficiency." *INS v. Chadha*, 462 U.S. 919, 959 (1983).

Moreover, whether there is a "crisis" in asbestos litigation is the subject of intense debate among judges, academics, and legislators. *See, e.g.*, Coffee, 95 COLUM. L. REV. at 1364; John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 996, 1010-12 (1995).[11] Even the authorities cited by petitioners maintain that asbestos cases are increasingly "mature" torts, and that, because the initial period of litigation has already established the parameters of liability and fixed the likely recovery values, the claims will increasingly be resolved through consensual settlements on a case-by-case basis. Roger Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 78-79. In fact, petitioners informed the district court that they already settle

[11] Indeed, these very same petitioners (in their collective voice as the Center for Claims Resolution) severely criticized what they saw as the alarmism of the Ad Hoc Committee's 1991 report (a report petitioners now purport to embrace). Petitioners argued: (1) that "claims for significant [asbestos] impairment" are in fact "on the decline, due to lowered workplace exposure levels in the past few decades;" (2) that any surges in federal asbestos filings are largely attributable to the publicity surrounding "radical consolidation or class action techniques" promoted by particular federal judges, which attract lower value claims that might otherwise never be filed; and (3) that proposals for mass class actions or consolidations could not be achieved under current law, would exceed the courts' legitimate authority, and would violate the separation of powers. *A Critical Analysis of the Report of the Ad Hoc Committee on Asbestos Litigation* (Center for Claims Resolution, May 7, 1991) in Second Supplemental Appendix in the Court of Appeals at 39, 41, 45-48.

99.8% of the asbestos claims filed against them,[12] and this figure does not even include the mass inventory settlements that petitioners have been able to negotiate, such as the thousands of pending claims that the petitioners settled in one stroke with the former class counsel on the eve of the filing of this class action.[13] The named plaintiffs in this case apparently do not believe that the settlement set aside by the Third Circuit is urgently needed, for they did not bother to file their own petition for certiorari or even to join the petition filed by the defendants.[14]

More fundamentally, petitioners' hyperbolic claims simply do not withstand scrutiny. Petitioners insist that, "[u]nder the Third Circuit's rule, mass tort cases ... cannot be settled, but must go on through years of grinding litigation," Pet. 2, and that the defendant would therefore "face a certified litigation class if the settlement ultimately falls apart or is disapproved.... No rational defendant would agree to settle in these circumstances." *Id.* at 19.

[12] Fourth Supplemental Appendix in the Court of Appeals at 33.

[13] The only conceivable barrier to petitioners' achieving many additional (and equally efficient) inventory settlements with other plaintiffs would be the possibility that the $215 million inventory settlement with the former class counsel in this case was not a *bona fide* settlement, but instead a bribe to induce class counsel to bring this "settlement class action" against the petitioners. Petitioners have of course denied any such possibility, although the Third Circuit raised grave doubts about the matter. App. 30a-31a.

[14] Another major asbestos defendant, Owens-Illinois, urged the Third Circuit to reject petitioners' dire warnings about docket collapse if this settlement class action were decertified. Owens-Illinois explained that the MDL process has already been extremely successful in resolving tens of thousands of asbestos claims by regular means (65% of all pending federal cases have been resolved as active matters as to all parties), and that experiments such as this "future claims" class action are entirely unnecessary. *See* Brief *Amicus Curiae* of Owens-Illinois in Opposition to Petition for Rehearing In Banc at 2-3.

But the Court of Appeals' decision belies petitioners' dire prediction. The Third Circuit expressly approved settlement class actions "whereby the court postpones formal class certification until the parties have successfully concluded a settlement." App. 37a n.9. The Court of Appeals added that, in such circumstances, "the court allows the defendant to challenge class certification in the event that the settlement falls apart." *Id.* In addition, the Third Circuit expressly contemplated "[a] series of statewide or more narrowly defined adjudications, either through consolidation under Rule 42(a) or as class actions under Rule 23" as viable means to resolve asbestos cases fairly and efficiently. App. 57a. Hence, the Third Circuit's decision does *not* confine the courts to "case-by-case adjudication of asbestos claims." Pet. 19.

Even if petitioners' predictions of congestion were correct, petitioners would nonetheless be seeking relief from the wrong branch of government. As the Court of Appeals recognized, although the "desirability of innovation in the management of mass tort litigation does not escape the collective experience of the panel, ... reform must come from the policy-makers, not the courts." App. 58a.

IV. ONLY ONE CIRCUIT COURT HAS EVER RELIED EXCLUSIVELY ON THE EXISTENCE OF A CLASS SETTLEMENT TO SATISFY RULE 23's REQUIREMENTS.

Petitioners grossly overstate the extent of the circuit court conflict regarding proper application of Rule 23 to "settlement classes." The Third Circuit's refusal to ignore the requirements of Rule 23 merely because the parties have reached a proposed settlement is consistent with every circuit court decision, with the possible exception of the Fifth Circuit's recent opinion in *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996), petition for rehearing pending (5th Cir). Thus, it is not the decision below that has "throw[n] the law governing class action

settlements into complete confusion." Pet. 2. To the extent any confusion exists, the Fifth Circuit has created it by being the first court of appeals to hold that the due process protections provided by Rule 23(a) may be ignored when the case has settled. *See In re Asbestos Litigation*, 90 F.3d at 996 ("Our sister circuits have rejected all other actions that came even close to attempting what Fibreboard has done here.") (Smith, J., dissenting).

Other than *In re Asbestos Litigation*, none of the circuit decisions cited by petitioners (which are the same decisions they unsuccessfully pressed below) supports their position regarding the propriety of certification in this case. And even *Asbestos Litigation* provides only weak support. The Fifth Circuit stated that, if it had confronted the facts of this case, it

> would likely agree with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy the typicality requirements due to the huge number of individuals and their varying medical expenses, smoking histories, and family situations.

In re Asbestos Litigation, 90 F.3d at 976 n.8.[15]

Petitioners rely first on *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989), a mass tort class action involving the claims of 300,000 plaintiffs against the insurer of a bankrupt medical device manufacturer, in which class certification was sought under the non-opt-out provisions of Rule 23(b)(1)(A) — not Rule 23(b)(3), the Rule applicable here. *Robins* did *not* hold that the Rule 23 criteria apply differently to a settlement class. To the contrary, the Fourth Circuit opined that:

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[15] In *Asbestos Litigation* itself, the Fifth Circuit considered the certifiability of a settlement class under Rule 23(b)(1)(B), the so-called limited fund class action provision, rather than Rule 23(b)(3), the provision at issue here.

> [A class action] must satisfy all *four* steps of the prerequisites mandated by subsection (a) of the Rule.... Assuming qualifications under (a) have been met, the next step demands that the action fit within at least one of the three categories of actions identified in subsection (b) of the Rule.

880 F.2d at 727-28 (emphasis in original). Although *Robins* stated in dictum at the very end of its discussion that "settlement should be a factor" in class certification, *id.* at 740, it did so only in the context of noting the permissibility of settlement class actions under Rule 23, *id.* at 738, a point with which the Third Circuit agreed. *See* App. 36a-37a & n.9.

The Ninth Circuit's decision in *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615 (9th Cir. 1982), is likewise inapposite. There, the attack on the settlement in no way implicated the question whether the criteria for certifying settlement classes are less stringent than for litigation classes. Indeed, before the parties had ever reached a settlement, the district court had *already* certified the class for litigation purposes, both under Rule 23(b)(2) and Rule 23(b)(3), and class members were given the opportunity to opt out at that time. The objector did not opt out and then complained that a subsequent settlement did not give him *another* chance to do so. The Ninth Circuit simply held that neither Rule 23 nor due process required that class members "be given a second chance to opt out." *Officers for Justice*, 688 F.2d at 635.

Similarly, *In re Dennis Greenman Securities Litig.*, 829 F.2d 1539 (11th Cir. 1987), involved a class action that had been certified by the district court prior to the commencement of settlement negotiations. 829 F.2d at 1543. Moreover, in direct contrast to the position of the petitioners, in *Greenman* the Eleventh Circuit held that, even after a settlement has been proposed, "[t]he prerequisites of Rule 23(a) must be satisfied,"

along with "one of the subsections to Rule 23(b)...." *Id.* at 1544 & n.5.[16]

Neither *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985), nor *Weinberger v. Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982), conflicts with the Third Circuit's decision below. In both cases, the Second Circuit assessed the adequacy of representation by reference to the settlement — as did the Third Circuit in the case at bar. Moreover, neither *Malchman* nor *Weinberger* held that the fairness of a settlement could *substitute* for the Rule 23(a) inquiries. Indeed, in an earlier appeal in *Malchman*, the court expressly held otherwise, noting that "the court must examine ... whether the class representative 'possess[ed] the same interest and suffer[ed] the same injury' as the class members." *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983) (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974)). In *Weinberger*, the court held merely that Rule 23 permits courts to approve settlements, *despite* their having been reached prior to class certification. 698 F.2d at 72. The Third Circuit in the instant case did not disagree. App. 36a-37a & n.9. *Weinberger* certainly did not present the question whether an uncertifiable class can become certifiable simply *because* the parties have proposed a settlement.

Finally, *White v. National Football League*, 41 F.3d 402 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995), is entirely unhelpful to petitioners, because it held only that a settlement's terms may inform the court's findings with respect to adequacy of representation. Again, this proposition is not in

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[16] Indeed, in *Greenman*, "[n]one of the parties challenge[d] the district court's holding that [the Rule 23(a)] prerequisites were satisfied." 829 F.2d at 1544 n.5. The district court in *Greenman* understood the necessity of making Rule 23(a) and (b) findings, for it did so in advance of the settlement *and again* as part of the settlement approval process. *In re Dennis Greenman Sec. Litig.*, 622 F. Supp. 1430, 1444 (S.D. Fla. 1985); *In re Dennis Greenman Sec. Litig.*, 94 F.R.D. 273, 276-78 (S.D. Fla. 1982).

conflict with the Court of Appeals' decision in this case. *See* Part I, *supra*.

Thus, the decision below is consistent with multiple Rule 23 precedents that this Court has declined to review, the most recent being *GM Trucks* (*cert. denied*, 116 S.Ct. 88 (1995)). It is the decision in *In re Asbestos Litigation*, not the decision below, that is the odd man out. Accordingly, the instant Petition does not present a suitable vehicle — much less the *best* vehicle — for this Court to resolve a conflict created only by the Fifth Circuit's decision. Because the Fifth Circuit affirmed the district court's approval of the *Asbestos Litigation* settlement, that case would present this Court with an opportunity not only to correct the Fifth Circuit's aberrant view, but also to address the entire cluster of Rule 23, justiciability, and due process issues that are inevitably raised by these "future claimant settlement class actions." All of these issues were both raised by the parties and decided by the Fifth Circuit in *Asbestos Litigation*, whereas the Third Circuit reached only the Rule 23 "settlement class" issue below.

V. THIS CASE IS IN ANY EVENT AN UNSUITABLE VEHICLE FOR ADDRESSING RULE 23 ISSUES BECAUSE OF THE JUSTICIABILITY, JURISDICTIONAL, AND DUE PROCESS DEFECTS THAT PROVIDE ALTERNATIVE GROUNDS FOR THE JUDGMENT BELOW.

Contrary to the impression given by the Petition, this case does not involve only the single, isolated issue of the application of Rule 23 to settlement class actions. There are multiple alternative grounds, which were pressed by respondents in both courts below, for affirming the judgment of the Third Circuit. As the Court of Appeals warned, using the federal courts to pioneer legislative solutions to "vexing social problems" such as mass torts raises grave questions about "the fundaments of the federal judicial polity: jurisdiction,

justiciability, [and] notice." App. 18a. Although the court below pretermitted these issues by ruling in respondents' favor on class certification and vacating the injunction, the court nonetheless voiced "serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction over absent class members," App. 19a. Since any relief for the petitioners on Rule 23 could therefore prove illusory, this Court would be well advised to consider issues about settlement class actions in some other case (perhaps *In re Asbestos Litigation*) where the Rule 23 questions are not destined to be a sideshow.

Standing. In his concurring opinion, Judge Wellford concluded that the vast majority of the class members, who merely alleged occupational exposure to asbestos at some time in the past and brought claims only for the possibility of developing some asbestos disease in the future, lacked standing because they had alleged no "'injury in fact' — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" App. 60a (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "Fear and apprehension about a possible future physical or medical consequence of exposure to asbestos is not enough to establish an injury *in fact*." App. 61a (emphasis in original).[17] This Court's recent decision in *Lewis v. Casey*, 116 S.Ct. 2174, 2179 (1996), underscored the importance of strict enforcement of the "actual injury" requirement as "a constitutional principle

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[17] In a nationwide diversity class action such as this one, in which the substantive tort laws of all fifty states are applicable, *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-23 (1985), it is vital to recall that many states do not recognize a "legally protected interest" against mere exposure to a toxin without any manifestation of physical injury. Hence exposure-only plaintiffs from those states cannot allege "non-frivolous" claims of "actual injury" sufficient to support Article III standing. *See Lewis v. Casey*, 116 S.Ct. 2174, 2181 n.3 (1996).

that prevents courts of law from undertaking tasks assigned to the political branches."

Feigned Case. Respondents also argued below that this class action is a non-justiciable feigned suit because neither plaintiffs nor plaintiffs' counsel had any intention of litigating their "futures" claims, but merely sought approval of an administrative claims process that plaintiffs and defendants undertook as a joint venture. The Third Circuit noted that:

> This contention is supported by the fact that class counsel presented the suit and settlement together with counsel for the CCR defendants in one package, after having negotiated with CCR a side-settlement of over $200 million for cases in their "inventory."

App. 30a-31a. Judge Wellford quoted sworn testimony in which *all* of the exposure-only class representatives themselves "stated emphatically" that "they did not intend to pursue the claims in the class complaint" and that they "claimed no damages and no present injury." App. 62a-66a (concurring opinion). The Court of Appeals therefore expressed "serious doubts" about justiciability (App. 19a) and concluded that "we think that what the district court did here might be ordered by a legislature, but should not have been ordered by a court." App. 59a.

Notice/Due Process/Personal Jurisdiction. The Court of Appeals also noted that:

> [Respondents] marshaled a powerful three-pronged argument that, in this futures class action with virtually no delayed opt-out rights, notice to absent class members cannot meet the requirements of Rule 23 or the Constitution.

App. 31a. The court expressed "serious concerns as to the constitutional adequacy of class notice" to absent and as yet healthy class members, *id.* at 33a, who may not even know

they were once exposed to asbestos, *id.* at 55a-56a, and opined that the problems of adequately providing notice to such plaintiffs "may be insurmountable." *Id.* at 55a. The Third Circuit had the same serious doubts about the district court's

> personal jurisdiction over class members lacking minimum contacts with the forum, because such class members have not had a meaningful opportunity to opt out and thus have not consented to jurisdiction. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985).

App. 31a.

Subject Matter Jurisdiction. The Court of Appeals also voiced "serious doubts" (App. 19a) about "subject matter jurisdiction over the exposure-only plaintiffs' claims" — which alleged only apprehension about possible future injuries — "because such claims cannot exceed the $50,000 minimum required by the diversity statute." App. 31a. The exposure-only class representatives uniformly testified under oath that they were not claiming any damages or any present injury. App. 66a.

Fairness of the Settlement. Finally, the fairness of the settlement under Rule 23(e) would be subject to appellate review on any subsequent appeal from a final district court judgment, and the opinion below suggests that the settlement would be unlikely to pass muster. In holding that the class action failed to meet the fairness component of the Rule 23(b)(3) "superiority" test, the Third Circuit ruled that the inclusion of future claimants in the class settlement along with presently injured plaintiffs raised "serious fairness concerns." App. 20a. The district court's rather conclusory findings notwithstanding, the Court of Appeals determined that the settlement's allocation of benefits was fatally tainted by "serious intra-class conflicts" (App. 49a) and that the future plaintiffs had been denied terms that all "rational actors" would

insist upon. App. 49a-50a & n. 14. If those exposure-only future plaintiffs, who constitute the vast majority of the class, were so ill-treated by the settlement that it could not even pass the Rule 23(b)(3) test for whether this class action settlement was a superior means of resolving their claims, it seems clear that the settlement has no hope of passing the more searching inquiry under Rule 23(e).

This Court should not resolve questions about the application of Rule 23 to settlement classes in a case in which the class action is fatally flawed in so many other ways that the Court's opinion is extremely unlikely to make any difference in the outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

AMCHEM PRODUCTS, INC., ET AL.,

Petitioners,

v.

GEORGE WINDSOR, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTION PRESENTED

Should this Court review the Third Circuit's rejection of a Rule 23(b)(3) class action certified for settlement, that could not have been certified as a litigated class, where: a) the Third Circuit based its decision on grounds independent of the issue raised by Petitioners; b) the Third Circuit has not yet addressed the fairness of the settlement nor had an opportunity to address other dispositive legal issues; c) the decision did not exacerbate any asserted inter-circuit conflict; and d) the issue presented may well be mooted by pending revisions to Rule 23?

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STATEMENT

This action, brought pursuant to Federal Rule of Civil Procedure 23(b)(3), involves a proposed global nationwide class action settlement of asbestos claims against 20 companies which comprise the Center for Claims Resolution (CCR). It is undisputed that "[e]xamined as a litigation class, this case is so much larger and more complex than all other class actions on record. . . . " App. 19a.

The Third Circuit rejected the certification of the class and vacated the injunction that prevented class members from initiating claims outside the settlement's administrative scheme. The Petition asks this Court to review only one basis for the Third Circuit's interlocutory order – its holding that the settlement class could not "conceivably satisfy Rule 23" requirements, if litigated. However, the Third Circuit rested its decision on at least two grounds which are independent of the issue presented for review. Moreover, many critical questions concerning this highly controversial settlement – its fairness, as well as serious jurisdictional and due process challenges – were not reached by the Third Circuit and thus are not before this Court. As a result, any decision by this Court on the question presented would have no effect in this case and would be nothing more than an abstract advisory opinion on civil procedure.

Petitioners assert virtually the same grounds for certiorari that were advanced – and rejected – last year in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied sub nom. General Motors Corp. v. French*, 116 S. Ct. 88 (1995) ("*GM Trucks*"). As with *GM Trucks*, this case is inappropriate for Supreme

Court review because the lower court explicitly based its holding in part on grounds independent of the issue presented. Moreover, unlike *GM Trucks*, this case comes in an interlocutory posture where critical jurisdictional, due process and fairness issues have not even been addressed by the lower appellate court. This case is, thus, an even less appropriate vehicle for addressing Petitioners' claim than was the *GM Trucks* case.

The Petitioners in *GM Trucks* asserted the same "dire" inter-circuit conflict now raised by the current Petitioners. Nothing since *GM Trucks* has altered or exacerbated any conflict. Indeed, litigants are now one year closer to a rules revision of Rule 23 which may well moot the issue. Nor is any conflict among the circuits "starkly illuminated" by the Fifth Circuit's not yet final judgment in *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), approving a global settlement of claims against one defendant and its insurers. To the contrary, the Fifth and Third Circuit's recent decisions are each carefully limited, recognizing important and distinguishing factors between the *Georgine* and *In re Asbestos* classes. The *Georgine* case concerns a Rule 23(b)(3) class case, in which no claim is made that defendants lack the resources to pay claims outside the class context. Yet, the *Georgine* settlement fixes low damage recoveries and sharply limits recourse to the tort system. See discussion, *infra* at 4-6. By contrast, the *In re Asbestos* case involves a Rule 23(b)(1)(B) class predicated upon the staggering risk of loss of insurance coverage, which mandates unitary disposition. That settlement, in contrast to *Georgine*, neither specifies individual damages nor limits access to the tort system. For

these and other reasons, the impact of the Third Circuit's holding in *Georgine* will be limited.

1. Relevant Facts Concerning the Proposed Class and Settlement

This lawsuit commenced with the simultaneous filing of a class action complaint, an answer and a Stipulation of Settlement (the "Settlement") on January 15, 1993. App. 23a-24a. On the same day, the named plaintiffs and CCR (the "Settling Parties") filed a motion for class certification, which the district court granted just two weeks later. App. 24a, 26a. The district court approved the settlement on August 16, 1994, and entered the preliminary injunction barring class members from initiating claims against CCR until a final judgment was entered. App. 29a-30a.

The district court has yet to enter a final judgment in the action, however, because the settlement is expressly conditioned upon CCR's insurers assuming liability for the settlement, an issue still pending before the district court. App. 34a. Since no judgment has been entered below, the district court's approval of the settlement following a "fairness" hearing has not yet been appealed.[1] This appeal is thus from the issuance of the preliminary injunction only.

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[1] The Petition falsely implies that Respondents did not challenge the fairness of the Settlement, or the district court's factual findings below. Petition at 5, 8. Respondents did challenge many aspects of fairness at the district court. As noted, the fairness issues have not been addressed by the Third Circuit because final judgment has not been entered.

The Scope of the Settlement – The proposed Settlement would extinguish all present and future asbestos-related claims of individuals who had not filed suit before January 15, 1993. The class is defined to include all persons who had been exposed to asbestos either occupationally or through exposure as a spouse or household member of such exposed person, *and* all spouses and family members of such persons who had not filed an asbestos related lawsuit against CCR as of the date the class action was commenced. App. 23a.

The proposed Settlement encompasses claims arising in over fifty separate jurisdictions, based upon all different types of asbestos diseases, against twenty different companies. Class members were "exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods." App. 41a. The complaint asserts claims based on negligence, strict liability, breach of warranty, emotional distress, enhanced risk of disease, medical monitoring and civil conspiracy. App. 24a.

The class was certified pursuant to Federal Rule of Civil Procedure 23(b)(3), the class action procedure used where claims are primarily for money damages and there is no particular risk of impairment of class member interests absent a class action solution. The Petitioners concede that they are financially solvent and could continue to meet their financial obligations through the tort system.

Settlement Compensation Scheme – The Settlement does not simply provide for a general recovery fund but rather establishes an elaborate administrative scheme that "fixes

a range of damages that CCR will award for each disease, and places caps both on the amount that a particular victim may recover and on the number of qualifying claims that may be paid in any given year." App at 25a.

Despite the fact that no claims are made by CCR of potential insolvency or inability to pay, the fixed damages are set at amounts which fall far short of those awarded in the tort system. Thus, the Settlement provides no cash compensation to pleural claims "even though such claims regularly receive substantial monetary payments in the tort system." App. 26a. Similarly those "unlucky" few who contract mesothelioma[2] are "relegate[d] . . . to a modest recovery, whereas the average recovery of mesothelioma plaintiffs in the tort system runs into the millions of dollars." App. 49a.[3] Although the settlement

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[2] Mesothelioma is a fatal cancer of the lining around the lung and/or abdomen that results from exposure to asbestos. Although only a small fraction of those exposed to asbestos will contract mesothelioma, its victims generally die within two years of diagnosis. App. at 56a. Unlike other asbestos diseases (such as lung cancer), the only medically established cause of mesothelioma is asbestos exposure. *Id.*

Mesothelioma can be caused by only slight or incidental exposure to asbestos fibers. The disease has been known to occur in children who lived with an asbestos-exposed parent or in household members who washed the clothes of an asbestos worker. App. at 56a. As the Third Circuit stated, "[t]he unpredictability of the disease is exacerbated by the long latency period between exposure to asbestos and the onset of the disease, typically between fifteen to forty years." *Id.*

[3] The Settlement provides that the "average negotiated value" for mesothelioma claims is $37,000 to $60,000. App. at 274a.

binds plaintiffs in perpetuity,[4] the fixed damage amounts are not adjusted for inflation. App. 25a.

While the settlement theoretically allows some class members dissatisfied with their settlements to pursue their claims in court, this option is "severely" limited. Only two percent of mesothelioma and lung cancer claimants, one per cent of "other cancer" claims and one-half percent of "non-malignant" claims may sue in the tort system. App. 25a.

2. The Decision Below

The Third Circuit recognized that the injunction could not bind the class unless the class was properly certified under Rule 23(b)(3). Accordingly, the court's decision focused on these prerequisites to class treatment.

Commonality – The Third Circuit first discussed the commonality requirements of Rule 23(a)(2) and (b)(3), but, mindful of the implications for other types of class actions, such as Rule 23(b)(1)(B) cases, rested its commonality holding on the (b)(3) requirement that common questions predominate over individual issues. App. 43a.[5] Under this demanding (b)(3) standard, the Court found that "the huge number of important individualized

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[4] In contrast, each defendant is free to withdraw from the settlement unilaterally after ten years. App. at 26a

[5] The court also distinguished this case from more limited certifications that involve injunctive relief ("infinitely fewer individualized issues than are posed here," App. at. 42a), property damage actions, cases where there was a central single issue such as one basic defense (App. at 45a), or cases involving only partial certification of common issues (App. at 47a).

issues" (App. 48a), overwhelmed the common and largely settled issue of the capacity of asbestos fibers to cause physical injury. App. 40a. The court noted the broad range of individual conditions, injuries, exposures and matters of causation among class members – all issues compounded "exponentially" by what the court perceived to be the requirement of individualized state by state choice of law analysis. App. 41a.

Adequacy of Representation and Typicality – The court next found that serious intra-class conflicts precluded a finding of adequacy of representation required by Rule 23(a)(4). Focusing on the terms of the Settlement, the Court explained that it "does more than simply provide a general recovery fund. Rather it makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions which necessarily favor some claimants over others." App. 49a (emphasis in the original). Thus, many kinds of claims are provided no recovery (e.g., "pleural", medical monitoring and loss of consortium claims), or very limited recoveries (e.g., mesothelioma) for which there is a back-end opt-out right limited to "a few persons per year". *Id.*

The "most salient conflict" highlighted by the court was between presently injured and futures plaintiffs. App. 49a. While the currently injured have an interest in maximizing current payments, and have little interest in delayed opt-out rights or inflation adjustments, futures plaintiffs would want to maximize future payments, adjust the settlements to take account of inflation and

changing medical science, and provide for a delayed opt-out right. App. 49a-50a.[6]

For some of the same reasons, typicality was lacking. The court further noted that the plaintiffs could not be typical of the "hodgepodge of factually as well as legally different plaintiffs" in the class. App. 53a.

Superiority – Finally, the court below found that Rule 23(b)(3)'s requirement that the action be "superior to other available methods" was lacking. It determined: (a) that the superiority requirement would not be met if the class were "[c]onsidered as a litigation class;" but also (b) that superiority was lacking even if the settlement were considered, because, "in this class action," plaintiffs "have a substantial stake in making individual decisions on whether or when to settle" yet "may become bound to the settlement even if they are unaware" of the settlement "or lack sufficient information to evaluate it." App. 55a. The court emphasized that the problems could have been alleviated by inclusion of provision in the Settlement which, for example, permitted victims to opt-out at the "back-end." App. 56a, n.16.

Finally, the court noted that, while this Settlement was not legally acceptable, more carefully limited classes and consolidation of claims remain viable alternatives for the resolution of this and other mass tort cases. App. 57a.

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[6] The court below analogized this conflict to the conflict in the *GM Trucks* case between individual and fleet owners. App. at 51a.

REASONS FOR DENYING THE WRIT

A. The Issue Raised by Petitioners Is Only One of Several Independent Grounds Relied Upon by the Third Circuit in Rejecting the Class Certification

If this Court reviews the largely abstract proposition that Petitioners urge, its ruling will not affect the outcome of this case because the Third Circuit did not rest its decision solely on the basis claimed by Petitioners – that the Settlement should be ignored in assessing class certification. In fact, the court below held that the purported class failed to satisfy at least two other aspects of Rule 23: adequacy of representation and superiority. And, most importantly, in reaching this conclusion, the court below explicitly *did* examine the terms of the Settlement. On both issues, the court held that, even taking the Settlement into account, the class fell far short of meeting these Rule 23 requirements. Thus, contrary to the Petitioners' assertion, the decision below, like *GM Trucks*, was based on alternative independent grounds.

1. Lack of Adequate Representation

The Third Circuit found that serious intra-class conflicts inherent in the structure of the Settlement precluded the class from meeting Rule 23(a)(4)'s adequacy of representation requirement. The Court's conclusion flowed from its explicit consideration of the actual terms of the Settlement and, particularly, the Settlement's failure to incorporate structural protections (such as sub-classing) in the class definition that could have mitigated these conflicts.

The court below closely scrutinized the terms of the Settlement and particularly those relating to the Settlement's compensation schedule, which fixes values for different categories of disease. The court emphasized that the Settlement "does more than simply provide a general recovery fund. Rather, it makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions which necessarily favor some claimants over others." App. 49a (emphasis in original).[7] As the Court explained, under the Settlement, some claimants who are regularly compensated in the tort system get no compensation at all (those with asymptomatic pleural thickening), while others who suffer the worst injuries, such as mesothelioma, are relegated to a modest recovery instead of tort system recoveries of "millions of dollars." App. 49a.

The intra-class conflict created by the Settlement's fixed settlement values is further exacerbated by the failure of the Settlement to provide a meaningful right to opt out of the Settlement at the "back-end" and by annual flow rates that limit the number of claims that may be resolved each year. These provisions of the Settlement create an unacceptable conflict of interest between class members with present injuries and those who may suffer

[7] By contrast, the settlement in *In re Asbestos Litig.* did not specify damage allocations but rather sets up an "equitable distribution process" which includes a meaningful back-end opt-out right. *In re Asbestos Litig.*, 90 F.3d at 976, n.7. In its opinion, the Fifth Circuit contrasted this approach with the terms of the *Georgine* settlement, which provide no meaningful back-end opt-out. *Id.* at 976, n.8.

injury in the future.[8] The court concluded that the Settlement resolves this conflict in favor of the presently injured: "the back-end opt out is limited to a few persons per year," future mesothelioma victims are offered at best modest recoveries, and fixed damage sums contain no adjustment for inflation. App. 25a, 49a.

The court below recognized that these conflicts might have been mitigated had the "differently situated plaintiffs negotiate[d] for their own unique interests." App. 51a. In the absence of structural protections, such as subclasses, within the Settlement, the intra-class conflicts "preclude[] a finding of adequacy of representation." *Id.* The court's conclusion, thus, rests upon the actual terms of the Settlement, not on some imagined conflict which would arise in the course of litigation.

2. Superiority

The second alternate independent ground supporting the decision below arises from the Third Circuit's holding that the "superiority" requirement of Rule 23(b)(3) was not met. The Third Circuit found that requirement to be

[8] The court below catalogued the differing interests of present and future victims. Potential "futures" plaintiffs would desire delayed opt-out rights, no preset limits on how many cases may be handled, and damage values that keep pace with inflation and scientific developments. In contrast, those currently injured would rationally want to maximize current payouts and would care little about future opt-out rights: "indeed, their interests are against such an opt out as the more people [are] locked into the settlement, the more likely it is to survive." App. at 50a.

lacking even if the class were not considered as a litigation class, determining that, in the context of this case, "[p]laintiffs have a substantial stake in making individual decisions on whether and when to settle" and that "in this class action, plaintiffs may become bound to the settlement even if they are unaware of the class action or lack sufficient information to evaluate it." App. at 55a, 55a.

The court explained its views as follows:

> First, exposure-only plaintiffs may not know that they have been exposed to asbestos within the terms of this class action. . . Second, class members who know of their exposure but manifest no physical disease may pay little attention to class action announcements. Without physical injuries, people are unlikely to be on notice that they can give up causes of action that have not yet accrued. Third, even if class members find out about the class action and realize they fall within the class definition, they may lack adequate information to properly evaluate whether to *opt out of the settlement*.

App. 55a-56a (emphasis added). In short, the Third Circuit determined that a class settlement was not a "superior" means of resolving this case, as Rule 23(b)(3) requires, because of what it perceived to be potentially "insurmountable" problems in informing many class members sufficiently to permit them to "make a reasoned decision about whether to stay" in the Settlement. App. at 55a, 56a.

This holding quite clearly is based – *not*, as Petitioners claim, on the notion that the Settlement cannot be

considered in ruling on class certification – but on *the very consideration of the Settlement that Petitioners desire*. Thus, the Third Circuit stressed that it was *not* holding that "Rule 23 prohibits binding futures plaintiffs to a 23(b)(3) opt-out class action;" rather, it was merely holding that, to meet the superiority requirement, such an action must present "significant advantages" over available alternatives – advantages it then determined *not* to be presented by the particular settlement in this case. Indeed, the court went on to specify alternative class settlement structures – such as affording a meaningful back-end opt-out right – that *would* "alleviate[]" its concerns about superiority. App. at 56a n.16. The Third Circuit thus gave Petitioners what they requested with respect to the superiority requirement – consideration of the Settlement. Its conclusion that superiority is nonetheless lacking will not be affected by any decision by this Court as to the issue raised in the Petition.

B. The Third Circuit's Interlocutory Ruling Did Not Address Fairness Contentions Inextricably Intertwined with Petitioners' Argument Nor Many Other Potentially Dispositive Claims

The Third Circuit's order, rendered prior to final judgment, is interlocutory. It is the Supreme Court's "normal practice" to deny interlocutory review. *Estelle v. Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting), *reh'g denied*, 429 U.S. 1066 (1977). Denial of certiorari is particularly appropriate here where substantial and interrelated legal issues were not resolved, or have not even been addressed, by the court below.

1. Issues Not Addressed on the Settlement's Fairness

Because this appeal is from the issuance of a preliminary injunction, the Third Circuit has not yet reviewed important issues raised regarding the fairness of the proposed Settlement. While Petitioners want this Court to simply presume that the Settlement is fair, the issue was strenuously litigated below and the findings of the district court have yet to be reviewed. See note 1, *supra*. These fairness issues are, moreover, inextricably intertwined with Petitioners' argument to uphold the class certification in this case. They assert that the fairness of the Settlement *establishes* some or all of Rule 23 class certification requirements for the *Georgine* Settlement. Petition at 27-29. In other words, they contend a fairness finding may, in effect, substitute for the more exacting analysis of Rule 23 criteria. So, even if this Court were to adopt Petitioners' theory of class certification in the settlement context, a review of *this* class certification cannot be properly made on the partial record now before this Court.

In determining fairness, the Third Circuit applies the nine factor test, articulated in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). Thus, a district court will ordinarily evaluate, *inter alia*, the complexity and duration of the litigation, the reaction of the class to the settlement, the stage of the proceedings, the risks of establishing liability and damages, the risks of maintaining class status, the ability of the defendants to withstand a greater judgment, and the range of reasonableness of the settlement in light of the best recovery and risks of litigation.

Objecting class members have raised significant concerns with respect to many of these fairness factors including issues relating to the arguable collusiveness of the Settlement, the levels of compensation provided, the medical criteria utilized, the compensation procedures including limitations of the number and types of claims to be resolved each year, the adequacy of class counsel and conflicts of interest. In addition, California objectors have argued that the Settlement failed to adequately address and account for interstate differences.[9] Potential and actual mesothelioma victims – by definition those with the strongest cases on causation and damages – have argued that the Settlement provides woefully inadequate relief, particularly given the Settlement's draconian case flow limitations.

Without a full record on these issues, this Court can offer at most an abstract primer on class settlement procedures.

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[9] California provides the most advantageous forum for the prosecution of asbestos personal injury claims. Yet, under the Settlement, Californians give up their unique victim-oriented protections but receive very little in return, particularly when compared to class members from other states. This unfairness was further exacerbated when the district court denied discovery into what, if any, differences among states were taken into account by the Settling Parties in their negotiations, despite the clear legal requirement that an "extensive analysis" of state-by-state differences be conducted in multistate class actions. *In Re Asbestos School Litigation*, 789 F.2d 996, 1010 (3d Cir.), *cert. denied sub nom. Celotex Corp v. School Dist. of Lancaster*, 479 U.S. 852 (1986).

2. Issues Not Addressed With Respect to the Injunction

The court below rested its decision on the many inadequacies of the class certification. The court made clear, however, that the injunction was highly vulnerable on several other legal grounds which it did not directly reach:

> Although we have serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction over absent class members, we will . . . pass over these difficult issues and limit our discussion to the class certification issues.

App. 19a.[10] In his concurring opinion, Judge Wellford added yet another perceived jurisdictional problem to the list – his view that class members, who do not suffer a current injury, lack standing. App. 60a. In order for the district court's injunction to stand, each of these issues of subject matter and personal jurisdiction must still be resolved. Therefore, even if the Court were to grant certiorari in this case in this posture, and reverse the circuit court decision, the lower courts would still have to grapple with numerous additional issues to uphold the injunction.

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[10] The court found some of these problems to be particularly acute with respect to those plaintiffs who will eventually develop "a fatal disease, mesothelioma, from only incidental exposure to asbestos." App. 56a.

C. The *Georgine* Decision Does Not Create an Intolerable Inter-Circuit Conflict

This Court was faced with an identical claim of inter-circuit conflict when it denied certiorari in the Third Circuit's *GM Trucks* decision less than a year ago. Petitioners can point to one intervening opinion – the Fifth Circuit's recent and not yet final[11] decision in *In re Asbestos Litig.* – to justify reconsideration of the denial of certiorari in *GM Trucks*. But nothing in *In re Asbestos Litig.* now elevates the previously asserted conflict to a level warranting Supreme Court review. Indeed, as discussed below, the passage of time has only added to the reasons for denying certiorari; we are one year closer to a modification of Rule 23 which could resolve any asserted conflict.

Petitioners claim that the *In re Asbestos Litig.* decision "starkly illuminated" inter-circuit conflict. Petition at 9. Quite the opposite is true. The only thing which *In re Asbestos Litig.* illuminates is that it is a drastically different kind of class and settlement from *Georgine* and *GM Trucks*. Both the Fifth Circuit in *In re Asbestos Litig.* and the Third Circuit in *Georgine* carefully noted the differing natures of the putative classes and took pains to draw appropriate distinctions in order to avoid a conflict.

Georgine and *GM Trucks* examined Rule 23(b)(3) damages class action settlements, while the Fifth Circuit in *In*

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[11] As of the date of this filing, a petition for rehearing is pending in the Fifth Circuit.

re Asbestos Litig. addressed a Rule 23(b)(1)(B) class.[12] Both the *Georgine* and *In re Asbestos* opinions use limiting language, recognizing the differences between 23(b)(1) and 23(b)(3) actions. Thus, the Third Circuit disclaimed resting its holding on Rule 23(a) commonality grounds because of the potential impact upon (b)(1)(B) actions. App. 43a. Similarly, the Fifth Circuit focused on the factors which establish commonality in that (b)(1)(B) action; namely, "unique risks" faced by the class and defendants, and the critical, common need to resolve hotly disputed insurance coverage litigation and thus avoid the "potentially disastrous results" of a loss of insurance coverage in the pending litigation. *In re Asbestos Litig.*, 90 F.3d at 975-76, 983.

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[12] Rule 23(b)(1) and 23(b)(3) class actions are designed to address different situations. As noted in *In re Asbestos Litig.*, different due process considerations adhere to (b)(3) damages actions than to (b)(1) actions, which are equitable in nature. *In re Asbestos Litig.*, 90 F.3d at 986-87. In (b)(1) class actions, particularly (b)(1)(B) actions, there is by definition a substantial risk that absent settlement class members may forfeit all rights, or be limited to diluted recoveries. In such situations, the need for a unitary resolution is paramount. NEWBERG & CONTE, 1 NEWBERG ON CLASS ACTIONS, § 1.22 at 1-51 (3d Ed. 1992).

In (b)(3) actions, on the other hand, there is no "make or break" necessity for class resolution. Indeed, as the Advisory Committee Notes to the 1966 amendments to Rule 23 make clear, (b)(3) treatment is reserved for those cases in which "class action treatment is not as clearly called for." Fed. Rule Civ. Proc. 23(b)(3) Advisory Committee's Notes (1966). Accordingly, heightened requirements, particularly regarding commonality and superiority, are imposed on such actions.

The *In re Asbestos Litig.* decision also demonstrates that the circuits are perfectly able to distinguish between a problematic settlement like *Georgine*, and settlements that are not overreaching and operate to the benefit of all class members. The Fifth Circuit specifically noted the differences between the *Georgine* and *In re Asbestos Litig.* settlements, and concluded that it "would likely agree with the Third Circuit" regarding its resolution of commonality and typicality issues. "As a result," the Fifth Circuit concluded, "this settlement is unaffected by the typicality and commonality problems" cited in *Georgine*. 90 F.3d at 976, n.8. Thus, the Fifth Circuit faced a settlement which established an "equitable distribution process to pay victims," (*Id.* at 976) rather than one like the *Georgine* settlement, which set fixed amounts for individuals based on the "severity of their injuries alone." *Id.* at n.8.

Although the Fifth Circuit in *In re Asbestos Litig.* repeated its previously enunciated approach to class certification in the settlement context, it added nothing to the mix that would elevate a conflict to intolerable levels. Rather, the distinctions drawn by the *In re Asbestos Litig.* and *Georgine* courts show, if anything, that the circuits approach common ground concerning the factors which are problematic in assessing futures class settlements. This does not constitute an intolerable conflict as asserted by Petitioners.

D. Any Conflict May Soon Be Mooted Because the Advisory Committee is in the Process of Amending Rule 23 to Eliminate any Uncertainty about the Propriety of Settlement Classes

The Petition concedes, as it must, that the Judicial Conference's Advisory Committee, after substantial study, has recommended that Rule 23 be amended to clarify that settlement classes may be certified even if the proposed Rule 23(b)(3) class does not meet the certification requirements for purposes of trial.[13] This fact alone is a sufficient basis for this Court to reject the Petition, since a decision by this Court on the abstract issue of settlement classes will affect, at most, a handful of cases decided in the interim before the issue is resolved.

Petitioners suggest that the proposed amendment was prompted solely by the Third Circuit's decision in this case and that, if only this Court intercedes to correct that "erroneous" ruling, "the cumbersome and time-consuming use of the rule's amendment mechanism" may be avoided. Petition at 20. This argument distorts the record.

At the request of the Judicial Conference, the Advisory Committee undertook in March 1991 a "course of Committee study" to determine whether Rule 23 should

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[13] The language of the proposed amendment is:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: * * * (4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

be amended "to accommodate the demands of mass tort litigation." Report of the Advisory Committee on Civil Rules, May 17, 1996. As a result of their work, the Advisory Committee has proposed a series of changes to Rule 23, which reach far beyond the settlement class issue.[14] The Advisory Committee's proposals, of course, are part of the specific process prescribed by Congress for full consideration of issues regarding the Federal Rules of Civil Procedure. *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1 (1940). Moreover, the Advisory Committee process – unlike a decision by this Court interpreting the procedural rules – has the further benefit of giving "Congress the opportunity to review the Rules before they bec[o]me effective and to pass legislation barring their effectiveness if the Rules were found objectionable." *INS v. Chaŭha*, 462 U.S. 919, 935 n.9 (1983). Particularly given the policy concerns animating the issue raised in this case, the Petition offers no reason whatever to justify its request that the Court preempt this Congressionally established process and deny Congress the "opportunity" to participate in the issue's resolution.

The Petitioners also dismiss the Advisory Committee's efforts because they argue the proposed amendment may never take effect "for any number of reasons, including the fact that it has sparked substantial controversy."

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[14] Congress has authorized the Supreme Court to prescribe "general rules of practice and procedure" for the federal courts. 28 U.S.C. § 2072. Such rules may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Any proposed rules must be submitted to Congress and may not become effective for at least seven months following submission. 28 U.S.C. § 2074.

Petition at 20-21. In fact, this argument reinforces the conclusion that this Court should defer to the completion of the Rule's process. If the Advisory Committee, after conducting its own five-year study and receiving public comments on its proposal, determines that some or all of the revisions to Rule 23 should not be made, its decision will presumably be based on a full and thoughtful analysis of all relevant prior case law. In contrast, Petitioners here seek a judicial amendment of the rules based solely upon the record and arguments presented by this highly idiosyncratic case. This is not an appropriate use of the Court's discretionary jurisdiction.

Finally, Petitioners argue that the Rule's process will take three years or more to complete, allowing for a period of "inconsistency and confusion." Petition at 21. For purposes of this case, that timeline is not markedly different from the likely timeline if this Court *does* grant certiorari. A decision from this Court would likely come in June 1997 and, even if Petitioners prevail, additional litigation will be required to resolve the many issues not reached by the Third Circuit. By that time, the Rules process would be close to completion.

Moreover, as argued *infra*, Petitioners have overstated the impact that the *Georgine* decision will have on other mass tort class action settlements. There is certainly no evidence that awaiting the completion of the Rule's process will frustrate the consummation of other settlements. As illustrated by this case and many others, mass tort class action settlements typically take a long time precisely because courts must thoroughly and carefully weigh their merits.

E. Petitioners Overstate the Impact and Reach of the *Georgine* Opinion

The Petition vastly overstates the reach and impact of the *Georgine* opinion. It is thus useful to focus on what issues *Georgine* did address, and what issues are not before this Court.

1. Contrary to the Petition's "Question Presented" and its Statement, the Third Circuit did not issue a universal holding applicable to all class actions. Rather, the decision addresses a personal injury class action brought under Rule 23(b)(3). The court explicitly disavowed making any broad pronouncement applicable to injunctive relief, limited fund or partial class actions.[15]

2. Nothing in *Georgine* prohibits the use of settlement classes. Indeed, the Court reaffirmed its earlier holding in *In re GM Trucks* that class actions may be certified for settlement purposes only. App. 36a. The Third Circuit is, therefore, fully in accord with the MANUAL FOR COMPLEX LITIGATION (Third) (Federal Judicial Center 1995), which cautiously endorses the use of settlement classes, but requires closer scrutiny of such settlements where the class has not previously been certified in adversarial litigation. *Id.* at 243.

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[15] The Petition incompletely quotes the Third Circuit as holding that the district court should apply the class certification criteria of Federal Rule of Civil Procedure 23 "as if the case were to be litigated". Petition at 1-2. The full phrase stated *"the Rule 23(b)(3) criteria* must also be applied as if the case were to be litigated." (emphasis added) App. at 19a.

3. Nor does *Georgine* require that the district court ignore the settlement in assessing class certification or the settlement itself. Indeed, as noted above, the *Georgine* court considered the terms of the Settlement in assessing Rule 23 adequacy of representation and superiority criteria. App. 49a. Moreover, *Georgine* did not disturb the well-settled Third Circuit doctrine that requires district courts, when assessing the fairness of a class action settlement, to consider, among other factors, "the complexity . . . and duration of the litigation," "the stage of the proceedings . . . ," and "the risks of maintaining a class action. . . . " *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). The Third Circuit reaffirmed the appropriateness of such *Girsh* factors as recently as the *GM Trucks* decision.

4. The Petition wrongly implies that, in order to assess the certification of a settlement class after *Georgine*, a district court must all but try the case. This argument ignores, however, the well-settled doctrines guiding all class certification determinations – litigated or not – under Rule 23. The court is prohibited from considering the merits of the action in determining class status. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178 (1974). Moreover, since Rule 23 requires a determination of class status "as soon as practicable", but subject to later alteration or amendment, the district court is not forced to speculate about all potential problems down the road. Rule 23(c)(1). Indeed, even in fully litigated class certification proceedings, the class certification may not be denied because the district judge "fears insurmountable problems may later appear . . . " *Windham v. American Brands, Inc.*, 565 F.2d 59, 70 (4th Cir.), *cert. denied*, 435 U.S. 968 (1978); *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir.), *cert. denied*, 429 U.S. 969 (1976) (possibility that later proceedings may prove decision to certify was incorrect is no reason to deny class certification).

5. Neither the *Georgine* decision, nor the *GM Trucks* decision that preceded it, has thrown "the law governing class action settlements into complete confusion". Petition at 2. Indeed, neither decision has stood as an obstacle to the approval of class action settlements such as the *In re Asbestos Litig.* or the *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, (1994 U.S. Dist. LEXIS 12521, N.D. Ala. Dec. 22, 1995) cases cited by Petitioners.

6. The *Georgine* decision does not preclude class or consolidated resolution of asbestos or other mass tort cases. As the Third Circuit noted, Rule 23(b)(3) class treatment – in a less overbroad format – is still available and appropriate, as are a host of procedural devices that streamline resolution of claims. App. 57a. Moreover, the *Georgine* decision has no effect on class treatment of mass tort cases under Rule 23(b)(1)(B).

7. This case is a stronger candidate for denial of certiorari than was the *GM Trucks* decision. Not only are there independent grounds for the Third Circuit's decision, but the interlocutory nature of its decision would limit any Supreme Court review to an abstract issue of no practical consequence to this litigation. To the extent there are conflicting circuit approaches to Rule 23, the rules revision process is properly the forum of first resort.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners,

v.

GEORGE WINDSOR, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS WHITE LUNG ASSOCIATION OF NEW JERSEY, ET AL.

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QUESTION PRESENTED

Should this Court grant review to decide whether the court of appeals correctly determined that this novel "futures-only" class action failed to meet the requirements of typicality, adequacy of representation, predominance, and superiority under Federal Rule of Civil Procedure 23, where there are substantial issues of justiciability, subject matter jurisdiction, and due process that would likely preclude approval of the settlement in any event?

PARTIES TO THE PROCEEDING

Petitioners have listed the parties below in the appendix to the petition at 292a. Respondents who were appellants below and who appear in this Brief in Opposition are the White Lung Association of New Jersey, the National Asbestos Victims Legal Action Organizing Committee, the Oil, Chemical, and Atomic Workers International Union, the Skilled Trades Association, Myles O'Malley, Marta Figueroa, Robert Fiore, Ron Maher, and Lynn Maher (in her own behalf and as next friend for her minor children, Jessica Marie Maher, Jamie Marion Maher, and Jennifer Megan Maher).

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IN THE

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AMCHEM PRODUCTS, INC., ET AL.,
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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS WHITE LUNG ASSOCIATION OF NEW JERSEY, ET AL.

This case involves a class action settlement of asbestos personal-injury claims against the Center for Claims Resolution ("CCR")—a consortium of twenty asbestos-producing defendants. The settlement was devised not to provide benefits to individuals who have already sustained legal injuries, but rather to resolve the "claims" of class members who *may* suffer injuries in the future. In the process, the settlement virtually eliminates the claimants' access to court and substitutes an alternative dispute resolution mechanism conceived wholly by the settling parties' attorneys. The court of appeals unanimously rejected the settlement as a classic, albeit extreme, attempt at judicial legislation: "In short, we think that what the district court did here might be ordered by a legislature, but should not have been ordered by a court" (59a).

CCR, but not the representatives of the plaintiff class for whose benefit the settlement was supposedly crafted, now seeks review of the court of appeals' holding that this case should not have been certified as a class action under Federal

Rule of Civil Procedure 23. The plaintiffs' abandonment of the settlement, in and of itself, requires that the petition be denied. Beyond that, the decision below involves no significant conflict among the courts of appeals and is true to both the text and purpose of Rule 23. Moreover, because of the presence of independent grounds for the court of appeals' decision, the result below—rejection of the settlement—will endure regardless of the Court's resolution of the single question presented. Finally, a ruling from this Court may well be unnecessary because a proposed amendment to Rule 23 on the very question on which petitioners seek review has recently passed through the Judicial Conference's Standing Committee on Rules and entered the formal comment period.

STATEMENT OF THE CASE

A. The Class Action "Suit."

In mid-1991, the Judicial Panel on Multidistrict Litigation transferred all federal asbestos personal-injury cases to the Honorable Charles Weiner of the Eastern District of Pennsylvania for the purpose of exploring settlement options. *In re Asbestos Prod. Liab. Litig.*, 771 F. Supp. 415, 416 (J.P.M.L. 1991). Later that year, the CCR defendants approached two plaintiffs' asbestos lawyers, Ronald L. Motley and Gene Locks, for the purpose of negotiating a settlement, not of the cases that the Panel had transferred, but of all asbestos claims against the CCR defendants that had not yet been filed, but might be filed in the future.

On January 15, 1993, that settlement was reached, and Messrs. Motley and Locks filed the complaint in this case, seeking an opt-out class under Rule 23(b)(3). At the same time, CCR filed its answer, and all parties signed and filed a Stipulation of Settlement. Shortly thereafter, the CCR defendants conceded that the case, involving the disparate claims of millions of class members under the laws of all 50

jurisdictions—some with serious diseases, some with relatively minor asbestos-related impairments, and the vast majority with no illness at all—could not be litigated as a class action. Third Circuit Joint Appendix ("JA") 456-57. Although nominally styled as a case brought by named plaintiffs against CCR, there is no dispute that, in the words of CCR's chief executive officer, CCR "picked" Motley and Locks for the purpose of negotiating a settlement, which would, in turn, become a friendly lawsuit whose sole purpose is to substitute an extra-judicial asbestos claims procedure for the remedies available in the court system. JA 1190-93.

The class—which may include as many as 20-30 million people (JA 876)—was defined to include all U.S. residents occupationally exposed to asbestos for whom CCR defendants may now, or at any time in the future, bear legal liability, as well as all individuals residing with, or related to, such persons, to whom CCR may be legally liable. JA 337. Specifically excluded are all individuals who had brought suit against one or more of the CCR defendants prior to January 15, 1993, the date of the settlement.

The exclusion of previously-filed suits was critical to class counsel who, while professing to endorse the class settlement, effectively opted-out their presently-injured clients from the class and settled their claims for $215 million in cash (including at least $70 million in attorney's fees), rather than putting those claimants through the class settlement's administrative scheme. JA 1399. These side-settlements, the most important of which were signed on the eve of the filing of the class action, were agreed to by CCR only after it believed that the class action settlement would be consummated. JA 1201, 1259, 1294. Not only did the side-deals pay class counsel's "present" clients far more than they could hope to obtain under the class action settlement, *see, e.g.*, Obj. Ex. O-170, but they paid cash for certain illnesses, such as many asbestos-related lung cancers, that would not qualify for compensation at all under that settlement. *See, e.g.*, JA 1300-01.

The vast majority of the class members were so-called "exposure-only" plaintiffs—individuals who had been exposed to CCR asbestos-containing products, but who suffered from no asbestos-related disease. JA 817-18. The class complaint alleged three bases for recovery of damages for the exposure-only plaintiffs: negligent infliction of emotional distress, increased risk of a future condition, and medical monitoring. JA 288-91. The complaint did not request any of the relief agreed to in the simultaneously-filed class settlement, and none of the relief actually provided in that settlement corresponds with the money damages nominally sought in the complaint.

Instead, the settlement established a procedure under which class members may file claims if they develop an asbestos-related illness. Under it, the CCR defendants and, if appealed by a class member, arbitrators appointed by the parties, decide whether the claimant satisfies the settlement's strict medical criteria for compensation. JA 348-77. Once medical eligibility is established, CCR itself, without any independent review, makes decisions on payment levels, within broad ranges, on more than 98% of all claims. JA 385-87. After completing the administrative process, claimants who meet the medical criteria may, in theory, seek arbitration or relief in the tort system (subject to numerous procedural requirements and a waiver of all punitive damages), JA 396-402, but fewer than 1% of all claimants may do so in any one year. JA 437, 517. Thus, even if just a small percentage of class members seek such relief, the pre-filing backlog will shortly exceed 15 years. *See, e.g.*, JA 808.

Nominally, the settlement requires that claimants be paid within about nine months of the filing of a qualifying claim. JA 344, 385-86. Payment, however, is subject to strict yearly case-flow maximums, and if the number of eligible claims exceed those maximums, JA 382, 436, which is likely in light of historical data, payments could be delayed for many years.

B. Proceedings Before The District Court.

Various class members, labor unions, and asbestos advocacy organizations objected to the settlement, arguing that it was grossly unfair and beset by fundamental legal impediments. As to the former, objectors argued, among other things, that (1) contrary to the principles of federalism established by *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-80 (1938), the settlement prospectively extinguishes certain of the class members' valuable state-law causes of action, which have historically been settled by CCR for substantial amounts of money; (2) the CCR defendants, and not a neutral decisionmaker, control the claims procedures, and retain, in almost all cases, unreviewable authority to set monetary awards for eligible class members at amounts drastically below those paid in the tort system; and (3) the settlement fails to adjust class members' recoveries for inflation, a problem exacerbated in this "futures" class action by the fact that the class members are bound to the settlement in perpetuity, while each defendant is granted an unqualified opportunity to abandon the settlement after 10 years.

Most important for present purposes, the objectors challenged the court's legal power to bind the absent class members on four distinct, but related grounds. First, they argued that this was a feigned or collusive case, not susceptible to resolution under Article III's case or controversy requirement, because there was no dispute among the parties when the case was filed and the plaintiffs never intended to pursue any of the relief allegedly sought in the complaint. This was made plain not only by the lack of any relation between the relief purportedly sought in the complaint and that obtained in the settlement, but also by the testimony of the named plaintiffs, each of whom expressly renounced the claims in the complaint and proclaimed no intention of seeking money damages because they had not sustained any asbestos-related injuries. As one named plaintiff put it, "I have nothing wrong with me. So

therefore, I should not and will not seek any damages or actions." JA 1265.

Second, objectors maintained that the none of the exposure-only class members had the requisite $50,000 in controversy to establish diversity jurisdiction under 28 U.S.C. 1332, since the causes of action pled were not valid causes of action in most, if not all, jurisdictions. The lack of a good faith allegation of $50,000 in damages for each class member was buttressed as well by the named plaintiffs' testimony which, again, demonstrated that the complaint's damages allegations were a sham. *See, e.g.*, JA 1124-25, 1162, 1178-79, 1181A; 62a-66a.

Third, objectors maintained that the notice to the class was ineffective under the due process clause and Rule 23 because it was impossible to notify millions of "future" class members to alert them to their opt-out rights. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-13 (1985). Objectors pointed out that the *uninjured* plaintiff class would have no reason to heed a notice because many class members knew nothing of their exposure, and that, even for those who did, it was fundamentally unfair to force individuals to opt out before they knew the extent of their injuries or what their personal circumstances would be at the time they became ill. *See Barry v. Barchi*, 443 U.S. 55, 66 (1979)(relinquishment of state-created property rights may only be demanded "at a meaningful time and in a meaningful manner").

With respect to the argument that formed the basis for the court of appeals' decision, objectors challenged class certification under Rule 23. They argued that it was impossible to meet Rule 23(a)(3)'s requirement that the claims of the representative plaintiffs be "typical" of the class, since no class representative could be said to be "typical" of any, let alone *all*, future asbestos victims whose circumstances were unknown and unknowable. The objectors also contended that the case did not present common questions of law and fact under Rule 23(a)(2), and that any common questions did not predominate over the

case's individual questions under Rule 23(b)(3). Specifically, they pointed out that the vastly different factual and legal circumstances of the individual members of the class—involving claims arising under the laws of 50 jurisdictions that would affect class members in vastly different ways—precluded certification.

Finally, the objectors contended that Rule 23(a)(4)'s adequacy of representation requirement had not been met. The settlement terms themselves indicated that the class representatives could not, with one set of lawyers, represent *all* the class members, some of whose claims were abrogated, or made virtually worthless, in order to enhance the position of other claimants. Similarly, the objectors pointed to class counsel's decision to benefit their "present" clients outside the class, by obtaining the $215 million side-deals, implicitly diminishing the recoveries of the class members.

The district court rejected each of respondents' arguments and approved the settlement. *See Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994); *Carlough v. Amchem Products, Inc.*, 834 F. Supp. 1437 (E.D. Pa. 1993). CCR then moved for an injunction that would bar any class members from suing the CCR defendants for asbestos-related injuries in federal or state court, and require them to use the settlement's claims procedure to obtain compensation. At this point, certain class members who had been diagnosed with asbestos-related diseases *after* the opt-out period ended, and who never received notice of the class action, entered the case to argue against the injunction. *See, e.g.*, Dkt. No. 1161. On September 21, 1994, the district court granted a preliminary injunction, JA 1034, and respondents appealed that order under 28 U.S.C. 1292(a)(1), arguing that, because the district court lacked subject matter jurisdiction and the power to bind the absent class members under both the due process

clause and Rule 23, the preliminary injunction should be vacated.[1]

C. The Decision of the Court of Appeals.

The court of appeals unanimously reversed in an opinion by Circuit Judge Edward M. Becker. It began by describing the "most notabl[e]" aspect of the settlement—that it did not resolve the claims of those who had suffered injury, but of those who had not (17a-18a)—and by expressing "serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction over the absent class members" (19a). In order to avoid ruling on these fundamental constitutional problems, the court held that "this class meets neither the [Rule] 23(a) requirements of typicality and adequacy of representation, nor the 23(b)(3) requirements of predominance and superiority" (19a). In so holding, the court rejected CCR's two related contentions—that Rule 23's certification criteria should be applied more liberally in a settlement context and that the court's review of the settlement terms may substitute for strict application of the certification criteria to the claims pled in the complaint.

Judge Becker relied on the Third Circuit's recent decision in *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.* ("*GM Trucks*"), 55 F.3d 768, 799 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995), which had held

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[1] By its own terms, 157 F.R.D. at 338, and by law, the district court's fairness decision was not a final appealable decision, because a third party complaint by CCR against its insurers remains pending (*see* 24a n.4, 34a). Thus, despite petitioners' statement to the contrary (Pet. 25), respondents do contend that the settlement is grossly unfair, but remain unable to challenge the district court's fairness determination in the absence of a final order.

that neither the purpose or text of Rule 23 "authorize[d] separate, liberalized criteria for settlement classes." The court acknowledged that *GM Trucks* had dealt expressly only with the criteria under subsection (a) of Rule 23, but then determined that, for the same reasons given in *GM Trucks*—the Rule's text and purpose in protecting "absent class members' rights" (38a)—strict application of Rule 23(b)(3)'s predominance and superiority criteria was also required.

The court then explained that, in order to obtain certification of any class action, the district court must first find that Rule 23(a)'s numerosity, commonality, typicality, and adequacy of representation requirements are met, and then that the class falls within one of Rule 23(b)'s three subdivisions (38a). The court initially examined whether common questions of law and fact exist (Rule 23(a)(2)) and whether such common questions "predominate over any questions affecting only individual [class] members" (Rule 23(b)(3)). In doing so, it discussed the large number of individual factual variations, such as differences in types of illness and smoking history, particularly regarding the "futures plaintiffs [who] share little in common, either with each other or with the presently injured class members" (41a). These differences translated into significant legal variations regarding causation, comparative fault, and the types of damages available to each class member. The problem was "compounded exponentially" by choice-of-law issues in this nationwide diversity class action, which demanded application of the law of all 50 states on a range of issues, such as statutes of limitations, the viability of "exposure-only" causes of action, causation, and the like. *See* 41a (citing *Shutts*, 472 U.S. at 823).

Despite these problems, the court of appeals declined to rule that the class did not satisfy the commonality requirement of Rule 23(a)(2); however, it did conclude that the sole common issue of asbestos' harmfulness could not support a finding that the common questions *predominated*

over the individual questions under Rule 23(b)(3). The court also pointed to the consistent refusal of the courts to certify mass-tort cases, and the Advisory Committee Note making clear that Rule 23 certification was not intended to apply to such cases (43a-48a).

Turning to Rule 23(a)(4), the court further concluded that "serious intra-class conflicts preclude this class from meeting the adequacy of representation requirement" (49a). The court looked to the settlement itself, noting that it "makes numerous decisions on which the interests of different types of class members are at odds" and that such decisions "necessarily favor some claimants over others" (49a). Thus, the court observed, some claimants would obtain benefits on relatively favorable terms, while those with claims of asymptomatic pleural thickening, medical monitoring, or loss of consortium would receive no damages at all, and others, such as mesothelioma victims, would get far less than they would in the tort system (49a).

The "most salient conflict," the court concluded (49a), was between presently-injured and future class members; the former would want to maximize current benefits, while the latter would want protections, such as an adjustment for inflation or a back-end opt-out procedure (which allows the class member to opt-out at the time injury is sustained), neither of which the settlement provided. The lack of any such protections "thwarted the adequate representation of the disparate groups of plaintiffs" (52a).

The Third Circuit also held that typicality—which demands alignment between the claims of the named representatives and the absentees—was lacking, because the same "hodgepodge" of claims (53a) and factual variations that plagued the commonality inquiry and defeated adequacy of representation made it impossible for a class member's claim to be "typical" of that of any other class member. This was particularly true, the court held, because of the clash between presently-injured and future class members, but would also have been true if the class contained only

"futures," since their circumstances are inherently unknowable and the types of diseases they might contract vary widely (53a).

Finally, the court found that class treatment was not "superior" to individual adjudication under Rule 23(b)(3), relying mainly on fairness concerns about the settlement itself. It noted, first, that class members had significant interests in controlling their own litigation, because asbestos personal-injury claims, as opposed to the kinds of small claims for which Rule 23(b)(3) was intended (55a), are judicially viable on their own. Second, the court relied on the inherent problems of providing adequate notice in a "futures" class action. Because the class is composed primarily of uninjured persons, they would have little reason to pay attention to the class notice, especially those who know nothing about their own asbestos exposure (55a, citing testimony of two named plaintiffs who were unaware of their own exposure until their spouses became ill from asbestos). Thus, the court held, binding them could not be deemed superior to individual actions brought when a class member suffers an asbestos-related injury. The panel supported its notice concerns by explaining that the latency period for asbestos-related disease can be very long, and that one particularly horrible disease—mesothelioma—can be contracted through incidental exposures. The court thus concluded that "we cannot conceive of how any class of this magnitude could be certified" (57a).

Circuit Judge Harry W. Wellford filed a concurrence, noting his agreement with Judge Becker's opinion, and further holding that the plaintiffs' mere exposure to asbestos fibers did not constitute "injury in fact" sufficient to confer standing (60a). Judge Wellford explained that individuals with only speculative, future injuries did not present an Article III case or controversy, buttressing his explanation with the testimony of the class representatives which, as noted above, expressly renounced any present intention of seeking damages. *See* 62a-66a (quoting testimony).

Judge Wellford's apprehension about the proper role of the courts thus struck the same chord as the panel's conclusions, albeit in a different key. While expressing concern over the large number of asbestos claims, the court of appeals made clear that the courts were not the place to seek mass-tort reform (57a-58a). The court was thus determined to "leave legislative solutions to legislative channels" (20a). "In doing so," the panel concluded (20a), "we avoid a serious rend in the garment of the federal judiciary that would result from the Court, even with the noblest motives, exercising power that it lacks."

REASONS FOR DENYING THE WRIT

Before explaining why the bases suggested by petitioners for granting review should be rejected, there is a prior insuperable obstacle to a grant of certiorari in this case—the class plaintiffs' decision not to seek review of the Third Circuit's ruling. After having lost in the court of appeals, and with their lucrative side-settlements still intact, class counsel decided not to seek review and thereby abandoned the settlement and the class members who they, *not CCR*, are duty bound to serve. Ordinarily, the absence of a key party would be reason enough to deny certiorari. But here, in a class action—particularly one in which the named plaintiffs' adequacy to represent the class members is at the heart of the dispute—it would be especially inappropriate for this Court to decide the matter when the court-appointed representatives of the class have chosen not to assert the class members' interests. After all, as CCR admits (Pet. 5-6), the class settlement is supposed to be for the benefit of the class, but their champions have decided to drop their quest for its approval.

Quite apart from these prudential considerations, the class plaintiffs' failure to seek review effectively bars resurrection of the class settlement, thus making CCR's petition to this Court entirely hypothetical. Put another way,

class counsel's failure to seek certiorari binds the class members to the decision below and precludes them from seeking its reinstatement. A class settlement is a contract that may only be enforced if it is endorsed by *all* the parties *and* it gains court approval. *See* Fed. R. Civ. P. 23(e). The court of appeals ordered the district court to decertify the settlement class (59a), thus invalidating the settlement, *see* Settlement, ¶ XXII.G.4, JA 432, which necessarily included certification of the class. That being the case, the settlement may go forward only if all the settling parties (not just the defendants) continue to seek and eventually obtain its judicial enforcement. Because the plaintiffs no longer seek such approval—perhaps because they believe it futile, or perhaps because they no longer support the settlement—the settlement is defunct, and review should be denied for that reason alone.

We now turn to the matters addressed in the petition and show why, apart from class counsel's abandonment of the settlement, review should be denied.

A. There Is No Substantial Conflict Among The Circuits.

In the main, the appellate decisions relied on by petitioners do not support the proposition that Rule 23's certification requirements can be ignored, or applied more liberally, in the settlement context. For instance, *In re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989), a mass-tort personal-injury class action involving claims against the insurer of a bankrupt medical device manufacturer, is distinguishable because class certification was granted under the non-opt-out provisions of Rule 23(b)(1)(A), not Rule 23(b)(3), the Rule applicable here. In any event, *Robins* did *not* decide whether the Rule 23 criteria apply differently to a settlement class. To the contrary, its class certification discussion begins by noting that a class action "must satisfy all *four* steps of the

prerequisites mandated by subsection (a) of the Rule ... [and] fit within at least one of the three categories of actions identified in subsection (b) of the Rule." 880 F.2d at 727-28 (emphasis in original).

Robins' main focus was on whether mass-tort class actions can be maintained at all under Rule 23(b), and said at the very end of its discussion that "settlement should be a factor" in class certification. *Id.* at 740. That passing dictum appeared in the context of noting that settlement class actions are permissible under Rule 23, *id.* at 738, a point with which the Third Circuit concurs (36a).

Similarly, in *In re Dennis Greenman Securities Litig.*, 829 F.2d 1539 (11th Cir. 1987), the court emphasized that settlement classes "must satisfy" the Rule 23(a) and (b) requirements, and the lower court's Rule 23(a) certification was not even challenged. The appellant argued only that the district court had certified the case under the wrong subsection of Rule 23(b), with which the Eleventh Circuit agreed. *Id.* at 1544 & n.5. While adverting in dicta to a "special standard" used in reviewing "settlement certifications," the court stated that "*this case is meaningfully different*," as the case was not a settlement class since "the district court certified a class action prior to the commencement of settlement negotiations." *Id.* at 1543.

Officers for Justice v. Civil Service Comm'n, 688 F.2d 615 (9th Cir. 1982), also relied on by petitioners, is simply not on point. There, the challenge to the settlement did not even raise the question whether the criteria for certifying settlement classes are less stringent than for litigation classes. Indeed, the district court had certified the case *for litigation* under Rule 23(b)(2) for equitable relief, and under Rule 23(b)(3) for damages, and class members were given the right to opt out. An objector who did not opt out at the time of certification then complained because a later-achieved settlement did not give him *another* chance to do so. The Ninth Circuit simply held that neither the Rule nor due

process demanded that class members "be given a second chance to opt out." *Officers for Justice*, 688 F.2d at 635.[2]

Although the foregoing precedents are not in conflict with the decision below, we acknowledge that a recent opinion of the Fifth Circuit, *In re Asbestos Litigation*, 90 F.3d 963 (1996), presents a different situation. There, in approving a settlement of future asbestos claims, the court asserted that the Third Circuit "has refused to look at settlements before it when deciding class certification issues." *Id.* at 975. That assertion is incorrect because, in both *GM Trucks* and the decision below, the Third Circuit looked at the settlement in detail in deciding that Rule 23's adequacy of representation, typicality, and superiority requirements had not been met. *See supra* at 10-11 (settlement terms here revealed insuperable class conflicts); *GM Trucks*, 55 F.3d at 796, 801 (noting that "evaluating the settlement can yield some information relevant to the adequacy of representation determination," and pointing to "conspicuous evidence of ... an intra-class conflict in the very terms of this settlement"). Thus, contrary to the Fifth Circuit's characterization, the decision below recognized that consideration of the settlement "enhances the ability of

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[2] Petitioners also rely on *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983), to show a circuit split, citing it for the proposition that settlement classes are permissible. But that holding is, as we have said, consistent with the Third Circuit's position (36a). Moreover, the principal holding in *Weinberger*—that settlement classes require a "clearer showing of a settlement's fairness, reasonableness and adequacy" than do "cases ... where a class has been certified and class representatives have been recognized at an *earlier date*," *id.* (emphasis added)—strongly suggests that strict certification findings under Rule 23(a) and one part of Rule 23(b) must be made at some point in every class action.

district courts to make informed certification decisions." *In re Asbestos*, 90 F.3d at 975.

The Third Circuit did hold that analysis of the settlement is not sufficient alone to satisfy the class certification criteria, and thus is not a *substitute* for the district court's obligation to find that the *claims in the complaint* meet the requirements of Rule 23. It did so because the principal purpose of the certification requirement is to protect the absent plaintiffs whose claims in the class complaint are compromised by the settlement. *See* 36a-37a (citing *GM Trucks*, 55 F.3d at 799). Although the Fifth Circuit did not explicitly reject this aspect of the decision below, we acknowledge that it implicitly did so because it looked *solely* to the circumstances of the settlement in its class certification analysis. *In re Asbestos*, 90 F.3d at 975-84.

However, even on this score, *In re Asbestos* does not present a direct circuit conflict, because it involved a non-opt out class action certified under Rule 23(b)(1)(B), whereas this case and *GM Trucks* both involved Rule 23(b)(3) classes. Significantly, the *GM Trucks* panel limited its holding to cases for which certification is sought under subdivision (b)(3), 55 F.3d at 796 n.18, and the panel in this case reiterated that concern in the Rule 23(a) context. *See* 43a (declining to find a lack of commonality under Rule 23(a)(2), because doing so "might have repercussions for class actions very different from this case, such as a Rule 23(b)(1)(B) limited fund class action, in which the action presented claimants with their only chance at recovery").

Indeed, the differences between Rules 23(b)(1)(B) and (b)(3) are significant. In *In re Asbestos*, the Fifth Circuit held that a settlement of future claims against the Fibreboard Corporation had been properly certified because, in its view, Fibreboard's current and future asbestos liabilities were such that the settlement presented the only way to preserve the company's diminishing assets other than through bankruptcy. *In re Asbestos*, 90 F.3d at 982. The settlement proceeds

were to be paid out of a parallel settlement (also approved by the Fifth Circuit) between Fiberboard and its insurers which constituted, the Fifth Circuit held, a "limited fund." *Id.* at 983-84. According to the Fifth Circuit, the limited fund justified class certification, because, in the words of Rule 23(b)(1)(B), individual adjudications against Fibreboard "would as a practical matter be dispositive of the interests" of the other class members, or "substantially impair or impede their ability to protect their interests" in Fibreboard's assets. *In re Asbestos*, 90 F.3d at 984.

Therefore, according to *In re Asbestos*, the class claims were akin to a joint claim for equitable distribution of common property. In those circumstances, arguably the Rule 23(a) inquiry merges with an analysis of the settlement terms because the class claims seek unitary resolution of a commonly held interest in maximizing the claimants' pro-rata recoveries from the limited fund. But that holding is irrelevant to this case which involves individual money damages claims against highly solvent defendants, and in which the claims in the complaint—which is the proper focus of the class certification inquiry—are unrelated to the terms of the settlement.

In sum, neither *In re Asbestos* or the other circuit authority upon which petitioners rely creates a significant conflict warranting this Court's review.

B. There Is An Independent Basis For The Third Circuit's Decision That Was Omitted From The Petition.

Even if there were a direct and substantial conflict, there is an alternative and independent ground for the Third Circuit's decision that supports denial of the petition. The principal holding below was that a Rule 23(b)(3) settlement class action could be certified if, after application of the certification criteria, the case could be litigated as a class action. In addition, the court held that, by virtue of the

settlement terms themselves, there were conflicts of interest between currently-injured class members and those who may suffer injuries years from now that required decertification of the class.

Thus, the court of appeals noted that, while currently injured claimants might be satisfied with the settlement's strict monetary limitations, future claimants would want protections against inflation, spend-thrift provisions, a bar against companies exiting the settlement (which the settlement permits after 10 years), and their own opportunity to opt out of the settlement, not at the front end, but when their injuries arose (49a-50a). In ordering decertification, the court also relied on the settlement's creation of other conflicts among class members, such as the fact that the settlement extinguishes all claims for medical monitoring, which might be valuable for "exposure-only" class members, but not for those already ill, and that it eliminates loss of consortium claims without any compensation, an implicit trade-off that harms some class claimants while benefitting others (49a).

These independently dispositive rulings of the court of appeals (48a-52a), while no doubt rulings with which petitioners disagree, have nothing to do with the question presented in the petition. In fact, they do *precisely* what petitioners say a court should do—they look to the settlement terms themselves in considering class certification. Thus, even if this Court grants certiorari and holds, as petitioners urge, that some lesser standard of class certification is permissible in the settlement context, the result in this case will not change. In short, "the class certification issue[] raised in the petition [is] unlikely ever to affect the class members or petitioner[s]" (Pet. 16 n.12), and review should be denied on that basis alone.[3]

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[3] In the same vein, the Third Circuit indicated that the (continued...)

C. Other Factors Make This Case A Poor Candidate For Review.

The class certification issue decided below did not arise in a vacuum, but rather as part of an attempt to exclude *future* claimants from the tort system and bind them to a CCR-run claims procedure. As a result, the case presented fundamental issues of justiciability, subject matter jurisdiction, and due process. The presence of these challenges, whose potency the court below acknowledged (19a, 30a-31a), makes it highly unlikely that the settlement can ever be revived.

Aside from the fairness concerns that plague this case (*see supra* at 5), the justiciability and amount-in-controversy problems are so great that it is likely that the Court would never reach a decision on the question presented. And, even if this Court declined to consider the issues relating to subject matter jurisdiction, a ruling favorable to petitioners on the question presented alone would provide neither the parties here, nor the world at large, adequate guidance about the legality of the type of "futures" settlement that CCR seeks to impose. Similarly, the due process question—whether it was permissible to bind huge numbers

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[3](...continued)
impossibility of providing adequate notice presented a serious question of unfairness for class members who are uninjured and therefore highly unlikely to be aware of the action or have adequate information to make an informed decision about whether to opt out of the case. Although this part of the decision was made under Rule 23(b)(3)'s superiority requirement, these problems are inherent in the *settlement itself* because of its inclusion of *future* personal-injury claimants. Thus, regardless of the Court's ruling on the question presented, the Third Circuit's ruling in this regard will stand.

of unknowing and unknowable class members to a settlement that abrogates their rights of access to the tort system *before* their claims accrue—presents a substantial barrier to upholding the settlement. Thus, the Third Circuit termed this argument "powerful" (31a), and relied on these concerns in its Rule 23(b)(3) superiority analysis (55a-57a), underscoring the likely fate of the settlement even if this Court agrees with petitioners on the Rule 23 question. For these reasons as well, review should be denied.

D. A Pending Proposal To Amend Rule 23 Makes Review Here Particularly Inappropriate.

The Judicial Conference's Standing Committee on Rules of Practice and Procedure has recently recommended, over strenuous objection, that Rule 23 be amended on the precise issue presented in the petition. *See* Pet. 20-21. If the amendment is approved, courts will be authorized to certify classes for settlement purposes that would not otherwise meet the criteria for litigation under Rule 23(b)(3). As such, the proposed rule would effectively modify the reasoning of the the opinion below, to the extent that it holds that the standards for certifying a class under Rule 23(b)(3) are the same in both the settlement and litigation contexts. This provides a powerful additional reason to deny review. The Rules amendment process devised by Congress (in which this Court has a significant role) should be allowed to run its course, since whatever the outcome, it will almost surely obviate the need to rule on the question presented here.

Moreover, the content of the proposed rule provides another reason why certiorari should be denied. The proposed rule would add a new subsection (b)(4) to Rule 23, permitting parties who had settled a Rule 23(b)(3)-type class action to be certified for settlement purposes, even though it might not meet Rule 23(b)(3)'s superiority and predominance requirements in the litigation context. *See* Advisory Committee Notes to Draft Rule 23 (on file at Committee on

Rules of Practice and Procedure, Admin. Office of U.S. Courts, Washington, D.C.). The proposed rule makes clear, however, that a (b)(4) class would be required to meet all of the certification requirements under subsection (a) of Rule 23 on the same terms as an ordinary Rule 23(b)(3) litigation class.

Here, however, while the Third Circuit did state that the Rule 23(b) requirements for litigation and settlement were the same, it *also* decertified the class on entirely independent grounds—failure to meet the *Rule 23(a)* typicality and adequacy of representation requirements. To our knowledge, no court has ever held that these fundamental Rule 23(a) requirements, which were included for the protection of the absentees, can be overlooked in the context of a settlement class certified under present Rule 23(b)(3), nor could they be under the proposed amendment. *See* Pet. 20. Therefore, review should be denied because, regardless of how this Court rules on the merits of the Rule 23(b)(3) question presented, or how the Rules Committee process is resolved, the result in this case will remain the same.

E. The Decision Below Is Consistent With The Language And Purpose Of Rule 23 And With Decisions Of This Court.

Building on its *GM Trucks* decision, the court of appeals correctly held that the language of Rule 23 does not admit of separate, liberalized criteria for settlement class actions. The Rule states simply that "[a]n action may be maintained as a class action if [the four] *prerequisites* of subdivision (a) are satisfied, and in addition" one of the parts of subdivision (b) is met. Fed. R. Civ. P. 23(b) (emphasis added). Further, the certification standards themselves—when they refer to "common *questions* of law and fact" and to typical "*claims* and defenses"—are plainly speaking of certification based on the complaint, not a settlement.

Petitioners strive mightily to find language in the Rule that would allow them to relax or ignore these requirements (Pet. 22-25), but there is none. They rely heavily, for instance, on Rule 23(b)(3)(B), which permits the court, in its certification inquiry, to consider whether litigation has already been commenced against the defendant. That language says nothing about whether the court is free, as petitioners claim, to avoid strict imposition of the Rule 23(a) prerequisites and the other requirements of Rule 23(b). Indeed, subdivision (b)(3)(B) was not intended to relax the Rule's other criteria, but to provide an additional *barrier* to certification in cases where the subject matter of the proposed class action has already progressed in other litigation. *See* C. Wright, A. Miller, & M. Kane, 7A *Federal Practice and Procedure* § 1780, at 569-70 (2d ed. 1986).

Moreover, petitioners' interpretation of the Rule is at odds with the teachings of *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), an employment discrimination class action in which the Court held that a Mexican-American employee, who was denied a workplace *promotion*, could not represent a class of Mexican-American job *applicants*. Although *Falcon* did not involve a settlement class, the Court's holding that "actual, not presumed, conformance with Rule 23(a) remains...indispensable[,]" 457 U.S. at 160, was not in any way restricted to class actions that were to be litigated. Indeed, if the differences between the class representatives and the absentees in *Falcon* defeated a claim to class certification, then this case does not even remotely justify certification, where a handful of representatives purport to seek relief over a dizzying array of unlawful conduct under the laws of 50 jurisdictions, and claim to represent the victims of *future* injuries, whose circumstances are obviously unknowable. Thus, *Falcon*'s holding that a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the

prerequisites of Rule 23(a) have been satisfied," 457 U.S. at 161, has particular force here.

Nor is there any textual support for petitioners' principal rationale for evasion of the certification criteria: that the district court's finding of fairness under Rule 23(e) is a substitute for, and thus serves to meet, those criteria (Pet. 27). Indeed, both the text and structure of subsection (e) firmly supports the court of appeals' decision. First, Rule 23(e) says only that "[a] class action"—presumably the same "class action" referred to in subsection (b)—"shall not be ... compromised without the approval of the Court...." This language demonstrates that *all* "class actions," including settlement classes approved under Rule 23(e), must meet the requirements of Rules 23(a) and (b). Thus, the approval requirement of Rule 23(e) is plainly in addition to, rather than a substitute for, strict application of the certification criteria.

Nor can petitioners' Rule 23(e) argument be squared with *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974). There, the named plaintiffs argued that they should be excused from giving class members notice and opt-out rights under Rule 23(c)(2)—which applies in 23(b)(3) class actions—because "adequate representation, rather than notice, is the touchstone of due process in a class action...." *Id.* at 176. "[T]his view has little to commend it," this Court held, because "Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided." *See also id.* at 176 n.13 (class members' opt-out rights also protected). So too here, petitioners may not pick and choose which portions of Rule 23 are applicable. Rather, the members of the class are entitled to all the protections of Rule 23(e) *and* of Rules 23(a) and (b).

While the text and structure of Rule 23 is dispositive, the decision below is also fully consistent with the purpose of the Rule, which is not, as petitioners would have it (Pet. 25-27), efficiency at all costs. Rather, the principal purpose of the Rule, particularly the Rule 23(a) criteria, is protection

of absent class members, by allowing their claims to be prosecuted when their interests are allied with the class representatives, and, as this case poignantly illustrates, to avoid the extinguishment of claims *en masse* when those interests diverge. *See* 48a-51a.

On the other hand, the regime extolled by petitioners would result in a wholesale evisceration of the rights of absentees. Petitioners commend the trend in the case law not to certify mass-tort class actions for *litigation* (Pet. 17), but argue that certification requirements should be loosened to permit mass-tort *settlements*. This "construction" of the Rule would leave absent class members without any structural protections. Defendants would be the masters of the Rule, defeating mass-tort class actions when they do not like them, and employing them, as here, after they have hand-picked the class lawyers and devised a settlement to their liking.

Finally, this Court should reject petitioners' hyperbolic claim that the decision below will thwart the settlement of class actions. It is not only irrelevant to the proper construction of Rule 23, but it is wrong as well. The Third Circuit has expressly embraced the settlement class action (36a), but it has insisted that the district court apply the criteria of Rule 23(a) and (b) strictly for the protection of the absentees. Since the benefits of settlement are often enormous for both plaintiffs and defendants (*see* Pet. 16-18), the need to satisfy the class certification criteria will not generally dissuade parties from settling legitimate cases. Moreover, the very statistics relied upon by petitioners undermine their argument, because more than half of all class actions that settle have been certified for litigation. *See* Pet. 17. This demonstrates that, even if settlement classes were eliminated entirely, class actions would still settle in large numbers.

In any event, Rule 23's class certification requirements *were* intended to thwart some class actions, settlement or otherwise, in which the absentees' interests are not adequately protected. *Falcon*, 457 U.S. at 157-60. That

protection is precisely what is at stake here where the "class action" does not involve real plaintiffs who have sustained actual injuries, but is a thinly-veiled invitation for judicially imposed legislation to resolve an asserted litigation crisis. *See* Pet. 19-20. As the court below recognized (20a), if a crisis exists, it can be resolved by Congress, the institution in which the Constitution has placed responsibility for crafting prospective solutions to difficult social and legal problems.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 30, 1996

e Court, U.S.
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(8)

No. 96-270

In the Supreme Court of the United States

OCTOBER TERM, 1995

AMCHEM PRODUCTS, INC., ET AL.
Petitioners

v.

GEORGE WINDSOR, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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5 pp

QUESTION PRESENTED

When the parties to a putative class action enter into a settlement of the class action before it is even filed, is it inappropriate for the district court to nevertheless apply the typicality and adequacy of representation requirements of Federal Rule of Civil Procedure 23(a) as well as the predominance and superiority requirements of Rule 23(b).

PARTIES TO THE PRECEDING

AND RULE 29.6 STATEMENT

The Respondent Casimir Balonis is dying of the asbestos cancer known as mesothelioma, and is in the terminal stages of that disease. The Respondent Margaret Balonis is his wife. The Respondent Shepard A. Hoffman is their attorney. The other parties to the proceeding are set forth at App. 292(a)-317(a) of Petitioners' Appendix to Petition for a Writ of Certiorari.

For the reasons set forth by Professor Susan P. Koniak in the law review article: **FEASTING WHILE THE WIDOW WEEPS**: *GEORGINE V. AMCHEM PRODUCTS, INC.*, 80 CORNELL L. REV. 1045 (1995), the Petition for Writ of Certiorari should not be granted. In addition, there is no more reason to grant certiorari in this case than there was as to the Third Circuit's decision in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3rd Cir.) cert. denied, 116 S. Ct. 88 (1995). Certiorari was denied in that case and should also be denied here.

CONCLUSION

Respondent Casimir Balonis, who is in the terminal stages of mesothelioma cancer caused by exposure to the Petitioners' asbestos products, on behalf of himself and other persons dying of asbestos cancer, respectfully request that the petition for a writ of certiorari be DENIED.

Respectfully submitted.

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SEPTEMBER 16, 1996

(9)

No. 96-270

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In the Supreme Court of the United States

OCTOBER TERM, 1996

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REPLY BRIEF FOR THE PETITIONERS

Respondents fail to present even one cogent reason for denying review. They do not dispute that

- The issue presented for review is exceptionally important (Pet. 2-3);

- The issue arises with great frequency throughout the federal courts, not just in mass tort cases but in class actions of all kinds (Pet. 16-19);

- There is a conflict among the courts of appeals on this significant, oft-recurring issue (Pet. 10-16) (although respondents try unsuccessfully to minimize the conflict);

- The conflict creates significant uncertainty about the viability of other class action settlements now pending in the lower courts (Pet. 17-18), and litigants and the lower courts urgently need this Court's guidance as to which of the conflicting views is right.

Despite these concessions, respondents contend that certiorari is not warranted. To an unusual degree, their arguments rely on invective and rhetorical flourishes. Their most hackneyed metaphors[1] are cumulated in an effort to prop up a contention (based on alleged extra-record statements (Windsor Op. 14 n.8)) that review should be denied because the plaintiff class has allegedly "abandoned the settlement" (White Lung Ass'n ("WLA") Op. 12), and "acquiesced in the judgment of the Third Circuit" (Windsor Op. 13), by not filing a separate petition for certiorari.

That contention should be dismissed out of hand, both as a matter of law and of fact. Rule 12.6, which automatically makes the plaintiff class a party in this Court, is a complete answer to respondents' assertion that the plaintiff class "*do[es] not appear here in any capacity*" (Windsor Op. 14 (emphasis in original). The plaintiff class will be bound by any judgment entered by this Court. And all three counsel for the plaintiff class — Gene Locks, Ronald Motley, and Joseph Rice — have asked us to inform this Court that (1) they continue to represent the class in this case and to support the settlement; (2) they believe that the Third Circuit erred in its

---

[1] *E.g.*, "[i]t takes two to tango"; "defendants are flying solo"; "the sound of one hand clapping"; "flown the coop"; "the fox * * * guarding the henhouse." Windsor Op. 13, 14.

construction of Rule 23 and in rejecting the settlement; and (3) it was not necessary for class counsel to file a duplicative certiorari petition because they knew that the legal issue would be presented to this Court by the petition filed by the settling defendants.

Respondents' assorted other reasons for denying certiorari fare no better.

A. The Conflict Is Clear And Substantial.

Respondents claim that there is no "substantial" conflict with respect to the issue presented. WLA Op. 13. Their contention rests on two false bases. First, respondents mischaracterize the issue presented as whether courts *must "rel[y] exclusively* on the existence of a class settlement to satisfy Rule 23's requirements." Windsor Op. 22 (emphasis added). The issue, in fact, is whether a court *may consider* the parties' settlement in determining whether to certify the class or whether — as the Third Circuit held — a court must completely ignore the settlement.

Second, respondents persistently refuse to accept the courts' own explanations of their decisions. For example, the Fifth Circuit in *In re Asbestos Litigation*, 90 F.3d 963, 975 (1996), held that "the district court can and should look at the terms of a settlement in front of it as part of the certification inquiry." The court *expressly said* that "[m]ost circuits to decide the issue" had reached that same conclusion, citing the Second, Fourth, Eighth, and Eleventh Circuit decisions discussed in the petition (at 11-12), and that "[o]nly the Third Circuit has refused to look at settlements."[2]

Similarly, the Third Circuit itself observed that "some other courts" take the existence of a settlement into account in the class certification determination, citing the Fourth, Fifth, Ninth, and Eleventh Circuit decisions discussed in the petition (at 11-12), and it *explicitly said* that it "disagree[d] with this approach."[3]

---

[2] 90 F.3d at 975 (citing *Malchman* v. *Davis*, 761 F.2d 893 (2d Cir. 1985); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989); *White* v. *National Football League*, 41 F.3d 402 (8th Cir. 1994); *In re Dennis Greenman Secur. Litig.*, 829 F.2d 1539 (11th Cir. 1987)).

[3] *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 798, 799 (3d Cir. 1995) (citing *In re A.H. Robins Co., supra; In re Corrugated Container Antitrust Litig.*, 643 F.2d 195 (5th Cir. 1981); *Officers for Justice* v. *Civil Serv. Comm'n*, 688 F.2d 615 (9th Cir. 1982); *In re Dennis Greenman Secur. Litig., supra*).

Notwithstanding these explicit statements, respondents claim that only one circuit (the Fifth) even arguably is in conflict with Third Circuit. WLA Op. 15; Windsor Op. 22. More remarkable still, the Windsor respondents claim that the Fifth Circuit somehow is the "odd man out" and the "aberrant" circuit. Windsor Op. 26.

Respondents do not even try to explain how their "analyses" can possibly trump the express, considered views of the courts of appeals. Certainly, respondents' invented distinctions among the cases do not undermine the existence or extent of the conflict.

Thus, for example, the WLA respondents (but not the Windsor respondents) attempt to distinguish *In re Asbestos Litigation* on the ground that the class there was certified under Rule 23(b)(1)(B) rather than Rule 23(b)(3). WLA Op. 16. But neither the Fifth Circuit nor the court below confined its holding to a particular type of class action. The Third Circuit held that "the district court erred by relying in significant part on the presence of the settlement to satisfy the Rule 23(a) requirements of commonality, typicality, and adequacy of representation" — requirements that apply to *all* types of class actions — because "each of these requirements must be satisfied without taking into account the settlement, and as if the action were going to be litigated." Pet. App. 39a. The Fifth Circuit, for its part, stated that it was "bound" by (and agreed with) prior Circuit precedent to consider the settlement, specifically citing a case involving a Rule 23(b)(3) class. 90 F.3d at 975 (citing *In re Corrugated Container Antitrust Litig., supra*). There can be no doubt that the Fifth Circuit would have taken the settlement into account in this case.[4]

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[4] The Windsor respondents — who acknowledge the conflict between the Third and Fifth Circuits (Op. 22-23) — point to a footnote in the Fifth Circuit decision in which that court indicated that it might not uphold class certification on the facts of this case (*id.* at 23). Of course, the Fifth Circuit panel did not have the record in this case before it. In any event, that assertion is irrelevant to the issue before this Court — whether a settlement may be taken into account in determining class certification.

Respondents similarly try to distinguish *In re A.H. Robins Co.*, *supra*, noting that the class in that case was certified under Rule 23(b)(1)(A). WLA Op. 13. But the Fourth Circuit held that the class could be certified under *both* Rule 23(b)(1) and Rule 23(b)(3) (880 F.2d at 747-748) — confirming that its ruling applies to all types of class actions.

Respondents also assert that *Robins* is inapposite because it "did *not* hold that the Rule 23 criteria apply differently to a settlement class." Windsor Op. 23 (emphasis in original). As explained in the petition (at 26-27), however, our position is not that the Rule 23 criteria apply differently in the settlement context, but rather that those criteria should be applied to the case actually before the court in its current posture — taking account of the existence of the settlement — not to a hypothetical contested case that does not exist. And that is precisely what *Robins* held: "settlement should be a factor, and an important factor, to be considered when determining certification." 880 F.2d at 740.[5]

Respondents try to distinguish the Ninth Circuit's decision in *Officers for Justice* v. *Civil Serv. Comm'n*, *supra*, by claiming that it did not involve any issue regarding post-settlement class certification. WLA Op. 14-15. In fact, the Rule 23(b)(3) damages class in that case was not certified until after the settlement (688 F.2d at 622), and the court of appeals observed that the settlement was relevant to that latter decision (*id.* at 633).

In the end, this Court need not rely on the parties' arguments at all in determining the extent of the conflict. The courts of appeals themselves have explicitly recognized their disagreement. And the Judicial Conference Advisory Committee on Civil Rules -- a disinterested body that includes seven federal judges — concluded six months ago, based on its own review of the case law, that the Third Circuit's position conflicts with "the law everywhere." Reporter's Draft Minutes, p. 198; see Pet. 15-16.

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[5] This holding is not "dictum." Windsor Op. 24. The court of appeals specifically approved what "the District Court did" (880 F.2d at 740), *because* the lower court had taken the settlement into account in certifying the class, and the court of appeals followed the same approach in upholding class certification (*id.* at 742-43, 744).

B. The Judgment Below Rests Solely On The Issue Presented For Review.

Respondents concede that the court of appeals squarely held that certification of a settlement class is proper only if "the case could be litigated as a class action." WLA Op. 17. But, they say, review should be denied because of a supposed "alternative and independent" holding that disregarded that conclusion and determined that class representation was inadequate under Rule 23(a) because of the terms of the settlement itself. WLA Op. 17-18; Windsor Op. 10-12.

Respondents' argument here — like their attempt to trivialize the conflict among the circuits — rests on their refusal to accept that courts actually mean what they say.

The Third Circuit twice articulated its holding with respect to the Rule 23(a) requirement of adequacy of representation. On both occasions it *expressly said* that the basis for its decision was its holding that Rule 23 must be applied as if the case were going to be litigated.

First, summarizing its holding at the outset of its opinion (Pet. App. 19a), the court of appeals reiterated its determination in *GM Trucks* "that, for settlement classes, the 23(a) requirements must be applied as if the case were going to be litigated." In the two succeeding sentences, it extended that principle to the Rule 23(b)(3) criteria. In the very next paragraph, the court summarized its application of that principle to this case: "Examined *as a litigation class*, this case * * * cannot conceivably satisfy Rule 23," and it proceeded to discuss the Rule 23(a) adequacy of representation requirement based on that analysis. *Id.* at 19a-20a (emphasis added).

Second, the court of appeals began its detailed analysis of the certification issues by stating that the district court's error lay in "relying in significant part on the presence of the settlement to satisfy the Rule 23(a) requirements of commonality, typicality *and adequacy of representation*, and the Rule 23(b)(3) requirements of predominance and superiority." Pet. App. 39a (emphasis added). The court therefore held that "this class, *considered as a litigation class*, cannot meet the 23(a) requirements of typicality *and*

adequacy of representation, nor the 23(b) requirements of predominance and superiority." *Id.* at 39a-40a (emphasis added).[6]

Having thus twice *explicitly said* that it was going to apply the adequacy of representation factor to the class "as a litigation class," the court of appeals did just that: it conducted "an inquiry into *potential* conflicts among various members of the class." Pet. App. 48a (emphasis added). The court did *not*, as respondents suggest, consider the *actual* settlement terms to decide whether class representation *actually* was adequate. To be sure, the court did note the settlement terms (Pet. App. 49a-51a), but it did so only to flesh out its holding that "[t]he lack of any *structural protections* in this case thwarted the adequate representation of the disparate groups of plaintiffs." *Id.* at 52a (emphasis added). See also *id.* at 51a (certification is flawed "[a]bsent structural protections to assure that differently situated plaintiffs negotiate for their own unique interests"). As the court explained at the outset of its opinion, this conclusion that "the amalgamation of factually and legally different plaintiffs creates problematic conflicts of interest" is a result of "[e]xamin[ing] [the class] as a litigation class." *Id.* at 19a.

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[6] Respondents "blunt[ly]" — but falsely — accuse us of "a rank fabrication" for stating that the court of appeals' adequacy analysis was conducted "'without taking into account the settlement.'" Windsor Op. 11 (quoting Pet. 29). The quoted phrase appears twice on page 29 of the petition. The first time it is correctly cited to page 39a. Respondents seize upon the second occasion — in the very next paragraph — where that citation is omitted because the reader plainly would have understood that we were repeating the very same quotation from the very same page.

Indeed, what is demonstrably untrue is *respondents'* claim — that "[t]hat language about not 'taking into account the settlement' simply does not appear on the pages cited [Pet. 48a-51a], *nor anywhere else in the Third Circuit's discussion of adequacy of representation*." Windsor Op. 11 (emphasis added). The court of appeals specifically stated on page 39a that "the district court erred by relying in significant part on the presence of the settlement to satisfy the Rule 23(a) requirements of commonality, typicality, *and adequacy of representation* * * *. But *each of these requirements must be satisfied without taking into account the settlement, and as if the action were going to be litigated*" (emphasis added).

That the Third Circuit's analysis of adequacy-of-representation was the product of its "litigation class" test is confirmed by the sharp contrast between the Third Circuit's approach here and that of courts which do take the terms of a settlement into account in ruling on adequacy of representation. Those courts hold that representation is presumptively adequate "when the court finds that the settlement is fair and adequate for the class and was negotiated at arm's length." 2 NEWBERG ON CLASS ACTIONS § 11.28, at 11-59. See Pet. 27-28.[7] The Third Circuit did not conduct such an analysis: it did not use the settlement terms to determine whether those terms *in fact* embodied a deal that was "fair and adequate" for each component of the class. Nor did it overturn the district court's extensive findings that the settlement was negotiated at "arm's length."

In short, there was no alternative, independent holding.

C. This Case Is A Particularly Suitable Vehicle For Resolving The Issue Presented.

1. Throughout their opposition briefs, respondents accuse the parties of collusion and attack the fairness of the settlement. Respondents' allegations, irrelevant to the issue before this Court, are designed to misportray the case as an inappropriate vehicle for reviewing the issue presented and to divert the Court's attention from the clear conflict and the importance of the question presented. As a matter of adjudicated fact, those allegations are also completely untrue.

The district court — lauded by the Third Circuit as "extremely able" (Pet. App. 18a) — conducted a five-week fairness hearing, preceded by extensive discovery, during which respondents advanced *all* of these accusations. The district court issued an exhaustive opinion (Pet. App. 88a-276a), including 300 factual findings (*id.* at 103a-223a), in which it rejected all of these contentions and upheld the fairness of the settlement.

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[7] The Third Circuit itself acknowledged in *GM Trucks* that other courts "have effectively relied on the settlement's terms — the outcome of the action — to find the required absence of antagonism." 55 F.3d at 798. The court expressly rejected that approach in *GM Trucks*. See *id.* at 799.

As the case comes to this Court, the district court's findings on these issues remain intact (not a single one was set aside by the court of appeals).[8] Respondents nevertheless act as if these findings do not exist and present as "facts" the very evidence that was considered and rejected by the district court. For example:

- Respondents suggest that class counsel received a bribe in the form of inflated settlements in pending cases, but the district court found that the settlement terms did not contain a premium and were just like those entered into with other plaintiffs' lawyers (compare Windsor Op. 2, 5, 21 n.13 with Pet. App. 210a-214a);

- Respondents assert that the settlement is "stingy," but the district court found that the payment terms reflect the defendants' historical average payments in tort cases (compare Windsor Op. 4-5 with Pet. App. 138a-139a);

- Respondents assert that the medical criteria are strict, but the district court found the criteria to be fair and concluded that they will award compensation to "substantially all persons with asbestos-related cancer or asbestos-related impairment" (compare Windsor Op. 4, 5 & WLA Op. 4 with Pet. App. 125a-136a).

Indeed, in one instance, respondents do not even cite the evidence they adduced in the district court, but rely on a law review article published two years later by the very professor whose testimony on the very same point the district court found "unpersuasive." Compare Windsor Op. 5 & n.3 with Pet. App. 214a (¶ 277).

2. Respondents also contend that this case is an "unsuitable vehicle" to resolve the question presented because they advanced alternative "constitutional" arguments that the court of appeals did not reach. Windsor Op. 26-30; WLA Op. 19-20. But it is often true in cases that come to this Court that the lower court has left some issues unresolved. Here, as in those other cases, this Court may decide the question presented and then either address any

[8] Respondents suggest, without citing any authority, that they somehow could not challenge the district court's Rule 23(e) fairness determination on appeal. Windsor Op. 6-7. But the same legal doctrines that allowed respondents to challenge on this appeal the district court's Rule 23(a) and (b) class certification decision would have permitted them to challenge the Rule 23(e) fairness decision as well. They simply chose not to do so.

alternative arguments for affirmance that respondents advance or leave those issues to be decided by the Third Circuit on remand.[9]

Respondents further argue that since the "constitutional" issues would remain in the case no matter how the Rule 23 issue is decided, the question presented here, unlike in "some other case," is a "sideshow." Windsor Op. 27.

Respondents have it precisely backwards. They suggest that this Court should deny review in this case and hold its breath waiting for a possible certiorari petition in *In re Asbestos Litigation*, the "other case" they have in mind. Windsor Op. 27. Although they purport to base that suggestion on this Court's institutional interests ("the Court would be well advised * * * " (*ibid.*)), counsel making the suggestion are also counsel for the would-be petitioners in *In re Asbestos Litigation*. At the same time, respondents make it clear that any such petition would raise an "entire cluster" of issues (*id.* at 26), so that the Court might never even reach the Rule 23 question.

In *this* case, by contrast, the Rule 23 question is no "sideshow"; it is the main (and only) event.

There is simply no reason for this Court to wait for some hypothetical future petition in some other case. The issue is important, the conflict is clear, and the question is squarely and cleanly presented by the instant petition. On every score — including the enormous significance of the nationwide asbestos settlement at stake here — the case at bar is an *especially* "suitable" vehicle for resolving the Rule 23 question presented.

[9] Respondents seek to paint the "constitutional" issues as insuperable barriers to ultimate approval of the settlement. But respondents' positions on those (or similar) issues were rejected by the district court in this case, the Fifth Circuit in *In re Asbestos Litigation*, *supra*, and other courts of appeals. See, *e.g.*, *Ivy* v. *Diamond Shamrock Chems. Co.*, 996 F.2d 1425 (2d Cir. 1993); *A.H. Robins*, 880 F.2d at 723-25.

Nor does the existence of these other issues make the case "interlocutory" (Cargile Op. 13) in any relevant sense. The court of appeals ordered the district court to "decertify the class" (Pet. App. 59a). If this Court denies review of the Third Circuit's decision, this case will be over and the settlement will be dead.

D. The Pending Rules Committee Proposal Is Irrelevant.

The WLA and Cargile respondents, but not the Windsor respondents, argue that the pending Advisory Committee proposal to amend Rule 23 warrants denial of certiorari. As explained in the petition, however (at 20-21), and as respondents do not dispute, the Advisory Committee has taken only the first step in a cumbersome and time-consuming process which will provide no remedy for courts and litigants that must face uncertainty, and be subjected to inconsistent legal standards, for at least several years before that process can be completed. And that process hardly assures any relief even at the end of those years — the amendment can be derailed at any stage.

Moreover, as the WLA respondents concede (Op. 21), the proposal would not fully remedy the havoc created by the decision below. The proposed new rule (if ever adopted) would alter the requirements for settlement classes only under Rule 23(b), while the Third Circuit held that settlement may not be taken into account for purposes of Rule 23(a) or (b).

Finally, respondents' counsel are actively involved in opposing the Advisory Committee's proposal. Surely they may not be heard to argue in this Court that certiorari should be denied because alternative help is on the way — when they are making every effort to sink the putative relief ship.

E. Respondents' Defense Of The Decision Below Is Both Wrong And Premature.

In light of the considerable judicial and academic authority that rejects the Third Circuit's approach (Pet. 10-16), and the support for our position in this Court's precedents and other authority (Pet. 21-30), respondents' defense of the decision below as "plainly correct" (Windsor Op. 15-22) is obvious hyperbole.

This is not the time, however, to fully debate the merits of the decision below: the only question at this juncture is whether this Court should address the merits. We submit that with respect to *that* question — in light of the importance of the issue, the clear conflict among the circuits, and the urgent need for a definitive resolution of the issue — the proper course is clear. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 96-270

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners,
v.
GEORGE WINDSOR, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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12 pp

No. 96-270

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners,
v.
GEORGE WINDSOR, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the National Association of Manufacturers moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. The National Association of Manufacturers (NAM) is the nation's oldest and largest broad-based industrial trade association. NAM regularly participates as *amicus curiae* in civil litigation raising issues of national concern to the business community.

The conflict in the circuit courts of appeals about the viability of settlement-only classes under Federal Rule of Civil Procedure 23 is of great concern to manufacturers

across the nation, since many are or have been involved in class action litigation in the federal courts. The manufacturing community urgently needs definitive resolution of the question presented by Petitioners in order to know whether comprehensive class settlements are available to conclusively resolve class action litigation.

Petitioners have consented to the filing of this brief, as have a number of other parties. Consent was denied by some of those who have filed in opposition to the Petition. Therefore, NAM requests leave to file the accompanying brief as *amicus curiae*.

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AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST

The National Association of Manufacturers (NAM) is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including approximately 10,000 small manufacturers, are in every state and produce about 85 percent of U.S. manufactured goods. Through its member companies and affiliated associations, the NAM represents every industrial sector and more than 18 million employees.

NAM's members frequently are involved in class action litigation and are vitally interested in resolution of the question presented here. This brief is filed as *Amicus Curiae* in support of the Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Amicus supports certiorari to the Third Circuit Court of Appeals to resolve the conflict among the circuit courts of appeals regarding settlement-only classes under Federal Rule of Civil Procedure 23 ("Rule 23"). Whether the Third Circuit's construction of Rule 23 is upheld and the settlement falls, or the majority interpretation of Rule 23 prevails and the settlement stands, a definitive ruling by this Court is of the greatest importance to NAM's members.

ARGUMENT

1. Product Manufacturers Have A Vital Interest In Prompt Resolution Of The Conflict Between the Circuits Regarding the Standards Applicable To Settlement Classes Under Rule 23.

The Petition for Certiorari presents the following question for the Court's consideration:

When the parties to a putative class action enter into a settlement, must the district court nevertheless pretend that every legal and factual issue in the case will be contested, and ignore the existence of the settlement, in determining whether class certification is appropriate under Federal Rule of Civil Procedure 23.

In recent years, procedural rules that aggregate claims, including Rule 23, have been the mechanism used to drive some manufacturers into bankruptcy. On occasion, however, in unique and compelling circumstances, Rule 23 settlement-only class actions have afforded litigants the sole means to forge fair and permanent dispositions of mass claims. The interests of many businesses, who are now party to massive litigation concerning products and materials other than asbestos, will be impacted by the Third Circuit's unique interpretation of Rule 23 as to settlement classes.

The Third Circuit held that Rule 23(b)(3) requires a settlement class to satisfy Rule 23 certification criteria as if it were a litigation class. This interpretation is a clear break from long-standing precedent followed in at least five other circuits. *Compare Georgine v. AmChem Products, Inc.*, 83 F.3d 610 (3rd Cir. 1996)(petition for cert. pending) *with In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539 (11th Cir. 1987); *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985), *cert. denied*, 475 U.S. 1143 (1986); *see also White v. National Football League*, 41 F.3d 402 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 2569 (1995); *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). Nonetheless, the Third Circuit's decision that this case could not be managed as a litigation class is consistent with the trend among the circuits toward more rigorous application of the requirements of Rule 23 for the certification of litigation classes. *See, e.g., Castano v. The American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Medical Systems*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer*,

Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S.Ct. 184 (1995) (all refusing to certify mass tort litigation for trial under Rule 23).

Undisturbed, the Third Circuit's decision renders uncertain Rule 23's availability to forge final, comprehensive class settlements -- particularly in mass tort litigation. From an historical perspective, such an interpretation would bring the Rule full circle, back to the original understanding of Rule 23 when it was last amended in 1966. The Advisory Committee Note that accompanied the 1966 amendments expressly stated that Rule 23 was not intended for even single accident mass torts, much less for widely dispersed mass torts such as the case now under review. *See* 1966 Advisory Committee Note, Advisory Committee on Civil Rules, Committee on Rules of Practice and Procedure, U.S. Judicial Conference, *reprinted in* FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 96 Pamphlet, at 99 (West. ed. 1996).

The Third Circuit's decision was rendered in the midst of consideration of amendments to Rule 23 by the Federal Advisory Committee on Civil Rules. The Rule 23 revisions being considered, in pertinent part, would authorize courts to certify classes for settlement purposes only under conditions that parallel those at issue in the underlying litigation. The proposed amendments are now being circulated for public comment. As a practical matter, the revisions to Rule 23 would not become effective, if at all, until 1999, at the earliest. Thus, the pending revisions to Rule 23 offer little, if any, meaningful guidance or relief to Petitioners, and will not resolve the confusion regarding the validity of Rule 23 settlements in the near future.

2. The Exceptional Importance Of This Case And The Compelling Need To Settle The Issue Presented Warrant The Grant Of Certiorari By This Court.

What the manufacturing community seeks from this Court's review is certainty. Aside from the inconsistent results that conflict produces in similar cases, without certainty and predictability, it is impossible for NAM's members to evaluate, address, and manage their litigation when one circuit forbids what others promote.

This is an extraordinary case. *Amicus* will not repeat the Petitioners' description of the legal rights of the parties or the unprecedented resources at stake in the underlying litigation. We pause only to make one point.

The essence of the class settlement strategy that the litigants adopted was suggested by a blue-ribbon panel that was convened to find an efficient, fair solution to the otherwise intractable asbestos litigation problem. *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, quoted in In re Asbestos Prods. Liab. Lit.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991). Having done what they were asked to do, the Petitioners naturally expected that they would be given the benefit of the certainty for which they had bargained. Other litigants, such as *Amicus's* members, need to know whether they can reasonably rely upon similar plans and procedures to resolve other intractable and complex litigation.

CONCLUSION

Amicus respectfully prays that the Court grant the Petition for Writ of Certiorari and set this case for briefing and argument to resolve the conflict in the circuits over the interpretation of Rule 23 as applied to settlement-only class actions.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CHEMICAL MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CHEMICAL MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Chamber of Commerce of the United States of America (Chamber) and the Chemical Manufacturers Association (CMA) move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari.

The Chamber is the largest federation of business, trade and professional organizations in the United States. The Chamber represents more than 215,000 companies, several thousand trade and professional organizations, and state and local chambers of commerce. The Chamber regularly participates as *amicus curiae* in civil cases raising issues of national concern to the business community. CMA is a

non-profit trade association whose member companies represent 90 percent of the production capacity for basic industrial chemicals in the United States. CMA's members include many major American corporations, as well as numerous other companies. Some of the petitioner companies are members of the Chamber and/or CMA.

Many CMA and Chamber members have been, and in various cases presently are, defendants in putative class actions. Those cases have involved a wide assortment of claims; examples include products liability, securities, tort, and antitrust allegations. In some of these cases, the parties may be able to negotiate a settlement to their dispute before the district court decides whether the class should be certified for the purpose of litigating the claims asserted in the complaint. The present case raises the question of how the Rule 23 standards for class certification should be applied in such circumstances.

The conflicting answers given to that question by the courts of appeals will have dramatically different consequences for the parties to federal court class actions. Accordingly, regardless of which of those answers is deemed to be correct by this Court, many Chamber and CMA member companies have a strong interest in having the Court resolve that inter-circuit conflict. As long as that conflict persists, many companies will be deterred from undertaking the major investment of time and resources needed to negotiate and gain approval of class action settlements. If the Third Circuit's view is wrong, numerous settlements will have been needlessly and expensively lost. Alternatively, if the Third Circuit's interpretation is ultimately upheld, any companies that do undertake such settlement efforts while the conflict

persists may ultimately find that they have wasted their -- and the courts' -- time and resources.

CMA and the Chamber therefore have a strong interest in informing the Court of the significance of the issue presented by this case, and of the conflict among the circuits, on the interests of the American business community, including companies within the chemical manufacturing industry. Petitioners have consented to the filing of this brief. However, while consent was granted by a number of other parties, consent was refused by Iona Cunningham et al., Kathryn Toy, American Re-Insurance Company et al., and Protective National Insurance Company et al. The Chamber and CMA therefore request leave to file the accompanying brief as *amici curiae*.

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BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CHEMICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the largest federation of business, trade and professional organizations in the United States. The Chamber represents more than 215,000 companies, in addition to numerous other organizations and local chambers of commerce, and participates as *amicus curiae* in civil cases raising issues of national concern to the business community. The Chemical Manufacturers Association (CMA) is a non-profit trade association whose member companies represent

90 percent of the production capacity for basic industrial chemicals in the United States. CMA's members include major American corporations as well as numerous other companies within the chemical manufacturing industry. Some of the petitioners are also Chamber and/or CMA members.

Many CMA and Chamber member companies have been, and in various cases presently are, defendants in cases initiated by class action complaints. Those cases have asserted allegations on a wide array of matters, such as products liability, securities, tort, or antitrust claims. In some of these putative class actions, the parties may be able to reach a settlement before the district court decides whether the class should be certified for the purpose of litigating the claims set forth in the complaint. The present case raises the question of how the standards for class certification set forth in Federal Rule of Civil Procedure 23 should be applied in such circumstances.

The conflicting answers given to that question by the courts of appeals will have dramatically different consequences for the parties to federal court class actions. Moreover, the existence of that circuit split will have significant adverse consequences for both litigants and the judicial system as long as it remains unresolved. Accordingly, many CMA and Chamber members have a strong interest in having this Court grant the petition and resolve the inter-circuit conflict over the issue presented herein.

REASONS FOR GRANTING THE PETITION

The question presented by this case is whether, in a putative class action where the parties have entered into a settlement prior to class certification, the court must ignore the existence of that settlement in applying the standards for class

certification set out in Rule 23. As shown in the certiorari petition, the Third Circuit's answer to that question is squarely in conflict with the decisions of the other circuit courts that have addressed this question.[1] As we now show, regardless of which interpretation of Rule 23 is correct, it is essential that this Court resolve that conflict without delay.

1. The question of whether a district court presented with a pre-certification settlement must ignore that settlement in applying the standards for class certification is one that has often arisen, and will continue frequently to arise, in a wide variety of cases -- the vast majority of which have nothing to do with asbestos litigation. American companies are frequently the targets of putative class actions. For the past 20 years and more, parties have negotiated, and courts have approved, pre-certification class action settlements resolving a wide array of such cases.

For example, in the chemical manufacturing industry, an order certifying a class "for settlement purposes" was employed in 1975 to settle a series of cases against chemical manufacturers that alleged a nationwide conspiracy to fix the prices of chemical dyestuffs. See *Dorey Corp.*, 1975-2 Trade Cases ¶ 60,576 (S.D.N.Y. 1975). Subsequently, various courts have taken the fact of settlement into account in certifying classes and consensually resolving claims against

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[1] The circuits themselves have explicitly recognized the conflict. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 795, 798-99 (3d Cir.) (stating "disagree[ment]" with other circuits), cert. denied, 116 S. Ct. 88 (1995); *In re Asbestos Litig.*, 90 F.3d 963, 975 (5th Cir. 1996) (observing that "[o]nly the Third Circuit has refused to look at settlements before it when deciding class certification issues").

chemical companies relating to such matters as alleged exposure to pesticides, silicone gel breast implants, and morning sickness medication.[2] Most recently, just last month, a class was preliminarily certified for the purpose of settling claims against a number of chemical manufacturers by hemophiliacs alleging injury from exposure to the HIV virus. See *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, MDL-986 and 93-C-7452 (N.D. Ill. Aug. 14, 1996). Notably, a year ago, the Seventh Circuit had reversed an order that had certified essentially the same class for purposes of litigation. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995).

Similarly, as set forth on pages 10-15 of the petition, courts have taken settlement into account in certifying classes for the purpose of consensually resolving claims against numerous other kinds of companies. In short, the issue presented here affects a broad cross-section of American businesses and is of national concern to the business community.

2. Because the conflicting ways in which the courts of appeals interpret and apply Rule 23 in such circumstances will have dramatically different consequences for the parties to federal court class actions, it is essential that this Court act swiftly to minimize the adverse effects of that conflict. In the wake of the uncertainty raised by the Third Circuit's con-

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[2] See, respectively, *Woodward v. NOR-AM Chem. Co.*, 1996 U.S. Dist. LEXIS 7372 (S.D. Ala. May 23, 1996); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994); and *In re Bendectin Prods. Liab. Litig.*, 102 F.R.D. 239, 240 n.4, 241 (S.D. Ohio), *rev'd on other grounds*, 749 F.2d 300 (6th Cir. 1984).

flicting decision, some -- but not all -- class action plaintiffs and defendants naturally will be deterred from seeking to negotiate and secure approval of class action settlements.

If the other Circuits' interpretation of Rule 23 is ultimately adopted by this Court, the deterrent effect of the Third Circuit's decision will have seriously injured litigants, courts, and the public. For example, class action settlements like the ones cited above -- which fairly, expeditiously, and efficiently resolve large numbers of claims in a single proceeding -- will be foregone or substantially deferred. Instead, those claims will have to be litigated at enormous cost and burden for all concerned. Thus, a prompt definitive ruling by this Court is essential to minimize the chilling effect of the Third Circuit's decision if that decision proves to be wrong.

If, on the other hand, the Third Circuit's interpretation of Rule 23 is ultimately adopted by this Court, the parties who nevertheless have proceeded in the meantime with efforts to negotiate and gain approval of class action settlements outside of the Third Circuit will in many cases find that they have wasted their, and the courts', time and resources. This is so because the class certifications in those cases will have to be reconsidered from scratch -- this time ignoring the proposed settlement -- and in many cases will have to be reversed. The resulting lost time and resources will be large indeed. For example, the settlement in this case required over a year of intensive negotiations (App. 113a-115a), and the process of judicial review involved a nationwide notice program costing millions of dollars (App. 216a-219a), a five-week fairness hearing in the district court (App. 101a), and the district court's time and effort required to research and prepare opinions totaling hundreds of pages (*e.g.*, App. 88a-

276a). Thus, a prompt definitive ruling by this Court is likewise essential to minimize the waste of time and resources if the Third Circuit's decision proves to be right.

Immediate review by this Court also is warranted because the merits of the Rule 23 issue have been fully explored by the courts of appeals. With respect to the Third Circuit's interpretation, that court's view is set out in a lengthy opinion in the *General Motors* case, and that opinion was confirmed by the panel in this case, with the full Third Circuit denying rehearing in banc (with a dissent). On the other side, the Fifth Circuit recently reaffirmed its contrary view of Rule 23 in the *In re Asbestos Litigation* case, and numerous decisions dating back some 20 years have also catalogued the reasons for interpreting Rule 23 to authorize settlement class actions.

CONCLUSION

The petition for a writ of certiorari should be granted.

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FOR THE THIRD CIRCUIT

Nos. 94-1925, 94-1927, 94-1928, 94-1929, 94-1930, 94-1931, 94-1932, 94-1960, 94-1968, 94-2009, 94-2010, 94-2011, 94-2012, 94-2013, 94-2066, 94-2067, 94-2068, 94-2085, 95-1705

GEORGINE, ET AL.

v.

AMCHEM PRODUCTS, INC., ET AL.

v.

ADMIRAL INSURANCE COMPANY, ET AL.

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
5/10/96	Opinion and Judgment of the United States Court of Appeals for the Third Circuit Issued
6/27/96	Order of the United States Court of Appeals for the Third Circuit Denying Petition for Panel Rehearing and Suggestion for Rehearing in banc Issued
7/3/96	Order of the United States Court of Appeals for the Third Circuit Staying Issuance of Mandate Issued

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civ. A. No. 93-0215

GEORGINE, ET AL.

v.

AMCHEM PRODUCTS, INC., ET AL.

v.

ADMIRAL INSURANCE COMPANY, ET AL.

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1/15/93	Class Action Complaint Filed in the United States District Court for the Eastern District of Pennsylvania
1/15/93	Answer Filed
1/15/93	Stipulation of Settlement Filed
2/1/93	Conditional Class Certification Order Filed
9/24/93	Amendment to Stipulation of Settlement Filed
10/6/93	Memorandum Opinion and Order Concerning Subject-Matter Jurisdiction Issued
10/27/93	Memorandum Opinion and Order Approving Notice Plan Issued
2/16/94	Settling Parties' Final Report on Implementation of the Notice Filed

8/16/94	Memorandum Opinion Including Findings of Fact and Conclusions of Law, and Order (approving the settlement and granting final class certification) Issued
9/22/94	Preliminary Injunction and Memorandum Containing Findings of Fact and Conclusions of Law in Support of Issuance of Preliminary Injunction Issued
12/6/95	Amendment to Stipulation of Settlement Filed

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 93-CV-021

EDWARD M. CARLOUGH; PAVLOS KEKRIDES AND NAFSSICA KEKRIDES, HIS WIFE; LAVERNE WINBUN, EXECUTRIX OF THE ESTATE OF JOSEPH E. WINBUN, DECEASED, AND IN HER OWN RIGHT; AMBROSE VOGT, JR. AND JOANNE VOGT, HIS WIFE; CARLOS RAVER AND DOROTHY M. RAVER, HIS WIFE; JOHN A. BAUMGARTNER AND ANNA MARIE BAUMGARTNER, HIS WIFE; TIMOTHY MURPHY AND GAY MURPHY, HIS WIFE; TY T. ANNAS; AND FRED ANGUS SYLVESTER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
PLAINTIFFS,

v.

AMCHEM PRODUCTS, INC.; A.P. GREEN INDUSTRIES, INC.; ARMSTRONG WORLD INDUSTRIES, INC.; CERTAINTEED CORPORATION; C.E. THURSTON & SONS, INC.; DANA CORPORATION; FERODO AMERICAN, INC.; FLEXITALLIC, INC.; GAF BUILDING MATERIALS CORPORATION; I.U. NORTH AMERICA, INC.; MAREMONT CORPORATION; NATIONAL GYPSUM COMPANY; NATIONAL SERVICES INDUSTRIES, INC.; NOSROC CORPORATION; PFIZER, INC.; QUIGLEY COMPANY INC.; SHOOK & FLETCHER INSULATION COMPANY; T&N, PLC; UNION CARBIDE CHEMICALS AND PLASTICS CORPORATION; AND UNITED STATES GYPSUM COMPANY,
DEFENDANTS.

CLASS ACTION COMPLAINT

ASBESTOS CASE

Jurisdictional Allocations

1. This Court has diversity-of-citizenship jurisdiction under 28 U.S.C. § 1332. The named Plaintiffs are citizens of the District of Columbia, Florida, Kentucky, Maryland, North Carolina and South Carolina for purposes of 28 U.S.C. § 1332. Each of the Defendants is incorporated in and has its principal place of business in a jurisdiction other than those of which Plaintiffs are citizens.

2. The amount in controversy exceeds $100,000, exclusive of interests and costs, for each and every named Plaintiff and Class Member.

Plaintiffs

3. Plaintiff EDWARD M. CARLOUGH is a citizen of the District of Columbia. During the period of 1949 to 1955, Plaintiff EDWARD M. CARLOUGH worked as an apprentice and then a journeyman sheet metal worker through Union Local 28 at various sites in New York State, including B. Altman Department Store and Radio City Music Hall. As a sheet metal worker, Plaintiff EDWARD M. CARLOUGH worked with or was exposed to asbestos or asbestos-containing products manufactured, supplied, produced, imported, distributed, or sold by the named Defendants.

The asbestos products to which Plaintiff EDWARD M. CARLOUGH was exposed included those manufactured and distributed by GAF BUILDING MATERIALS CORPORATION, UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, and T&N, plc. While Plaintiff EDWARD M. CARLOUGH has not been diagnosed as having an asbestos-related condition, his exposure to asbestos or asbestos-containing products increases his risk of developing a number of both malignant and nonmalignant asbestos related conditions.

4. Plaintiffs PAVLOS KEKRIDES and NAFSSICA KEKRIDES, his wife, are citizens, and residents of the State of Florida.

Plaintiff PAVLOS KEKRIDES has worked as a painter for Myers and Watters (Painting Contractors) in Bensalem, Pennsylvania from 1966 to 1981. While working for Myers and Watters, Plaintiff PAVLOS KEKRIDES worked at a variety of job

sites, including Sun Oil Refinery, ARCO Refinery, and Westinghouse Electric Corporation.

In the performance of his duties Plaintiff PAVLOS KEKRIDES continually worked with, used, handled and was caused to come into contact with and be exposed to a variety of asbestos products and to the dust and fiber resulting from the ordinary and foreseeable use of those products. The asbestos products to which Plaintiff PAVLOS KEKRIDES was exposed included those manufactured and/or supplied by Defendants GAF BUILDING MATERIALS CORPORATION, ARMSTRONG WORLD INDUSTRIES, INC., UNITED STATES GYPSUM COMPANY, NATIONAL GYPSUM COMPANY, PFIZER, INC. and T&N, plc.

Plaintiff PAVLOS KEKRIDES has contracted malignant mesothelioma as the direct and proximate result of his exposure to asbestos.

5. Plaintiff LAVERNE WINBUN, Executrix of the Estate of JOSEPH E. WINBUN, Deceased, is an [sic] citizen, and resident of the State of Kentucky.

Plaintiff's decedent JOSEPH E. WINBUN was employed by the Louisville & Nashville Railroad and its predecessor from 1943 to 1979. In the course of his employment, he was exposed to the dust and fibers from asbestos-containing products, including products manufactured and/or supplied by Defendants MAREMONT, NOSROC CORPORATION, CERTAINTEED CORPORATION, I.U. NORTH AMERICA, INC., FERODO AMERICA, INC., and GAF BUILDING MATERIALS CORPORATION.

As the direct and proximate result of his exposure to asbestos, Plaintiff's decedent, JOSEPH E. WINBUN, contracted an asbestos-related lung cancer, which ultimately caused his death on November 6, 1991.

6. Plaintiffs AMBROSE VOGT, JR. and JOANNE VOGT, his wife, are citizens, and residents of the State of Maryland.

Plaintiff AMBROSE VOGT, JR. has worked as an insulator and member of Local 11 of the International Association of Heat and Frost Insulators, Asbestos Workers of America since 1971.

Throughout his employment Plaintiff AMBROSE VOGT, JR. was employed at numerous job sites on which he worked for various employers as a member of Local 11 of the International Association of Heat and Frost Insulators, Asbestos Workers of America. In the performance of his duties he continually worked with, used, handled and was caused to come into contact with and be exposed to a variety of asbestos products and to the dust and fibers resulting from the ordinary and foreseeable use of those products.

At different times, Plaintiff AMBROSE VOGT, JR. worked for different contractors and worked near employees of and was exposed to asbestos products supplied by Defendants NATIONAL SERVICES INDUSTRIES, INC., NOSROC CORPORATION, C.E. THURSTON and SONS, INC., and SHOOK AND FLETCHER INSULATION COMPANY.

The asbestos products to which Plaintiff AMBROSE VOGT, JR. was exposed included those manufactured and/or supplied by Defendants ARMSTRONG WORLD INDUSTRIES, INC., GAF BUILDING MATERIALS CORPORATION, FLEXITALLIC, INC., NATIONAL GYPSUM COMPANY, UNITED STATES GYPSUM COMPANY, A.P. GREEN INDUSTRIES, INC., QUIGLEY COMPANY, INC., and DANA CORPORATION.

As the direct and proximate result of his exposure to asbestos, Plaintiff AMBROSE VOGT, JR. is at an increased risk of developing a number of both malignant and nonmalignant asbestos-related conditions, although he has not been diagnosed as suffering from such a condition up until this time.

7. Plaintiffs CARLOS RAVER and DOROTHY M. RAVER, his wife, are citizens and residents of the State of Maryland.

Plaintiff CARLOS RAVER has been employed at the Congoleum Corporation, Residential Flooring Division, in Finksburg, Maryland, since 1963.

In the course of his employment, Plaintiff CARLOS RAVER was exposed to raw asbestos fiber and dust and fiber from asbestos-containing products, including those supplied and/or manufactured by Defendants AMCHEM PRODUCTS, INC. T&N, plc, and UNION CARBIDE CHEMICAL AND PLASTICS CO., INC.

As the direct and proximate result of his exposure to asbestos, Plaintiff CARLOS RAVER has been diagnosed as suffering from a nonmalignant asbestos condition.

8. Plaintiffs JOHN A. BAUMGARTNER and ANNA MARIE BAUMGARTNER, are citizens and residents of the State of Maryland.

Plaintiff JOHN A. BAUMGARTNER served in the United States Navy during the period 1957 through 1961. Throughout that period, he worked aboard ships as a fireman performing boiler maintenance, operation and repair work. Additionally, Plaintiff worked in 1969 and 1970 for Allstate Boiler Repair Company, performing boiler repair work at various job sites, including but not limited to Baltimore Gas and Electric power stations, Baltimore City's Hilton Street Public Schools and other locations in and around the area of Baltimore.

During the period 1970 through 1972, Plaintiff worked at the Maryland Shipbuilding and Drydock Company, performing boiler repair work aboard numerous ships. Additionally, Plaintiff also worked at Bethlehem Steel Corporation's Sparrow's Point steel mill.

Since 1976, Plaintiff has been employed by Potomac Air Gas Company as a pressure pumper. Plaintiff has not worked since July 3, 1992, as a result of his asbestos-caused mesothelioma.

Plaintiff JOHN BAUMGARTNER was frequently exposed to a variety of asbestos-containing materials in the course of his employment, including, but not limited to, products manufactured, and supplied by Defendants ARMSTRONG WORLD PRODUCTS, INC. GAF BUILDING MATERIALS CORPORATION, FLEXITALLIC, INC., A.P. GREEN INDUSTRIES, INC., I.U. NORTH AMERICA, INC., FERODO AMERICA, INC., QUIGLEY COMPANY, INC., and AMCHEM PRODUCTS, INC.

As the direct and proximate result of these exposures to asbestos, Plaintiff JOHN A. BAUMGARTNER suffers from a condition diagnosed on July 24, 1992, as malignant mesothelioma.

9. Plaintiffs TIMOTHY MURPHY and GAY MURPHY, his wife, are citizens, and residents of the State of Kentucky.

Plaintiff TIMOTHY MURPHY has worked as an insulator and member of Local 51 of the International Association of Heat and Frost Insulators, Asbestos Workers of America since 1970.

In the course of his employment, Plaintiff TIMOTHY MURPHY worked for various employers at numerous job sites. In the performance of his duties he continually worked with, used, handled and was caused to come into contact with and be exposed to a variety of asbestos and asbestos-containing products and to the dust and fibers resulting from the ordinary and foreseeable use of those products.

At different times, Plaintiff TIMOTHY MURPHY worked for different contractors in different states and worked near employees of and was exposed to asbestos products supplied by Defendants NOSROC CORPORATION, C.E. THURSTON AND SONS, INC., SHOOK AND FLETCHER INSULATION CO., DANA CORPORATION, A.P. GREEN INDUSTRIES, INC., and NATIONAL SERVICES INDUSTRIES, INC.

The asbestos products to which Plaintiff TIMOTHY MURPHY was exposed included those manufactured and/or supplied by Defendants GAF BUILDING MATERIALS CORPORATION, ARMSTRONG WORLD INDUSTRIES, INC., DANA CORPORATION and A.P. GREEN INDUSTRIES, INC.

As a result of his exposure to asbestos, Plaintiff TIMOTHY MURPHY is at an increased risk of developing a number of both malignant and nonmalignant asbestos-related conditions, although he has not been diagnosed as suffering from such a condition up until this time.

10. Plaintiff TY T. ANNAS is a citizen of North Carolina. From 1950 to 1981, Plaintiff TY T. ANNAS worked at various work sites as an insulator including the Dupont May plant in Camden, South Carolina, and the Dupont plant in Kinston, North Carolina. He worked for North Brothers from 1951 to 1955 and for Daniel Construction Co. from 1955 to 1973 as an insulator at various work sites. Plaintiff TY T. ANNAS worked with, or was exposed to, asbestos or asbestos-containing products mined, manufactured, produced, supplied, imported, distributed, or sold by A.P. GREEN INDUSTRIES, INC., ARMSTRONG WORLD INDUSTRIES, INC., QUIGLEY COMPANY, INC., C.E.

THURSTON AND SONS, INC., DANA CORPORATION, GAF BUILDING MATERIALS CORPORATION, NATIONAL GYPSUM COMPANY, NATIONAL SERVICES INDUSTRIES, INC., NOSROC CORPORATION, SHOOK AND FLETCHER INSULATION COMPANY, T&N plc, and UNITED STATES GYPSUM COMPANY. While Plaintiff TY T. ANNAS has not been diagnosed as having an asbestos-related condition, his exposure to asbestos or asbestos-containing products increases his risk of developing a number of both malignant and nonmalignant asbestos-related conditions.

11. Plaintiff FRED ANGUS SYLVESTER is a citizen of South Carolina. During the period of 1944 to 1964, Plaintiff FRED ANGUS SYLVESTER worked as a sheet metal worker at the Charleston Naval Shipyard. In the course of his employment as a sheet metal worker, he worked with, or was exposed to, asbestos and asbestos-containing products manufactured, produced, supplied, imported, distributed, or sold by A.P. GREEN INDUSTRIES, INC., ARMSTRONG WORLD INDUSTRIES, INC., GAF BUILDING MATERIALS CORPORATION, NATIONAL GYPSUM COMPANY, and UNITED STATES GYPSUM COMPANY. As the direct and proximate result of his exposure to asbestos and asbestos-containing products, Plaintiff FRED ANGUS SYLVESTER suffers from an asbestos-related mesothelioma.

Defendants

12. Defendants, as named herein, refer to those entities listed in Paragraphs 13 through 32 as well as all other predecessors-in-interest to said entities due to continuation of product line, merger, acquisition, stock transfer, buyout, or other contractual agreement.

13. Defendant AMCHEM PRODUCTS, INC. was incorporated under the laws of the Commonwealth of Pennsylvania. AMCHEM PRODUCTS, INC. is now or was engaged in the business of mining, manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

14. Defendant A.P. GREEN INDUSTRIES, INC. is incorporated under the laws of the state of Delaware. Its principal place of business is in Missouri. A.P. GREEN INDUSTRIES, INC. is now or was engaged in the business of mining,

manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

15. Defendant ARMSTRONG WORLD INDUSTRIES, INC. is incorporated under the laws of the Commonwealth of Pennsylvania. Its principal place of business is in Pennsylvania. ARMSTRONG WORLD INDUSTRIES, INC. is now or was engaged in the business of mining, manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

16. Defendant CERTAINTEED CORPORATION is incorporated under the laws of the state of Delaware. Its principal place of business is in Pennsylvania. CERTAINTEED CORPORATION is now or was engaged in the business of mining, manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

17. Defendant C.E. THURSTON AND SONS, INC. is incorporated under the laws of the Commonwealth of Virginia. Its principal place of business is in Virginia. C.E. THURSTON AND SONS, INC. is now or was engaged in the business of mining, manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

18. Defendant DANA CORPORATION is incorporated under the laws of the Commonwealth of Virginia. Its principal place of business is in Ohio. DANA CORPORATION is now or was engaged in the business of mining, manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

19. Defendant FERODO AMERICA, INC. in incorporated under the laws of the state of Delaware. Its principal place of business is in Tennessee. FERODO AMERICA, INC. is now or was engaged in the business of mining, manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

20. Defendant FLEXITALLIC, INC. is incorporated under the laws of the state of Delaware. Its principal place of business is in Texas. FLEXITALLIC, INC. is now or was engaged in the business of mining, manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

21. Defendant GAF BUILDING MATERIALS CORPORATION is incorporated under the laws of the state of

Delaware. Its principal place of business is in New Jersey. GAF BUILDING MATERIALS CORPORATION is now or was engaged in the business of mining, manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

22. Defendant I.U. NORTH AMERICA, INC. is incorporated under the laws of the state of Delaware. I.U. NORTH AMERICA, INC. is now or was engaged in the business of mining, manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

23. Defendant MAREMONT CORPORATION is incorporated under the laws of the state of Delaware. Its principal place of business is in Illinois. MAREMONT CORPORATION is now or was engaged in the business of mining, manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

24. Defendant NATIONAL GYPSUM COMPANY is incorporated under the laws of the state of Delaware. Its principal place of business is in Texas. NATIONAL GYPSUM COMPANY is now or was engaged in the business of mining, manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

25. Defendant NATIONAL SERVICES INDUSTRIES, INC. is incorporated under the laws of the state of Delaware. Its principal place of business is in Georgia. Its predecessor, North Brothers, was engaged in the business of distributing and/or supplying asbestos or asbestos-containing products.

26. Defendant NOSROC CORPORATION was incorporated under the laws of the Commonwealth of Pennsylvania. NOSROC CORPORATION and its predecessors-in-interest engaged in the business of distributing and/or supplying asbestos or asbestos-containing products.

27. Defendant PFIZER, INC. is incorporated under the laws of the state of Delaware. Its principal place of business is in New York. PFIZER, INC. is now or was engaged in the business of mining, manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

28. Defendant QUIGLEY COMPANY, INC. is incorporated under the laws of the state of New York. Its principal place of business is in New York. QUIGLEY COMPANY, INC. is now or was engaged in the business of mining, manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

29. Defendant SHOOK & FLETCHER INSULATION CO. is incorporated under the laws of the state of Delaware. Its principal place of business is in Alabama. SHOOK & FLETCHER INSULATION CO. is now or was engaged in the business of distributing and/or supplying asbestos or asbestos-containing products.

30. Defendant T&N, plc is incorporated under the laws of England. Its principal place of business is in England. T&N, plc is now or was engaged in the business of mining, manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

31. Defendant UNION CARBIDE CHEMICAL AND PLASTICS CO. is incorporated under the laws of the state of New York. Its principal place of business is in Connecticut. UNION CARBIDE CHEMICAL AND PLASTICS CO. is now or was engaged in the business of mining, manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

32. Defendant UNITED STATES GYPSUM CO. is incorporated under the laws of the state of Delaware. Its principal place of business is in Illinois. UNITED STATES GYPSUM CO. is now or was engaged in the business of mining, manufacturing, distributing and/or supplying asbestos or asbestos-containing products.

Class Allegations

33. Plaintiffs bring this action as a class action pursuant to Fed. R. Civ. P. 23 (b)(3) on behalf of themselves and a class of persons similarly situated.

34. The Plaintiff class is defined as follows:

(a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant, or passenger ships), either occupationally or through

the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the Defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or death in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability).

(b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph (a) above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) above in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability).

(c) The Defendants in this action are:

AMCHEM PRODUCTS,INC.
A.P. GREEN INDUSTRIES, INC.
ARMSTRONG WORLD INDUSTRIES, INC.
CERTAINTEED CORPORATION
C.E. THURSTON & SONS, INC.

DANA CORPORATION
FERODO AMERICA, INC.
FLEXITALLIC, INC.
GAF BUILDING MATERIALS CORPORATION
I.U. NORTH AMERICA, INC.
MAREMONT CORPORATION
NATIONAL GYPSUM COMPANY
NATIONAL SERVICES INDUSTRIES, INC.

NOSROC CORPORATION
PFIZER, INC.

QUIGLEY COMPANY, INC.
SHOOK & FLETCHER INSULATION COMPANY
T&N, PLC
UNION CARBIDE CHEMICAL AND PLASTICS CORPORATION
UNITED STATES GYPSUM COMPANY

35. The class is sufficiently numerous that joinder of all members is impracticable. The exact number of class members is unknown, but those claimants likely number in the tens of thousands.

36. Plaintiffs will fairly and adequately protect the interests of the class. The interests of the class representatives are coincident with, and not antagonistic to, those of the remainder of the class. In addition, Plaintiffs are represented by experienced and able counsel who have previously litigated numerous personal injury cases involving asbestos exposure and the medical conditions which may arise from such exposures.

37. There are questions of law and fact, relating to Plaintiffs' claims, common to the class, including the health hazards of asbestos, Defendants' knowledge of these hazards, Defendants' failure to test or adequately test their asbestos products, and the lack of any warnings concerning, or providing insufficient warnings concerning, the dangers of asbestos and asbestos-containing products. These questions predominate over any questions affecting individual members.

38. Class treatment is a superior method for the fair and efficient adjudication of the controversies herein described because it permits a large number of injured parties, joinder of whom is impracticable, to prosecute their common claims in a single forum simultaneously, without unnecessary duplication. The class action provides an efficient method whereby the relative rights of Plaintiffs, class members and the Defendants can be fairly managed.

Liability Allegations

Count I: Negligent Failure to Warn

39. The allegations of paragraphs 1 - 38 are incorporated by reference herein.

40. The Defendants, during all times relevant hereto, caused asbestos or asbestos-containing products to be placed in the stream of commerce with the result that all Plaintiffs and their decedents, and those similarly situated, were exposed, occupationally or through a spouse's exposure to asbestos fibers and dust emitted by those products.

41. As the proximate result of exposure to Defendants' asbestos or asbestos-containing products, Plaintiffs and those similarly situated to them have suffered injuries, including the inhalation of asbestos fibers and dust, causing cellular changes in their lungs and other organs and affecting their bodies' ability to resist asbestos-related conditions; and/or the contraction of asbestos-related conditions such as pleural thickening, pleural plaques, asbestosis, respiratory cancer, and mesothelioma; and/or an enhanced risk of contracting such conditions in the future; and/or emotional distress arising out of asbestos-related conditions or the fear of future asbestos-related conditions; and/or the necessity to undergo medical surveillance in order to detect the onset of any future asbestos-related conditions. As a proximate result of these injuries, Plaintiffs and those similarly situated to them, or some of them, have suffered further losses, such as lost wages, past and future medical expenses, funeral and burial expenses, loss of consortium, and pain and suffering. Also, as the proximate result of those conditions, all Plaintiffs and their decedents, and those similarly situated, have suffered injuries, such as loss of support, loss of consortium, emotional distress, loss of life's pleasures, and loss of society.

42. During all times relevant hereto, each and every Defendant knew or should have known of the dangers that exposure to its asbestos or asbestos-containing products could cause conditions such as pleural thickening, pleural plaques, asbestosis, respiratory cancer, and mesothelioma in all Plaintiffs and their decedents, and those similarly situated to them.

43. During all times relevant hereto, each and every Defendant failed to take reasonable steps to provide to all Plaintiffs, their decedents, and those similarly situated to them, (a) adequate warnings of the known or potential dangers from exposure to its asbestos or asbestos-containing products and (b) adequate instructions on how to safely use its asbestos or asbestos-containing

products so as to reduce the risk of asbestos-related conditions. The failure by each and every Defendant to provide such warnings and instructions constitutes negligence and proximately caused the injuries or potential injuries to Plaintiffs, their decedents, and those similarly situated to them as described above.

44. The failure of each and every Defendant to provide Plaintiffs and those similarly situated to them with both adequate warnings of the danger from exposure to its asbestos or asbestos-containing products and adequate instructions on how to use its asbestos or asbestos-containing products so as to reduce the danger was reckless, wanton, and willful and in conscious disregard of Plaintiffs' safety and health.

Count II: Strict Liability

45. The allegations of paragraphs 1 - 44 are incorporated by reference herein.

46. The asbestos or asbestos-containing products mined, manufactured, produced, marketed, sold, or distributed by each and every Defendant were defective and unreasonably dangerous to human health (a) because they were sold without any warnings or adequate warnings as to their dangers and without adequate instructions on how to use the products so as to reduce those dangers, or (b) because Defendants failed to develop alternative products with safer designs even though such products were feasible. Those defects were the proximate cause of the injuries to Plaintiffs and those similarly situated to them, as described in Count 1.

47. The manufacture, production, marketing, sale, or distribution by each and every Defendant of defective asbestos or asbestos-containing products was reckless, wanton, and willful and in conscious disregard of the safety and health of Plaintiffs and those similarly situated to them.

Count III: Breach of Express and Implied Warranty

48. The allegations of paragraphs 1 - 47 are incorporated by reference herein.

49. Each and every Defendant has breached express, as well as implied, warranties of good and merchantable quality and fitness for intended use with respect to its asbestos-containing products.

50. The breach of those warranties has proximately caused injury to Plaintiffs and those similarly situated to them, as described in Count 1.

Count IV: Negligent Infliction of Emotional Distress

51. The allegations of paragrapns 1 - 50 are incorporated by reference herein.

52. During all times relevant hereto, each and every Defendant knew or should have known that exposure to its asbestos or asbestos-containing products could cause emotional distress arising from present asbestos-related conditions or the fear of contracting an asbestos-related condition in all Plaintiffs, their decedents, and those similarly situated to them.

53. During all times relevant hereto, each and every Defendant failed to take reasonable steps to provide to all Plaintiffs, their decedents, and those similarly situated to them, (a) adequate warnings of the danger from exposure to its asbestos or asbestos-containing products and (b) adequate instructions on how to use its asbestos or asbestos-containing products so as to reduce the danger.

54. The failure by each and every Defendant to provide such warnings and instructions constitutes negligence and proximately caused the injuries to Plaintiffs and those similarly situated to them as described above.

55. The failure of each and every Defendant to provide all Plaintiffs, their decedents, and those similarly situated to them, with both adequate warnings of the potential dangers from exposure to its asbestos or asbestos-containing products and adequate instructions on how to use its asbestos or asbestos-containing products, thus subjecting Plaintiffs and those similarly situated to them to emotional distress arising from present asbestos-related conditions or the fear of contracting asbestos-related conditions, was reckless, wanton, and willful and in conscious disregard of Plaintiffs' safety and health.

Count V: Enhanced Risk of Future Condition

56. The allegations of paragraphs 1 - 55 are incorporated by reference herein.

57. During all times relevant hereto, each and every Defendant knew or should have known that exposure to its asbestos

or asbestos-containing products could cause an enhanced risk of contracting asbestos-related conditions in all Plaintiffs, their decedents, and those similarly situated to them.

58. During all times relevant hereto, each and every Defendant failed to take reasonable steps to provide to all Plaintiffs, their decedents, and those similarly situated to them, (a) adequate warnings of the known or potential dangers from exposure to its asbestos or asbestos-containing products and (b) adequate instructions on how to use its asbestos or asbestos-containing products so as to reduce the danger.

59. The failure by each and every Defendant to provide such warnings and instructions constitutes negligence and proximately caused the injuries to Plaintiffs and those similarly situated to them as described above.

60. The failure of each and every Defendant to provide Plaintiffs and those similarly situated to them with both adequate warnings of the danger from exposure to its asbestos or asbestos-containing products and adequate instructions on how to use its asbestos or asbestos-containing products, thus subjecting Plaintiffs and those similarly situated to them to the enhanced risk of contracting asbestos-related conditions, was reckless, wanton, and willful and in conscious disregard of Plaintiffs' safety and health.

Count VI: Medical Monitoring

61. The allegations of paragraphs 1 - 60 are incorporated by reference herein.

62. During all times relevant hereto, each and every Defendant knew or should have known of the danger that exposure to its asbestos or asbestos-containing products would cause Plaintiffs and those similarly situated to them to be exposed for significant periods of time to dangerous levels of asbestos, which was known by Defendants to be a cause of cancer and other serious conditions.

63. During all times relevant hereto, each and every Defendant knew or should have known that exposure to its asbestos or asbestos-containing products could cause an enhanced risk of contracting asbestos-related conditions in all Plaintiffs, their decedents, and those similarly situated to them, which would make

it necessary for them to undergo medical surveillance in order to monitor for the development of asbestos-related conditions and permit early medical diagnosis or treatment of any such condition.

64. During all times relevant hereto, each and every Defendant knew or should have known of the danger that exposure to its asbestos or asbestos-containing products would make it necessary for all Plaintiffs, their decedents, and those similarly situated to them to undergo medical surveillance in order to monitor for the development of asbestos-related conditions and permit early medical diagnosis or treatment of any such conditions.

65. The failure of each and every Defendant to provide all Plaintiffs, their decedents, and those similarly situated to them, with both adequate warnings of the danger from exposure to its asbestos or asbestos-containing products and adequate instructions on how to use its asbestos or asbestos-containing products has made it necessary that Plaintiffs and those similarly situated undergo regular medical surveillance in order to monitor for the development of asbestos-related conditions and permit early medical diagnosis or treatment of any such conditions.

66. The failure of each and every Defendant to provide all Plaintiffs, their decedents, and those similarly situated to them, with both adequate warnings of the danger from exposure to its asbestos or asbestos-containing products and adequate instructions on how to safely use its asbestos or asbestos-containing products rendered it necessary for Plaintiffs and those similarly situated to undergo medical surveillance. Such conduct by each and every Defendant was reckless, wanton, and willful and in conscious disregard of Plaintiffs' safety and health.

Count VII: Civil Conspiracy

67. The allegations of paragraphs 1 - 66 are incorporated by reference herein.

68. Defendants, individually and in concert with each other, reached an agreement or tacit understanding to do the aforesaid acts with the unlawful intent of marketing asbestos and asbestos-containing products in an unlawful manner by willfully, knowingly, and fraudulently suppressing knowledge about the dangers of asbestos, and by marketing without adequate testing and without adequate warnings.

69. The aforesaid acts, and similar acts, were committed in furtherance of this conspiracy to market asbestos and asbestos-containing products in an unlawful manner.

70. In furtherance of the unlawful conspiracy between Defendants, one or more of the co-conspirators committed overt acts that were intended to effectuate the goals of the conspiracy.

71. Defendants' combination provided Defendants with additional power to inflict injury, harm, and damages upon Plaintiffs; such power would not have otherwise existed absent such combination.

72. Plaintiffs were directly and proximately harmed by Defendants' tortious combination and conspiracy as alleged herein and the act of one co-conspirator, therefore, should be deemed the act of all.

Prayer for Relief

WHEREFORE, Plaintiffs pray that the Court grant the following relief:

A. Plaintiffs and other members of the class recover the general and special compensatory damages determined to have been sustained by each of them respectively;

B. Plaintiffs and other members of the class recover punitive damages from Defendants in an amount to be determined;

C. Plaintiffs and other members of the class recover the costs of this suit; and

D. The Court grant such other, further and different relief as may be deemed just and proper.

Jury Demand

The named plaintiffs request trial by jury on all issues triable to a jury.

DATED: January 15, 1993

Respectfully submitted,

/s/ GENE LOCKS
Gene Locks, Esquire
Pennsylvania Supreme Court
I.D. No. 12969
Greitzer and Locks
1500 Walnut Street

/s/ RONALD L. MOTLEY
Ronald L. Motley, Esquire
Joseph F. Rice, Esquire
Ness, Motley, Loadholt,
Richardson & Poole
151 Meeting Street, Suite 600
Charleston, SC 29404

/s/ JOSEPH F. RICE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

ANSWER

Defendants [collectively referred to as the Center for Claims Resolution Defendants or "CCR Defendants" and each Defendant individually, where appropriate] answer the Complaint as follows:

FIRST DEFENSE

1. - 2. CCR Defendants are without sufficient information to form a belief as to the truth of the allegations of Paragraph 1-2 of the Complaint.

3. - 11. CCR Defendants are without sufficient information to form a belief as to the truth of the allegations of Paragraphs 3-11 of the Complaint.

12. CCR Defendants deny the allegations of Paragraph 12 of the Complaint.

13. - 32. CCR Defendants admit the allegations of Paragraphs 13-32 of the Complaint as they pertain to allegations of incorporation and principal place of business. All other allegations are denied.

33. - 38. CCR Defendants admit the allegations of Paragraphs 33-38 of the Complaint insofar as they relate to the certification of a settlement class. CCR Defendants specifically deny that the questions of law and fact as set forth in Paragraph 37 are common to the class or that they predominate over any questions affecting individual members; and otherwise deny the allegations with respect to maintenance of a litigation class.

39. In response to Paragraph 39 of the Complaint, CCR Defendants incorporate by reference their responses to Paragraphs 1-38.

40. CCR Defendants are without sufficient information to form a belief as to the truth of the allegations of Paragraph 40 of the Complaint and therefore deny same.

41. - 44. CCR Defendants deny the allegations of Paragraphs 41-44 of the Complaint.

45. In response to Paragraph 45 of the Complaint, CCR Defendants incorporate by reference their responses to Paragraphs 1-44.

46. - 47. CCR Defendants deny the allegations of Paragraphs 46-47 of the Complaint.

48. In response to Paragraph 48 of the Complaint, CCR Defendants incorporate by reference their responses to Paragraphs 1-47.

49. - 50. CCR Defendants deny the allegations of Paragraphs 49-50 of the Complaint.

51. In response to Paragraph 51 of the Complaint, CCR Defendants incorporate by reference their responses to Paragraphs 1-50.

52. - 55. CCR Defendants deny the allegations of Paragraphs 52-55 of the Complaint.

56. In response to Paragraph 56 of the Complaint, CCR Defendants incorporate by reference their responses to Paragraphs 1-55.

57. - 60. CCR Defendants deny the allegations of Paragraphs 57-60 of the Complaint.

61. In response to Paragraph 61 of the Complaint, CCR Defendants incorporate by reference their responses to Paragraphs 1-60.

62. - 66. CCR Defendants deny the allegations of Paragraphs 62-66 of the Complaint.

67. In response to Paragraph 67 of the Complaint, CCR Defendants incorporate by reference their responses to Paragraphs 1-66.

68. - 72. CCR Defendants deny the allegations of Paragraphs 68-72 of the Complaint.

SECOND DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

The plaintiffs' claims are barred by the applicable statute of limitations or statutes of repose, or by the doctrine of laches.

FOURTH DEFENSE

The plaintiffs' losses, if any, were caused by plaintiffs' or plaintiffs' decedents' assumption of the risk.

FIFTH DEFENSE

The plaintiffs' losses, if any, were caused by plaintiffs' or plaintiffs' decedents' contributory or comparative negligence or fault.

SIXTH DEFENSE

CCR Defendants were not negligent, did not furnish a product unreasonably dangerous, and did not make or breach any express or implied warranties.

SEVENTH DEFENSE

Plaintiffs' claims of breach of warranty are barred by plaintiffs' failure to give prompt notice of any breach of warranty as is required by the applicable state Uniform Commercial Code.

EIGHTH DEFENSE

At all times material hereto, the state of the medical and industrial art was such that there was no generally accepted or recognized knowledge of any unavoidably unsafe, inherently dangerous, or hazardous character or nature of asbestos containing products when used in the manner and for the purpose described by plaintiffs. Therefore, CCR Defendants were under no duty to know of such character or nature or to warn plaintiffs or others similarly situated.

NINTH DEFENSE

The injuries and illnesses, if any, sustained by the plaintiffs were caused or contributed to by the neglect, misuse, fault, and want of due care of plaintiffs or by others for whose actions or omissions or breach of legal duty CCR Defendants are not liable.

TENTH DEFENSE

Plaintiffs' claims, if any, are preempted by the regulations of the Occupational Health and Safety Administration and other applicable federal laws.

ELEVENTH DEFENSE

Some or all of plaintiffs' claims are barred by plaintiffs' lack of privity with these answering CCR Defendants.

TWELFTH DEFENSE

Plaintiffs' claims for punitive damages are unconstitutional.

WHEREFORE, CCR Defendants pray that the Plaintiffs' Complaint be dismissed with prejudice and that the Court award CCR Defendants such other relief as is appropriate.

Respectfully submitted,

/s/ JOHN G. GAUL # 34257

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Attorneys for Defendants
Represented by the Center for Claims Resolution

DATED: January 15, 1993

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

JOINT MOTION OF PLAINTIFFS AND CCR MEMBERS FOR CONDITIONAL CLASS CERTIFICATION

Plaintiffs Edward M. Carlough; Pavlos Kekrides and Nafssica Kekrides, his wife; Laverne Winbun, Executrix of the Estate of Joseph E. Winbun, deceased; Ambros Vogt, Jr. and Joanne Vogt, his wife; Carlos Raver and Dorothy M. Raver, his wife; John A. Baumgartner and Anna Marie Baumgartner, his wife; Timothy Murphy and Gay Murphy, his wife; Ty T. Annas; and Fred Angus Sylvester, on behalf of themselves and all others similarly situated, and the members of the Center for Claims Resolution ("CCR")[1] hereby move for conditional certification of a class action for purposes of settlement, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. In support of their motion, plaintiffs and the CCR members state as follows:

1. Plaintiffs and the CCR members have engaged in lengthy and intense negotiations in an attempt to settle the claims of all persons exposed to asbestos or asbestos-containing products for which the CCR members bear legal liability, but who have not yet filed suit.

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[1] The CCR members are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Certainteed Corp.; C.E. Thurston & Sons, Inc.; Dana Corp.; Flexitallic Gasket Co., Inc.; GAF Corp.; I.U. North America, Inc.; Maremont Corp.; National Gypsum Co.; National Services Industries, Inc.; Nosroc Corp.; Ferodo America, Inc. (formerly Nuturn Corp.); Pfizer, Inc.; Quigley Co., Inc.; Shook & Fletcher Insulation Co.; T&N, PLC; Union Carbide Corp.; and United States Gypsum Co.

2. Those negotiations were ultimately successful and resulted in a Stipulation of Settlement. A copy of this Stipulation is being filed with the Court together with this Motion for Conditional Class Certification.

3. A class complaint has been filed by the above plaintiffs on behalf of all persons who meet the following definitions, but excluding those persons who opt out of this class action pursuant to the opt-out provisions in Rule 23(b)(3) of the Federal Rules of Civil Procedure, as implemented by order of the Court in this action:

(a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant, or passenger ships), either occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or death in any state or federal court against the defendant(s) (or against entities for whose actions or omissions the defendant(s) bear legal liability).

(b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph (a) above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) above in any state or federal court against the defendant(s) (or against entities for whose actions or omissions the defendant(s) bear legal liability).

(c) The defendants in this action are:

AMCHEM PRODUCTS, INC.
A.P. GREEN INDUSTRIES, INC.
ARMSTRONG WORLD INDUSTRIES, INC.
CERTAINTEED CORPORATION
C.E. THURSTON & SONS, INC.

DANA CORPORATION
FERODO AMERICA, INC.

FLEXITALLIC, INC.
GAP BUILDING MATERIALS CORPORATION
I.U. NORTH AMERICA, INC.
MAREMONT CORPORATION
NATIONAL GYPSUM COMPANY
NATIONAL SERVICES INDUSTRIES, INC.

NOSROC CORPORATION
PFIZER, INC.
QUIGLEY COMPANY, INC.
SHOOK & FLETCHER INSULATION COMPANY
T&N, PLC
UNION CARBIDE CHEMICAL AND PLASTICS CORPORATION
UNITED STATES GYPSUM COMPANY

4. Certification of a conditional opt-out class action, pursuant to Rule 23(b)(3), for purposes of settlement would provide the most effective means for fairly and efficiently resolving plaintiffs' claims and assuring prompt payment in an orderly fashion that maximizes the money available for claimants, while minimizing transaction costs.

5. The conditional class action proposed here meets the requirements of Rules 23(a)(2) and 23(b)(3), since the plaintiff class is so numerous that joinder of all members would be impracticable; the question, now common to the class, is whether the proposed settlement is fair and reasonable and was reached through a fair process; the claims of the representative plaintiffs are typical of the claims of the other class members; the representative plaintiffs have no interests antagonistic to those of the other class members; and the proposed class counsel are highly qualified to represent the proposed class based upon their proven capabilities and extensive experience in the asbestos litigation.

6. The proposed settlement would not adversely impact the interests of any of the CCR members' co-defendants in the asbestos litigation.

7. The proposed settlement would prevent significant future asbestos-related litigation from being filed in either the federal or state courts, would allow the defendants to address the pending

cases in an orderly fashion, and would serve the best interests of the parties and of the public.

* * * *

For the foregoing reasons, plaintiffs and the CCR members request that their Joint Motion for Conditional Certification of the Proposed Class for Purposes of Settlement be granted.

Respectfully submitted,

/s/ GENE LOCKS
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Attorneys for Defendants Represented by the Center for Claims Resolution

DATED: January 15, 1993

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

PROPOSED ORDER GRANTING CONDITIONAL CLASS CERTIFICATION FOR PURPOSES OF SETTLEMENT

Upon consideration of the Joint Motion of Plaintiffs and the CCR Members for Conditional Class Certification for Purposes of Settlement, the memorandum in support thereof, and any opposition thereto, it is hereby

ORDERED that the Joint Motion for Conditional Class Certification for Purposes of Settlement is GRANTED pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, and a class is certified including all persons who meet the following definitions, but excluding those persons who opt out of this class action pursuant to the opt-out provisions in Rule 23 (b) (3) of the Federal Rules of Civil Procedure, as implemented by order of the Court in this action:

(a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant, or passenger ships), either occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or death in any state or federal court against the defendant(s) (or against entities for whose actions or omissions the defendant(s) bear legal liability).

(b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described

in paragraph (a) above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) above in any state or federal court against the defendant(s) (or against entities for whose actions or omissions the defendant(s) bear legal liability).

(c) The defendants in this action are:

AMCHEM PRODUCTS, INC.
A.P. GREEN INDUSTRIES, INC.
ARMSTRONG WORLD INDUSTRIES, INC.
CERTAINTEED CORPORATION
C.E. THURSTON & SONS, INC.

DANA CORPORATION
FERODO AMERICA, INC.
FLEXITALLIC, INC.
GAF BUILDING MATERIALS CORPORATION
I.U. NORTH AMERICA, INC.
MAREMONT CORPORATION
NATIONAL GYPSUM COMPANY
NATIONAL SERVICES INDUSTRIES, INC.

NOSROC CORPORATION
PFIZER, INC.
QUIGLEY COMPANY, INC.
SHOOK & FLETCHER INSULATION COMPANY
T&N, PLC
UNION CARBIDE CHEMICAL AND PLASTICS CORPORATION
UNITED STATES GYPSUM COMPANY

ORDERED that plaintiffs Edward M. Carlough; Pavlos Kekrides and Nafssica Kekrides, his wife; Laverne Winbun, Executrix of the Estate of Joseph E. Winbun, deceased; Ambros Vogt, Jr. and Joanne Vogt, his wife; Carlos Raver and Dorothy M. Raver, his wife; John A. Baumgartner and Anna Marie Baumgartner, his wife; Timothy Murphy and Gay Murphy, his wife; Ty T. Annas; and Fred Angus Sylvester, are hereby designated as the representative plaintiffs in this class action; and further

ORDERED that since the Court finds that it is in the best interests of the class to appoint counsel for class representatives at this time, Gene Locks, of Greitzer and Locks, in Philadelphia, Pennsylvania, Ronald L. Motley and Joseph F. Rice, of Ness, Motley, Loadholt, Richardson & Poole, in Charleston, South Carolina, are hereby appointed as class counsel in this class action; and further

ORDERED that all class members who wish to opt out of this Rule 23 (b) (3) class action may do so by completing an Exclusion Request Form as designated by this Court and sending it (or other written notification of the Members' intention to exclude himself or herself from the class) to the Clerk of this Court, at 601 Market Street, 2609 U.S. Courthouse, Philadelphia, Pennsylvania 19106 by , 1993; and further

ORDERED that all parties or persons wishing to file briefs in support of the proposed settlement must do so by , 1993. All parties or persons wishing to file briefs in opposition to the proposed settlement must do so by , 1993. All parties or persons who have filed briefs in support of the proposed settlement may file reply briefs by , 1993; and further

ORDERED that hearing(s) to determine the fairness, adequacy and reasonableness of the proposed settlement shall be held on , 1993, at 601 Market Street, U.S. Courthouse, Philadelphia, Pennsylvania 19106, and further

ORDERED that notice shall be given of this conditional class certification and of the fairness hearing(s) pursuant to Rules 23 (c)(2) and 23(e), in accordance with a separate order to be issued by this Court.

IT IS SO ORDERED this day of , 1993.

Charles R. Weiner
United States District Judge

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

MEMORANDUM IN SUPPORT OF PLAINTIFFS' AND CCR MEMBERS' JOINT MOTION FOR CONDITIONAL CLASS CERTIFICATION

I. INTRODUCTION

Plaintiffs Edward M. Carlough; Pavlos Kekrides and Nafssica Kekrides, his wife; Laverne Winbun, Executrix of the Estate of Joseph E. Winbun, deceased; Ambros Vogt, Jr. and Joanne Vogt, his wife; Carlos Raver and Dorothy M. Raver, his wife; John A. Baumgartner and Anna Marie Baumgartner, his wife; Timothy Murphy and Gay Murphy, his wife; Ty T. Annas; and Fred Angus Sylvester, on behalf of themselves and all others similarly situated, and defendants, members of the Center for Claims Resolution ("CCR"),[1] have moved for conditional certification of an opt-out class action for purposes of settlement, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. They submit this memorandum in support of that joint motion.

The CCR members are presently defendants in more than 80,000 asbestos personal injury suits in the state and federal courts. Projections by experts indicate that, if the asbestos personal injury litigation continues to be handled within the normal tort system, the

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[1] The CCR members are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Certainteed Corp.; C.E. Thurston & Sons, Inc.; Dana Corp.; Flexitallic Gasket Co., Inc.; GAF Corp.; I.U. North America, Inc.; Maremont Corp.; National Gypsum Co.; National Services Industries, Inc.; Nosroc Corp.; Ferodo America, Inc. (formerly Nuturn Corp.); Pfizer, Inc.; Quigley Co., Inc.; Shook & Fletcher Insulation Co.; T&N, PLC; Union Carbide Corp.; and United States Gypsum Co.

CCR members can expect to be named as defendants in thousands of additional cases over the next 10 years.

In an effort to find a fair and more efficient means of resolving these future cases, the CCR members and plaintiffs have engaged in a lengthy and intense negotiation process, beginning in February 1 1991. Those negotiations ultimately resulted in a Stipulation of Settlement, a copy of which was filed with the Court along with this Motion.

As a result of reaching this Stipulation of Settlement, the parties here soak conditional certification of an opt-out class action, for settlement purposes only, on behalf of the following class:

(a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant, or passenger ships), either occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or death in any state or federal court against the defendant(s) (or against entities for whose actions or omissions the defendant(s) bear legal liability).

(b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph (a) above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) above in any state or federal court against the defendant(s) (or against entities for whose actions or omissions the defendant(s) bear legal liability).

(c) The defendants in this action are:

AMCHEM PRODUCTS, INC.
A.P. GREEN INDUSTRIES, INC.
ARMSTRONG WORLD INDUSTRIES, INC.
CERTAINTEED CORPORATION
C.E. THURSTON & SONS, INC.

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SHOOK & FLETCHER INSULATION COMPANY
T&N, PLC
UNION CARBIDE CHEMICAL AND PLASTICS CORPORATION
UNITED STATES GYPSUM COMPANY

The class action and settlement, if approved, would resolve the claims of all such persons who do not opt out of this class action pursuant to the opt-out provisions in Rule 23(b)(3) of the Federal Rules of Civil Procedure, providing a non-judicial resolution of virtually all of their claims without further resort to the court system, while establishing an expeditious and equitable administrative system for providing them with compensation.

II. THE PROPOSED SETTLEMENT

The settlement negotiated by class counsel and the CCR members would establish an administrative process by which class members could apply to the CCR for compensation awards. Claimants who meet certain exposure and medical criteria would be compensated based upon the nature and severity of the medical condition that they, or their decedents, suffered as well as other traditional tort factors. Medical criteria are established by the Stipulation of Settlement pursuant to which qualifying claimants would be classified into the categories of mesothelioma, lung cancer, "other" cancers (primary colon-rectal, laryngeal, esophageal, or stomach), or non-malignant conditions. A range of values has been established for each of these medical categories, based upon the CCR members' historical settlements of like claims. There are also special procedures for compensating claimants who

present "exceptional" medical claims or "extraordinary" damages claims. The CCR would waive the statute of limitations as to any claim that was not time-barred as of the date the class action complaint was filed. Claimants who failed to satisfy the medical criteria to be compensated for any current asbestos-related condition would be free to file for compensation at such time as they might develop such a compensable condition. The terms of the settlement are set forth in full in the stipulation.

III. A CONDITIONAL CLASS SHOULD BE CERTIFIED FOR PURPOSES OF SETTLEMENT ONLY.

A. It Is Appropriate to Certify a Conditional Class For Purposes of Settlement

The procedure proposed here — the certification of a conditional class for purposes of settlement only — is not a new one. Such classes have been approved on numerous occasions, both in the United States Court of Appeals for the Third Circuit and elsewhere. See *Girsh* v. *Jepson*, 521 F.2d 153, 155 n.3 (3d Cir. 1975) ("There is no impediment to determining a class action for the purpose of settlement only.") (citing *Greenfield* v. *Villager Indus., Inc.*, 483 F.2d 824, 832 (3d Cir. 1973)); *In re Beef Indus., Antitrust Litig.*, 607 F.2d 167, 173-78 (5th Cir. 1979) (Wisdom, J.); *Weinberger* v. *Kendrick*, 698 F.2d 61, 72-73 (2d Cir. 1982) (Friendly, J.); *Manual For Complex Litigation 2d* § 30.45, at 242-44 (1985).[2] Class actions for settlement purposes have also been endorsed in the mass tort context, both by the Fourth Circuit in the Dalkon Shield litigation, *In re A.H. Robins, Co., Inc.*, 880 F.2d 709, 738-40 (4th Cir. 1989); and by Judge Weinstein in his opinion reformulating the Manville Trust, *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 851-52 (E. & S.D.N.Y. 1991) *rev'd on other grounds*, *Findley* v. *Blinken*, No. 91-5068(L) (2d Cir. Dec. 4, 1992).

[2] For further cases within the Third Circuit, see *Fisher Bros.* v. *Phelps Dodge Indus., Inc.*, 604 F. Supp. 446, 448-49 (E.D. Pa. 1985); *Kushner* v. *First Pennsylvania Corp.*, 74 F.R.D. 606, 607 (E.D. Pa. 1977), *aff'd mem.*, 577 F.2d 726 (3d Cir. 1978); *Philadelphia Housing Auth.* v. *American Radiator & Standard Sanitary Corp.*, 322 F. Supp. 834, 835 (E.D. Pa. 1971), *aff'd as modified on other grounds sub nom. Ace Heating & Plumbing Co., Inc.* v. *Crane Co.*, 453 F.2d 30 (3d Cir. 1971).

Indeed, the standards for determining whether a class should be certified are considerably more lenient when certification is sought for purposes of settlement, rather than for purposes of litigation. See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 816 (quoting *In re A.H. Robins Co.*, 85 B.R. 373, 378 (E.D. Va. 1988) ("[T]he requirements under Rule 23 are more easily satisfied in the settlement context than in the more complex litigation context."); *In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301, 308 (D. Mass. 1987); 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 11.27, (3d ed. 1992).

As the court held in *In re A.H. Robins*, 85 B.R. at 379, settlement "eliminates, as a practical matter, uncommon or atypical individual issues" and therefore "eliminates obstacles frequently present in tort actions where plaintiffs seek to certify a class." Since the parties, through their stipulation of settlement, have eliminated the need to address the usual issues of liability, causation, and damages, "[t]he primary issue which the Court must ultimately determine in a settlement context is whether the class's claims were fairly and vigorously advocated in non-collusive negotiations reaching a fair and reasonable settlement." *Id.* at 378.

Accordingly the present motion for certification of a conditional class for purposes of settlement should be granted so that a determination may be made as to whether the proposed settlement should be approved.

B. The Requirements of Rules 23(a) and 23(b)(3) Are Met Here.

In order to qualify as a class action under Rule 23(b)(3), an action must meet the requirements of both Rule 23(a) and Rule 23(b)(3). Rule 23(a) requires that:

> "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

In addition, Rule 23(b)(3) requires a finding

> "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

As we now show, all of these requirements are met in the instant case.

1. *Numerosity*. There can be little question that the class members here are "so numerous that joinder of all members is impracticable." As noted above, projections by the CCR members' accounting experts indicate that, absent the proposed settlement, they may expect to be sued in thousands of asbestos personal injury cases over the next 10 years. In *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 817, the court had no difficulty in finding the numerosity requirement settled in the circumstances of the Manville Trust proceeding; indeed, Judge Weinstein implied that the numerosity requirement was particularly well-satisfied where a class of future claimants is involved, since such a group perforce involves a large number of individuals who, because their identities are unknown, cannot be joined except through the class action procedure. *Id.*

Judge Weinstein also stated that the numerosity requirement should be found to have been satisfied where individual resolution of the claims would place a heavy burden on state and federal courts. *Id.* The Court of Appeals did not disagree with this finding. Plainly, the instant case involves just these circumstances. Consequently, the numerosity requirement is satisfied here.

2. *Commonality*. In a Rule 23(b)(3) class action, the requirement of common issues is two-fold. Rule 23(a)(2) requires that there be "questions of law or fact common to the class," and Rule 23(b)(3) requires that these common questions "predominate over any questions affecting only individual [class] members." As observed above, the fact that the parties have already agreed upon a settlement of the cases eliminates the issues of liability, causation, and damages that raise so many disparate issues among the cases. See *In re E. & S. Dist. Asbestos Litig.*, 129 B.R. at 819 ("[t]he

existence of a proposed Settlement * * * greatly minimizes the significance of any noncommon issues").

Hence, where, as here, there in a stipulation of settlement, the primary issue that remains is whether the proposed settlement is fair and reasonable, and whether it was reached through a negotiation process that was not collusive or otherwise improper. *Id.* at 818 ("most fundamental" question is whether the procedure by which the claimants are to be compensated must be changed to provide "equitable compensation to all beneficiaries"); see also *In re A.H. Robins*, 85 B.R. at 378. As this issue of fairness is common to each of the proposed class members' claims, the requirement of commonality is satisfied here.

3. *Typicality*. To satisfy the requirement of typicality, there must be a showing that the claims or defenses of the representative parties are typical of the claims or defenses of the class. The purpose of this requirement in to ensure that "absent class members receive adequate protection of their interests." *In re E. & S. Dist. Asbestos Litig.*, 129 B.R. at 819-20. It does not matter if the representatives' injuries differ in degree, or are not precisely equivalent to the types of diseases experienced by class members. *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986) (upholding certification of nationwide schools asbestos property class despite differing degrees of property damages among class members); *Jenkins* v. *Raymark Indus., Inc.*, 109 F.R.D. 269, 272 (E.D. Tex. 1985) (in asbestos personal injury class action, named plaintiffs' injuries "may differ in degree" from those of other class members), *aff'd*, 782 F.2d 468 (5th Cir. 1986).

The representative plaintiffs here, like the remainder of the class members, include persons with a range of asbestos exposures and a variety of asbestos-related medical conditions. Like the other class members, the representative plaintiffs have asserted, among them, claims against each of the CCR members. Moreover, like the rest of the class, the named plaintiffs are from a variety of jurisdictions, and represent a variety of occupations. Consequently, the requirement of typicality is met here.

4. *Adequacy of Representation*. The adequacy of representation requirement is comprised of two components: first, the named plaintiffs may not have interests antagonistic to those of

the remainder of the class and, second, class counsel must be qualified, experienced, and able to handle the proposed litigation. *In re Fine Paper Antitrust Litig.*, 617 F.2d 22, 27 (3d Cir. 1980); *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 157 n.13 (1982); *In re E. & S. Dist. Asbestos Litig.*, 129 B.R. at 820-21 (quoting *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968), *vacated on other grounds*, 417 U.S. 156 (1974)).

As discussed above, there would be no conflict of interests between the representative plaintiffs and the remainder of the class members. Hence, the first component of the adequacy inquiry is satisfied.

The second component of the inquiry is similarly met here. Class counsel, Gene Locks, of Greitzer and Locks, in Philadelphia, Pennsylvania, and Ronald L. Motley and Joseph F. Rice, of Ness, Motley, Loadholt, Richardson & Poole, in Charleston, South Carolina, are experienced and prominent members of the plaintiffs' asbestos bar. They have participated in the asbestos litigation since its infancy and were responsible for much of the original discovery work that developed important evidence for plaintiffs. See Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* 124, 135-43 (1985). Through affiliated counsel, Mr. Motley and Mr. Rice represent some thousands of plaintiffs in pending asbestos personal injury litigation. Mr. Locks' firm also represents thousands of plaintiffs in numerous jurisdictions. Clearly, both Mr. Locks, Mr. Motley, and Mr. Rice are eminently qualified to handle this proceeding on behalf of the plaintiff class.

In short, as the above discussion shows, the requirements for certification of a conditional opt-out class under Rule 23(b)(3) are satisfied here. Therefore, plaintiff's and the CCR members' joint motion for certification of a conditional class should be granted.

C. The Proposed Timeline for This Proceeding

Assuming that the Court grants this motion, plaintiffs and the CCR members propose that the Court first enter the accompanying order, certifying a conditional class action for the purposes of settlement. The proposed order would also designate the named plaintiffs as the representative plaintiffs for the class, appoint Messrs. Locks, Motley, and Rice as class counsel, and set forth a proposed timeline for this proceeding.

By a separate order, the Court would provide that combined Rule 23(c)(2) and 23(e) notice should be issued, and would establish the procedures to be followed in giving such notice. The Court would establish a bar date approximately three months after the notice campaign was to begin, by which date class members would be required to elect to opt out of the class, if they chose to do so. The Court would also set deadlines for the submission of briefs in support of the proposed settlement, briefs in opposition to the proposed settlement, and reply briefs.

Finally, the Court should schedule the fairness hearing or hearings on the proposed settlement. In order to facilitate this hearing, as set forth in our separate Joint Motion to Appoint a Special Master, the parties propose that the Court appoint a Special Master to supervise the pre-hearing proceedings and discovery process incident to the fairness hearing.

IV. CONCLUSION

For the foregoing reasons, plaintiffs and the CCR members request that their joint motion for certification of the proposed conditional class for purposes of settlement be granted.

Respectfully submitted,

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DATED: January 15, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

STIPULATION OF SETTLEMENT BETWEEN THE CLASS OF CLAIMANTS AND DEFENDANTS REPRESENTED BY THE CENTER FOR CLAIMS RESOLUTION

[Table of Contents Omitted]

PREAMBLE

This Stipulation of Settlement is made and entered into as of January 15, 1993, by and between the Plaintiff Class Representatives (as defined below) who represent the Class of Claimants (as defined below) and the defendants represented by the Center For Claims Resolution ("CCR Defendants") (as defined below), all parties acting by and through their respective undersigned counsel.

WHEREAS:

1. The Class of Claimants is a class of individuals on whose behalf the Plaintiff Class Representatives have filed a Class Action Complaint against the CCR Defendants in the United States District Court for the Eastern District of Pennsylvania, and who have sought certification of that class as an opt-out class under Rule 23(b)(3) of the Federal Rules of Civil Procedure;

2. The Center For Claims Resolution ("CCR") represents a group of twenty companies that are defendants in asbestos personal injury litigation and that are named as defendants in the Class Action Complaint filed by the Plaintiff Class Representatives on behalf of the Class of Claimants;

3. For more than fifteen years, thousands of individuals exposed to asbestos or asbestos-containing products have filed lawsuits alleging personal injury and damage in the state and

federal courts against the CCR Defendants and against many other defendants;

4. This litigation has resulted in extensive discovery concerning the potential liability of the CCR Defendants and other defendants, as well as full consideration of the legal and factual basis, including medical issues, underlying each individual asbestos plaintiff's personal injury lawsuit;

5. The vast majority of the asbestos personal injury lawsuits brought against the CCR Defendants and others in the past fifteen years has been settled without trial, although a small percentage has been tried to verdict, with some plaintiffs and some defendants prevailing;

6. The volume of asbestos personal injury lawsuits has been extremely large, and has impacted the ability of some courts to process the suits in a prompt, efficient, and fair manner;

7. Compensation to asbestos personal injury claimants has been distributed in some instances on an inequitable basis, often dependent more upon the trial docket and procedure in the court where the case is filed than upon the individual plaintiff's factual circumstances;

8. Despite significant success in reducing litigation costs through coordinated claims handling organizations (such as the CCR), plaintiffs and defendants have spent, and continue to spend, enormous resources contesting both liability and damages, allocating responsibility among the parties, and litigating insurance coverage for the liability;

9. The expenditures necessary to process and resolve many thousands of asbestos lawsuits have contributed to more than ten major asbestos defendants filing for bankruptcy reorganization. Because some of these defendants represent a significant portion of the traditional liability share in asbestos personal injury cases, and many jurisdictions apply the principle of joint and several liability, these bankruptcy filings have increased costs substantially, caused significant delays to plaintiffs, and created financial pressures on the remaining solvent defendants;

10. Class Counsel each has a decade or more of experience in the litigation of asbestos personal injury cases. They have

conducted a thorough investigation into the law and facts relating to matters met forth in the complaint;

11. There are approximately 77,000 asbestos personal injury claims currently pending against the CCR Defendants in the state and federal courts. The goal and intent of the CCR Defendants is to resolve all these presently pending claims over the next five years;

12. The procedures set forth in this Stipulation would provide a fair, flexible, speedy, cost-effective, and assured method of compensating claimants who have exposure to asbestos or asbestos-containing products manufactured or supplied by the CCR Defendants, and who have contracted or will in the future contract an asbestos-related medical condition. Thus, this settlement provides considerable benefit to the Class of Claimants, while avoiding costly litigation of difficult and contentious issues;

13. Based on extensive analysis of the law and facts at issue in this complaint, other factors and considerations concerning asbestos litigation, and the fair, flexible, speedy, cost-effective, and assured procedures set forth below for compensating the Class of Claimants, Plaintiff Class Representatives, on advice of Class Counsel, have determined that settlement with the CCR Defendants on the terms set forth below would be fair, adequate, and reasonable, and thus in the best interests of the Class of Claimants;

14. Based on extensive analysis of the law and facts at issue in this complaint, the other considerations concerning the asbestos litigation set forth above, and the fair, flexible, speedy, cost-effective, and assured procedures set forth below for compensating the Class of Claimants, the CCR Defendants have determined that settlement with the Class of Claimants on the terms set forth below would be fair, adequate, and reasonable, and thus in the best interests of the CCR Defendants;

It is therefore stipulated and agreed by and among the Plaintiff Class Representatives, the undersigned Class Counsel for the Class of Claimants, the undersigned CCR Defendants, and the undersigned Counsel for the CCR Defendants that, subject to Court approval of this Stipulation of Settlement as a good-faith, ethical, fair, adequate, and reasonable settlement, and to the satisfaction of the other conditions set forth herein, this action shall be settled as

of the date of the execution of this Stipulation of Settlement on the terms and conditions set forth below.

AGREEMENT

I. Definitions

For purposes of this Stipulation, the following terms shall have the meanings set forth below. Terms used in the singular shall be deemed to include the plural, and vice versa.

A. "Additional Releasee(s)" shall mean individuals and entities in addition to the CCR Defendant(s) that are to be released pursuant to this Stipulation. Such Additional Releasee(s) shall include (1) each CCR Defendant(s)' present and former foreign and domestic parents, subsidiaries, and affiliates; (2) the foreign and domestic predecessors, successors, distributors, vendees, transferees, insurers, and assigns of each CCR Defendant or of (1) above; and (3) the present, former, and subsequent officers, directors, agents, servants, shareholders, and employees of each CCR Defendant or of (1) or (2) above. With respect to Additional Releasee(s) that are not individuals, the liability of Additional Releasee(s) that is to be included and released under this Stipulation must arise 1) out of products, actions or omissions of a CCR Defendant; or 2) out of actions or omissions of an Additional Releasee for which a CCR Defendant bears legal liability.

B. "CCR" shall mean the nonstock, not-for-profit corporation maintained by the CCR Defendants (or any successor entity) for the processing of claims pursuant to this Stipulation of Settlement and for other purposes. The CCR's current address is 116-300 Village Boulevard, Princeton, New Jersey 08540. The CCR's current Chief Executive Officer is Lawrence Fitzpatrick; its current Chief Operating Officer is Michael F. Rooney.

C. "CCR Defendant(s)" shall mean any one or more of the following companies that are defendants named in the Class Action Complaint: Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; CertainTeed Corp.; C.E. Thurston and Sons, Incorporated; Dana Corp.; Flexitallic, Inc.; GAF Corp.; I.U. North America, Inc.; Maremont Corp.; National Gypsum Company; National Service Industries, Inc.; Nosroc Corp.; Ferodo America, Inc. (formerly Nuturn Corp.); Pfizer, Inc.; Quigley Co. Inc.; Shook & Fletcher Insulation Co.; T&N plc;

Union Carbide Chemicals and Plastics Company Inc.; and United States Gypsum Co.

D. "Claim" shall mean any and all claims by any Settlement Class Member against the CCR Defendant(s) or the Additional Releasee(s) for any asbestos-related personal injury or damage, including any claim based on, arising out of, or related to premises ownership or vicarious liability. A Claim under this Stipulation shall include, without limitation, any and all claims for 1) personal injury, damage, or death and all forms of mental or emotional harm, that is based on, arises out of, or relates to exposure to asbestos (i.e., actinolite, amosite, anthophyllite, chrysotile, crocidolite or tremolite fibers) or to asbestos-containing products; 2) loss of support, services, consortium, companionship, society, and other valuable services made by spouses, parents, children, or other relatives, however such claims are denominated, including, without limitation, wrongful death or survival actions, that are based on, arise out of, or relate to the asbestos exposure set forth in this Paragraph D; and 3) punitive, aggravated, or exemplary damages of any sort that are based on, arise out of, or relate to exposure to asbestos or to asbestos-containing products. A Claim under this Stipulation shall not include, however, any claim by an employee or the employee's representative against an employer when that claim is or would be subject to any workers' compensation or similar statutory provision. Accordingly, as set forth in Part XV of this Stipulation, this Stipulation is not intended to, and shall not, affect any otherwise applicable provision of a workers' compensation or similar statutory provision that bars a Settlement Class Member from filing a tort suit against the CCR Defendant(s) or the Additional Releasee(s).

E. "Claimant" shall mean any individual Settlement Class Member (or legal representative of a Settlement Class Member) who submits a Claim for processing under this Stipulation. Claimant shall also refer to Claimant's Counsel to the extent that the Claimant is represented by individual counsel.

F. "Claimant's Counsel" shall mean any attorney who represents a Claimant for purposes of submitting a Claim for processing under this Stipulation. Claimant's Counsel shall not mean Class Counsel unless the Claimant retains Class Counsel to

represent him or her for purposes of submitting a Claim for processing under this Stipulation.

G. "Class Action Complaint" shall mean the complaint filed by the Class of Claimants against the CCR Defendant(s) in the United States District Court for the Eastern District of Pennsylvania.

H. "Class Counsel" shall mean Gene Locks of Greitzer and Locks of Philadelphia, Pennsylvania, and Ronald L. Motley and Joseph F. Rice of Ness, Motley, Loadholt, Richardson & Poole, P.A., of Charleston, South Carolina.

I. "Class of Claimants" or "Settlement Class Members" shall mean 1) all Exposed Persons, or their legal representatives, who, as of the date of filing of the Class Action Complaint, reside in the United States or its territories, and who have not, as of that same date, filed a Pending or Prior Lawsuit; and 2) all spouses, parents, children, or other relatives of such Exposed Persons, or their legal representatives, who, as of the date of the filing of the Class Action Complaint, have not filed a Pending or Prior Lawsuit related to the personal injury, damage, or death of an Exposed Person. The class shall not include any persons who meet these definitions but who opt out of this class action pursuant to Fed. R. Civ. P. 23(c)(2), as implemented by order of the Court in this class action.

J. "Compensable Medical Category" shall mean the four medical categories set forth in Part V of this Stipulation, which are Mesothelioma, Lung Cancer, other Cancer, and Non-malignant Conditions.

K. "Counsel for the CCR Defendants" or "CCR Counsel" shall include undersigned counsel as well as any other attorneys employed by the CCR as counsel.

L. "Court" shall refer to the United States District Court for the Eastern District of Pennsylvania.

M. "Exceptional Medical Claim" shall mean a Claim identified as such pursuant to the procedures in Part V.D. below.

N. "Exposed Person" shall mean any person who has been exposed in the United States or its territories (or while working aboard U.S. military, merchant, or passenger ships) either

occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the CCR Defendants may bear legal liability.

O. "Extraordinary Claim" shall mean a Claim selected as such pursuant to the procedures in Part IX of this Stipulation.

P. "Pending or Prior Lawsuit" shall mean a suit for asbestos-related personal injury, damage, or death filed in any state or federal court against the CCR Defendant(s) or the Additional Releasee(s) at any time prior to the date that the Class Action Complaint is filed.

Q. "Plaintiff Class Representatives" shall mean the individual plaintiffs in the Class Action Complaint.

R. "Qualifying Claim" shall mean any Claim submitted to the CCR for processing that is determined to qualify for compensation under this Stipulation.

II. Exclusive Remedy

All Claims shall be submitted to the CCR in writing by the Claimant in accordance with the procedures set forth in or developed pursuant to this Stipulation. Submission of Claims under this Stipulation shall be the exclusive remedy of all Settlement Class Members for any Claim against the CCR Defendant(s) and the Additional Releasee(s), and a Claim submitted hereunder shall be in lieu of any other remedy or right of action against the CCR Defendant(s) and the Additional Releasee(s) for such Claims, except as provided in Parts XVI and XXII of this Stipulation with respect to any CCR Defendant that defaults under or withdraws from this Stipulation. Accordingly, no CCR Defendant(s) or Additional Releasee(s) shall be subject to liability or expense of any kind to any Settlement Class Member with respect to any Claim, other than as set forth in this Stipulation; and each Settlement Class Member, upon the Court's entry of an order approving the Stipulation as a good faith, ethical, fair, adequate, and reasonable settlement, and concluding that the Class of Claimants has received adequate notice and has been adequately and ethically represented by Class Counsel, shall be enjoined by that order from instituting or maintaining any claim or action for asbestos-related personal injury or damage against the CCR Defendant(s) or the Additional

Releasee(s) in any state or federal court, other than as set forth in this Stipulation. The Court shall retain jurisdiction over this case and shall use its equitable powers to enforce this Stipulation.

III. Eligibility for Compensation

A. In order to qualify for compensation under this Stipulation, the Claimant must submit to the CCR (1) evidence that the Exposed Person has had sufficient occupationally-related exposure, as defined in Part IV of this Stipulation, to asbestos or to an asbestos-containing product manufactured or supplied by the CCR Defendant(s) or the Additional Releasee(s); and (2) evidence that the Exposed Person meets the medical criteria for one of the Compensable Medical Categories, as defined in Part V of this Stipulation, or should be identified as an Exceptional Medical Claim, under the procedures set forth in Part V.D. of this Stipulation. In addition, as set forth in Part VI of this Stipulation, the CCR may reject any Claim submitted for compensation under this Stipulation that was time-barred, under the standards and burden of proof that would have applied, as of the date that the Class Action Complaint was filed, to a lawsuit by the Claimant for asbestos-related personal injury in an appropriate forum.

B. **Required Information**

1. The Claimant shall provide to the CCR, on forms agreed to by Class Counsel and Counsel for the CCR Defendants, the following information concerning the Exposed Person: name; address; social security number; date of birth; date of death (if applicable); marital status and number and age of dependents; spouse's name and social security number; occupation; smoking history; year of first exposure to any asbestos or asbestos-containing products; year of last exposure to asbestos or asbestos-containing products; identification of all asbestos or asbestos-containing products manufactured or supplied by the CCR Defendant(s) or the Additional Releasee(s) and others to which the Exposed Person was exposed, the work sites where such exposures occurred, and the years of such exposure, including specific descriptive comments concerning the duration and intensity of such exposure; any medical reports or records of the Exposed Person that relate to any alleged asbestos-related condition; the Compensable Medical Category, under Part V of this Stipulation,

for which the Claimant believes the Claim qualifies or for which the Claimant intends to apply to the Exceptional Medical Panel for identification as an Exceptional Medical Claim under Part V.D. of this Stipulation; the names, addresses, and telephone numbers for all physicians and hospitals involved in diagnosing, treating, testing, counseling, or consulting with the Exposed Person concerning any medical condition within the last five years; and five signed copies of a release and authorization, in a form acceptable to Counsel for the CCR Defendants and Class Counsel, allowing the CCR to obtain any and all medical, employment, and other relevant records for the Exposed Person, to the extent that those records could be obtained in discovery by the CCR Defendant(s) if the Claimant filed a lawsuit for asbestos-related injury against such CCR Defendant(s) in an appropriate forum. The Claimant may amend any information provided to the CCR under this Paragraph B at any time before the Claimant accepts a settlement offer under Parts VIII-IX of this Stipulation; provided, however, that if the amended information may significantly affect the CCR's evaluation of the Claim under the procedures set forth in Part VIII.B.2. of this Stipulation, then the CCR at its option may treat that Claim as submitted to the CCR on the date that such amended information was received by the CCR.

2. The CCR shall evaluate the information obtained concerning the Claim as a whole, and may decide to process the Claim no further until more complete information is provided (pursuant to Paragraph E of this Part), only if the information provided is materially incomplete so that no decision concerning whether the Claim qualifies for compensation can reasonably be made.

3. All testimonial information provided to the CCR in connection with a Claim, other than information in any medical reports or records, shall be made under oath, or by sworn affidavit, or by written declaration subscribed to as true under penalty of perjury.

4. Any Claimant-specific or CCR Defendant-specific information obtained by the CCR under this Paragraph B shall be confidential and used only for processing the Claim pursuant to this Stipulation. Accordingly, such information may be used by the CCR, the CCR Defendant(s), their insurers, the Claimant, and

Claimant's Counsel only in connection with the Claim at issue, and shall not be furnished to any other person or entity, or used for any other purpose by the CCR, the CCR Defendant(s), their insurers, the Claimant, or Claimant's Counsel.

5. Any release for an Exposed Person's medical records shall allow Counsel for the CCR to obtain written medical records only, and shall not allow Counsel for the CCR to discuss, without the Claimant's consent, the Exposed Person's medical condition with any of the Exposed Person's treating physicians.

6. In the event that the CCR seeks to obtain medical, employment, or other relevant, discoverable records concerning an Exposed Person, it shall give notice to the Claimant, and shall, upon request and at the Claimant's expense, furnish copies of all records obtained to the Claimant.

C. The Claimant may also indicate, at the time that the Claim is submitted, that, assuming that the Claim qualifies for compensation under this Stipulation, the Claimant elects the "simplified payment procedures" set forth in Part VIII.B.1. of this Stipulation; the "individualized payment procedures" set forth in Part VIII.B.2. of this Stipulation; or that the Claimant nominates the Claim for Extraordinary Claim treatment pursuant to the procedures in Part IX of this Stipulation.

D. As soon as practicable and, in any event, no later than ninety (90) days after receiving each Claim, the CCR shall notify the Claimant whether 1) the Claim qualifies for compensation under this Stipulation; 2) the Claim does not qualify for compensation under this Stipulation; or 3) because the information submitted concerning the Claim is materially incomplete, no determination concerning whether the Claim qualifies for compensation can reasonably be made. To the extent that the CCR reasonably believes that it cannot resolve, on the basis of the available medical information, whether an Exposed Person meets the medical criteria for one of the Compensable Medical Categories as defined in Part V of this Stipulation, the CCR may, at its option and expense, require the Exposed Person to undergo appropriate, reasonable, non-invasive, and non-excessive medical examination or testing (excluding any sort of computed tomography (CT) scan).

E. For each Claim where the CCR notifies the Claimant that the information submitted is materially incomplete, the CCR shall at the same time notify the Claimant of the missing information, and shall not further process the Claim until complete information is provided.

F. For each Claim where the CCR notifies the Claimant that the Claim does not qualify for compensation under this Stipulation, the CCR shall at the same time notify the Claimant as to the reasons for non-qualification. The Claimant shall have sixty (60) days from the receipt of that notice to 1) seek reconsideration of the CCR's decision by submitting a written statement to the CCR giving grounds for reconsideration; 2) submit additional information concerning the Claim to the CCR; or 3) invoke the dispute resolution procedures, as set forth in Part IV.B., Part V.C., or Part VI.B. of this Stipulation (depending on the reasons for non-qualification of the Claim). If the Claimant seeks reconsideration of the CCR's decision or submits additional information concerning the Claim to the CCR, the CCR shall, as soon as practicable and, in any event, no later than ninety (90) days after receipt of the request for reconsideration or of additional information concerning the Claim, respond to the Claimant in the manner specified in Paragraph D of this Part.

G. At the time a Claim is submitted, the Claimant may indicate that the Claimant concedes that the Claim cannot meet the requirements of any Compensable Medical Category, as defined in Part V of this Stipulation, and that the Claimant intends to apply to the Exceptional Medical Panel for identification as an Exceptional Medical Claim under Part V.D. of this Stipulation. In that case, the CCR shall, as soon as practicable and, in any event, no later than ninety (90) days after receiving such a claim, give notice to the Claimant whether the Claim meets the exposure and timeliness criteria of Parts IV and VI of this Stipulation. If the information provided concerning the Claim is materially incomplete, or if the CCR determines that the Claimant does not meet the exposure or timeliness criteria of Parts IV and VI of this Stipulation, the procedures in Paragraphs E and F of this Part shall apply. If, instead, the Claimant is determined to have met the exposure and timeliness criteria of Parts IV and VI of this Stipulation, the Claimant may apply to the Exceptional Medical Panel for

identification as an Exceptional Medical Claim, pursuant to the procedures set forth in Part V.D. of this Stipulation. In addition, a Claimant with a Claim that is determined by the CCR not to qualify for payment solely for failure to meet the requirements of any Compensable Medical Category may apply to the Exceptional Medical Panel for identification as an Exceptional Medical Claim. As set forth in Part V.D. of this Stipulation, any Claim ultimately identified as an Exceptional Medical Claim shall be deemed to meet the medical criteria of the given Compensable Medical Category.

H. All submissions or applications required from a Claimant under this Part III, or under any other provisions of this Stipulation, shall be mailed or delivered to the CCR at its then-current address. If the submission must be considered by some other entity, the CCR shall forward the submission to that entity.

IV. Sufficient Occupationally-Related Exposure

A. **Evidence**. Evidence of sufficient occupationally-related exposure shall mean evidence of exposure to asbestos or an asbestos-containing product that was manufactured or supplied by the CCR Defendant(s) or by the Additional Releasee(s), and which occurred while the Exposed Person was engaged in carrying out his job responsibilities, or, in the case of a spouse or household member of a person having such occupational exposure, was secondary to such occupational exposure. The evidence of such exposure must be sufficient to show exposure to the asbestos or asbestos-containing product on a regular basis over some extended period of time in proximity to where the Exposed Person actually worked (the so-called "frequency, regularity, and proximity" standard), or an equivalent exposure if exposure secondary to occupational exposure is claimed. If, however, a Claimant is able to show, under the law that would be applicable at the time the Claim is submitted to the CCR to a lawsuit by that Claimant for asbestos-related personal injury or damage in an appropriate forum, that the evidence of asbestos exposure required to present a jury issue would be measured by a different standard from the "frequency, regularity, and proximity" standard, then that different legal standard shall govern with respect to that Claim.

B. **No Prejudice**. The fact that the CCR agrees that an Exposed Person meets the exposure requirements set forth in

Paragraph A of this Part is not and shall not be deemed as an admission that a CCR Defendant bears legal liability for such asbestos or asbestos-containing products with respect to any other Claimant or with respect to any other proceeding or proceedings. The fact that the CCR agrees to pay such a Claim shall not be admissible in any other proceeding or proceedings.

C. **Disputes**

1. Any dispute as to whether a Claim meets the exposure requirements set forth in Paragraph A of this Part shall be referred for decision to a single arbitrator assigned by rotation from the List of Arbitrators developed pursuant to Part XXVI.B. of this Stipulation.

2. The arbitrator shall render a decision as soon as practicable based on written submissions from the parties, unless live testimony is appropriate. All testimonial evidence submitted to the arbitrator shall be made under oath or by sworn affidavit, or by written declaration subscribed to as true under penalty of perjury. The arbitrator shall determine whether the Claimant's evidence of exposure satisfies the applicable exposure standard by a preponderance of the evidence. The arbitrator's decision shall finally determine the issue.

3. If the arbitrator determines that the Claimant's evidence of exposure satisfies the applicable exposure standard, and the Claim has otherwise been deemed to qualify for compensation under this Stipulation, the Claim shall be governed by the procedures in Parts VIII-X of this Stipulation.

V. Compensable Medical Categories

A. **General Provisions**. For purposes of this Stipulation, the following terms shall have the meanings set forth below. Terms used in the singular shall be deemed to include the plural, and vice versa.

1. "Board-certified Pathologist" shall mean a physician currently licensed to practice medicine in the District of Columbia or in one or more U.S. states or territories and who currently holds primary certification in anatomic pathology, or combined anatomic and clinical pathology, from the American

Board of Pathology, and whose professional practice is principally in the field of pathology and involves regular evaluation of pathological materials obtained from surgical and post-mortem specimens.

2. "Board-certified Internist" shall mean a physician currently licensed to practice medicine in the District of Columbia or in one or more U.S. states or territories and who is currently certified by the American Board of Internal Medicine in internal medicine.

3. "Board-certified Pulmonary Specialist" shall mean a physician currently licensed to practice medicine in the District of Columbia or in one or more U.S. states or territories and who is currently certified by the American Board of Internal Medicine in the subspecialty of pulmonary disease.

4. "Board-certified Radiologist" shall mean a physician currently licensed to practice medicine in the District of Columbia or in one or more U.S. states or territories and who is currently certified by the American Board of Radiology.

5. "Board-certified Oncologist" shall mean a physician currently licensed to practice medicine in the District of Columbia or in one or more U.S. states or territories and who is currently certified by the American Board of Internal Medicine in the subspecialty of medical oncology.

6. "Certified B-reader" shall mean an individual who has successfully completed the x-ray interpretation course sponsored by the National Institute of Occupational Safety and Health (NIOSH), and whose NIOSH-certification is up-to-date.

7. "ILO Grade" shall mean the radiological ratings for the presence of lung changes by chest x-ray as established from time to time by the International Labour Office (ILO), and as currently set forth in "Guidelines for the Use of ILO International

Classification of Radiographs of Pneumoconioses" (1980).

8. "Chest X-rays" shall mean chest radiographs taken in four views (Posterior-Anterior, Lateral, and Left and Right Obliques) within one year of the date that the Claim is submitted to the CCR (or within one year of death, if the Exposed Person is deceased), and graded quality 1 for reading according to the criteria established by the ILO; provided, however, that in situations where the Claimant is unable to provide quality 1 chest x-rays because of death or because of an inability to have new chest x-rays taken, then in those situations only, chest x-rays graded quality 2 will be acceptable.

9. Unless otherwise agreed to by CCR Counsel, whose consent shall not be unreasonably withheld, "Pulmonary Function Testing" shall mean spirometry, lung volume, and diffusing capacity ("DLCO") testing that substantially conforms to quality criteria established by the American Thoracic Society ("ATS") and is performed on equipment which substantially meets ATS standards for technical quality and calibration, all as set forth in 20 C.F.R. 718.103 and Appendix B thereto or in the ATS guidelines in 144 *American Review of Respiratory Disease* 1202-18 (1991). The CCR may examine all back-up data pertaining to Pulmonary Function Testing of an Exposed Person to ensure that these quality criteria and standards have been satisfied.

10. Unless otherwise agreed to by CCR Counsel, whose consent shall not be unreasonably withheld, "Predicted Values" for spirometry and lung volumes shall be those published by Morris, *Clinical Pulmonary Function Testing*, 2d Edition, Intermountain Thoracic Society (1984), or others that are substantially equivalent. Each subject must be tested with and without inhaled bronchodilators, with best values taken. Unless otherwise agreed to by

CCR Counsel, whose consent shall not be unreasonably withheld, "Predicted Values" for diffusing capacity shall be those published by *Miller, et al.*, 127 *American Review of Respiratory Disease*, 270-77 (1983), or others that are substantially equivalent. Predicted Values for any pulmonary function testing shall be corrected for race, ethnic origin, or other relevant factors, as appropriate.

11. "Basilar Crackles," sometimes called "rales," shall mean those sounds described in American Thoracic Society, "The Diagnosis of Nonmalignant Diseases Related to Asbestos," 134 *American Review of Respiratory Disease*, 363, 366 (1986), and shall be observed in accordance with the criteria set forth therein.

12. "Latency Period" shall mean the period from the date of the Exposed Person's first significant exposure to asbestos or an asbestos-containing product to the date of manifestation of the condition claimed.

13. "Manifestation" shall mean either the date of the actual diagnosis of the condition claimed, or the date upon which the clinical records and available tests indicate that the condition could reasonably have been diagnosed by a competent physician.

B. **Compensable Medical Categories**. Compensable medical categories under this Stipulation shall be as follows:

1. **Mesothelioma**

The Mesothelioma category shall have the following requirements:

a. A diagnosis of malignant mesothelioma with a primary site in the pleura or peritoneum, derived from appropriate tissue, and verified using standardized and accepted criteria of microscopic morphology, and/or a variety of appropriate staining techniques, by either i) two Board-certified Pathologists, or ii) one Board-certified Pathologist

who is, at the time that the diagnosis is verified, a member of the U.S.-Canadian Mesothelioma Reference Panel; and

b. Exposure sufficient to meet the minimum exposure requirements set forth in Part IV of this Stipulation occurring at least ten (10) years prior to the Manifestation of the mesothelioma.

2. **Lung Cancer**

The Lung Cancer category shall have the following requirements:

a. A diagnosis by a Board-certified Pathologist, Pulmonary Specialist, or Oncologist of primary lung carcinoma; and

b. Exposure sufficient to meet the minimum exposure requirements set forth in Part IV of this Stipulation occurring at least twelve (12) years prior to Manifestation of the lung cancer; and

c. One of the following:

i. Evidence of a Non-Malignant Condition sufficient to meet the requirements of Paragraph B.4 of this Part; or

ii. Chest X-rays which, in the opinion of a Certified B-reader, demonstrate asbestos-related bilateral pleural plaques or asbestos-related bilateral pleural thickening; and evidence of occupational exposure to asbestos for the following exposure periods in the following occupations and trades:

(1) Eight (8) years of exposure for insulators, pipefitters, boilermakers, shipfitters, steamfitters, or persons in other trades performing similar functions;

(2) Ten (10) years of exposure for shipyard workers, power house workers, refinery workers, individuals employed primarily in engine and boiler rooms aboard ships, or

persons in other trades performing similar functions;

(3) Fifteen (15) years of exposure for general construction workers, maintenance workers, steel workers, general manufacturing workers, or persons in other trades performing similar functions;

(4) One (1) year of exposure for World War II shipyard workers; and

(5) Six (6) months of exposure for workers in manufacturing plants handling raw asbestos fibers.

For purposes of calculating the years of exposure prescribed above in this Paragraph ii, each single year of exposure prior to 1972 shall be counted as one year; each single year of exposure from 1972 through 1979 shall be counted as one-half year; and exposures after 1979 shall not be counted. For each year from 1972 forward, however, for which a Claimant can demonstrate, by a preponderance of the evidence, that his or her exposure to asbestos in his or her occupation or trade (such as in a rip-out of existing asbestos-containing products) was, during a substantial portion of that year, in excess of the 8-hour time-weighted average airborne concentration for asbestos exposure prescribed by the Occupational Safety and Health Administration (OSHA) at that time, then that year shall count as one full year for purposes of calculating the years of exposure prescribed in this Paragraph ii.

3. **Other Cancer**

The Other Cancer category shall have the following requirements:

a. A diagnosis by a Board-certified Pathologist, Pulmonary Specialist, or Oncologist (as appropriate for the type of cancer claimed) of primary colon-rectal, laryngeal, esophageal, or stomach cancer; and

b. Exposure sufficient to meet the minimum exposure requirements set forth in Part IV of this Stipulation occurring at least twelve (12) years prior to Manifestation of the cancer; and

c. Evidence of a Non-Malignant Condition sufficient to meet the requirements of Paragraph B.4. of this Part.

4. **Non-Malignant Conditions**

The Non-Malignant Conditions category shall have the following requirements:

a. A Latency Period of at least twelve (12) years, and either the clinical or pathological evidence of Asbestosis prescribed in Paragraphs B.4.b. and B.4.c. of this Part, or the evidence of Bilateral Pleural Thickening described in Paragraph B.4.d. of this Part.

b. **Clinical Evidence of Asbestosis**

A diagnosis of pulmonary asbestosis by a Board-certified Internist or Pulmonary Specialist based on the following minimum objective criteria:

i. Chest X-rays which, in the opinion of a Certified B-reader, show small irregular opacities of ILO Grade 1/0 and Pulmonary Function Testing and physical examination that show either:

(1) FVC $<80\%$ of predicted with FEV-1/FVC $\geq 75\%$ (actual value);

or

(2) TLC $<80\%$ of predicted, *with* either DLCO $\leq 76\%$ of predicted or bilateral Basilar Crackles, *and* also the absence of any probable explanation for this DLCO result *or* crackles finding other than the presence of lung disease; or

ii. Chest X-rays which, in the opinion of a Certified B-reader (or of an individual who at

one time was a Certified B-reader and who has not subsequently failed the examination for certification or recertification as a B-reader), show small irregular opacities of ILO Grade 1/1 or greater; and Pulmonary Function Testing that shows either:

(1) FVC < 80% of predicted *with* FEV-1/FVC ≤ 72% (actual value) or, if the individual tested is at least 68 years old at the time of the testing, *with* FEV-1/FVC ≥ 65% (actual value);

or

(2) TLC < 80% of predicted.

c. **Pathological Evidence of Asbestosis**

A statement by a Board-certified Pathologist that more than one representative section of lung tissue otherwise uninvolved with any other process (e.g., cancer or emphysema) demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies, *and* also that there is no other more likely explanation for the presence of the fibrosis.

d. **Bilateral Pleural Thickening**

Chest X-rays demonstrating bilateral pleural thickening which (1) has not been followed within two years by a malignancy; (2) includes blunting of at least one costophrenic angle; and (3) is not explained by any other condition in the subject's history; and *either*

i. If the bilateral pleural thickening is, in the opinion of a Certified B-reader, of ILO Grade B2 or greater, then Pulmonary Function Testing that, in the opinion of a Board-certified Internist or Pulmonary Specialist, shows:

(1) If TLC is available, TLC < 75% of predicted; or

(2) If TLC is not available, a VC or FVC < 75% of predicted with FEV-1/FVC ≥ 75% (actual value); and in either case

(3) a statement by the Board-certified Internist or Pulmonary Specialist that the asbestos-related changes are a substantial contributing factor in causing the pulmonary function changes; *or*

ii. If the bilateral pleural thickening is, in the opinion of a Certified B-reader, of ILO Grade C2 or greater, then Pulmonary Function Testing that, in the opinion of a Board-Certified Internist or Pulmonary Specialist, shows:

(1) FVC < 80% of predicted with FEV-1/FVC ≥ 75% (actual value), or, if the individual tested is at least 68 years old at the time of the testing, with FEV-1/FVC ≥ 65% (actual value); or

(2) TLC < 80% of predicted; (and in either case)

(3) a statement by the Board-certified Internist or Pulmonary Specialist that the asbestos-related changes are a substantial contributing factor in causing the pulmonary function changes.

C. **Disputes**

1. **Disputes Concerning Pathological Diagnoses**

a. **Initial Review**

i. At the beginning of each twelve-month period after this Stipulation is effective, Class Counsel and Counsel for the CCR Defendants, or failing agreement, a mutually selected, neutral third-party, shall select a group of five Board-certified Pathologists that shall decide all disputes concerning pathological issues during that twelve-month period. Each pathologist

serving in this group shall not, within the five-year period prior to the effective date of this Stipulation, have spent more than one-half of his or her professional time, or derived more than one-half of his or her professional income, either annually or in total, either reviewing or testifying in any forum on medical-legal issues related to asbestos. If Class Counsel and Counsel for the CCR Defendants are able to agree on some, but not all five members of this group, the individuals agreed upon by Class Counsel and Counsel for the CCR Defendants shall be members of this group, and the remainder of the group shall be selected by the mutually selected, neutral third-party. If Class Counsel and Counsel for the CCR Defendants are unable to agree on such a neutral third party, Class Counsel and Counsel for the CCR Defendants shall each select a representative, and those two representatives shall together select the neutral third party.

ii. All disputes concerning whether a Claim 1) meets the requirements for a diagnosis of a malignancy, either to satisfy the Mesothelioma, Lung Cancer, or Other Cancer categories; 2) meets the requirements for asbestosis by pathological evidence, either to satisfy the Non-Malignant Conditions, Lung Cancer, or Other Cancer categories; or 3) has a manifestation date sufficient to meet any latency requirements related to these pathological determinations, shall be referred for decision to a single member of the group of five pathologists, who shall be selected in rotating order; provided,

however, that if any pathologist in the group of five pathologists has had any prior involvement with the Claim submitted for resolution, that pathologist shall be disqualified from any further involvement concerning that Claim, and the next pathologist in rotating order shall decide the dispute. Each side shall be allowed to make written submissions to the pathologist designated to decide the dispute. Although the pathologist shall generally decide the disputed issue on the papers submitted, the pathologist shall have the authority, if the pathologist deems it appropriate, to order additional appropriate, reasonable, non-invasive, and non-excessive testing or examination of the Exposed Person, or appropriate and reasonable testing or examination of any existing pathological material (excluding any sort of computed tomography (CT) scan). Assuming that no additional review in sought pursuant to Paragraph (b) of this Part, the pathologist's decision on the issue referred for resolution shall finally determine the issue. The pathologist shall decide the issue referred to him or her as soon as practicable.

iii. If, on the basis of the medical reports or other medical evidence submitted by the Claimant, the Claim satisfies on its face the requirements of a given Compensable Medical Category, the standard to be applied by the pathologist to determine the issue referred to him or her shall be whether the ultimate conclusion from those medical reports or evidence is clearly erroneous.

b. **Additional Review**. Either the Claimant or the CCR shall have the right to seek additional review of the single pathologist's decision under Paragraph (a) of this Part, under the following procedures. First, the party seeking such additional review shall give notice to the other party within thirty (30) days of receipt of the decision of the single pathologist's decision under Paragraph (a). The disputed issue shall then be referred to two other members of the group of five pathologists, who shall be selected by rotation. The two pathologists to whom the dispute is referred shall independently decide the disputed issue, after reviewing the same medical information, records, and submissions, and under the same standard as the single pathologist. The two pathologists conducting the additional review shall decide the issue referred to them as soon as practicable. If the three pathologists who have decided the issue (the initial single pathologist, and the two pathologists conducting additional independent reviews of the issue) disagree, the decision of the majority shall finally determine the issue. If the Claimant seeks additional review and the decision of the initial single pathologist is sustained after this additional review, the Claimant shall pay the costs of such additional review. Otherwise, the CCR shall pay the costs of the additional review.

c. If, at the conclusion of the medical dispute resolution process, it has been determined that the Claim satisfies the applicable requirements of a Compensable Medical Category, and the Claim has otherwise been deemed to qualify for compensation under this Stipulation, the Claim shall be governed by the procedures in Parts VIII-X.

2. **Disputes Concerning Clinical Diagnoses**

a. **Initial Review**

i. At the beginning of each twelve-month period after this Stipulation is effective, Class Counsel and Counsel for the CCR Defendants, or failing agreement, a mutually selected, neutral third-party, shall select a group of five physicians that shall decide all disputes concerning the clinical diagnosis of Non-Malignant Conditions during that twelve-month period. Each

physician shall be a Board-certified Internist or Pulmonary Specialist and a Certified B-reader (or, if not, shall consult with a Certified B-reader when interpreting Chest X-rays in connection with resolution of disputes described below). Further, each physician serving in this group or consulting with a member of this group (whether a Board-certified Internist, Pulmonary Specialist, or a Certified B-reader) shall not, within the five-year period prior to the effective date of this Stipulation, have spent more than one-half of his or her professional time, or derived more than one-half of his or her professional income, either annually or in total, either reviewing or testifying in any forum on medical-legal issues related to asbestos. If Class Counsel and Counsel for the CCR Defendants are able to agree on some, but not all five members of this group, the individuals agreed upon by Class Counsel and Counsel for the CCR Defendants shall be members of this group, and the remainder of the group shall be selected by the mutually selected, neutral third-party. If Class Counsel and Counsel for the CCR Defendants are unable to agree on such a neutral third party, Class Counsel and Counsel for the CCR Defendants shall each select a representative, and those two representatives shall together select the neutral third party.

ii. All disputes concerning whether a Claim 1) meets the requirements for the Non-Malignant Conditions category by clinical evidence; 2) meets, by clinical evidence, the underlying Non-Malignant Conditions

necessary to satisfy the Lung Cancer or Other Cancer categories; or 3) has a manifestation date sufficient to meet any latency requirements related to these clinical determinations, shall be referred for decision to a single member of the group of five physicians, who shall be selected in rotating order; provided, however, that if any physician in the group of five physicians has had any prior involvement with the Claim submitted for resolution, that physician shall be disqualified from any further involvement concerning that Claim, and the next physician in rotating order shall decide the dispute. Each side shall be allowed to make written submissions to the physician designated to decide the dispute. Although the physician shall generally decide the disputed issue on the papers submitted, the physician shall have the authority, if the physician deems it appropriate, to order additional appropriate, reasonable, non-invasive, and non-excessive testing or examination of the Exposed Person (excluding any sort of computed tomography (CT) scan). Assuming that no additional review is sought pursuant to Paragraph (b) of this Part, the physician's decision on the issue referred for resolution shall finally determine the issue. The physician shall decide the issue referred to his or her as soon as practicable.

iii. If, on the basis of the medical reports or other medical evidence submitted by the Claimant, the Claim satisfies on its face the requirements of a given medical category, the standard to be applied by the physician to determine the issue referred to him or her shall be whether the ultimate conclusion from those medical reports or evidence is clearly erroneous.

b. **Additional Review**. Either the Claimant or the CCR shall have the right to seek additional review of the single physician's decision under Paragraph (a) of this Part, under the following procedures. First, the party seeking such additional review shall give notice to the other party within thirty (30) days of receipt of the decision of the single physician's decision under Paragraph (a). The disputed issue shall then be referred to two other members of the group of five physicians, who shall be selected by rotation. The two physicians to whom the dispute is referred shall independently decide the disputed issue, after reviewing the same medical information, records, and submissions, and under the same standard as the single physician. The two physicians conducting the additional review shall decide the issue referred to them as soon as practicable. If the three physicians who have decided the issue (the initial single physician, and the two physicians conducting additional independent reviews of the issue) disagree, the decision of the majority shall finally determine the issue. If the Claimant seeks additional review and the decision of the initial single physician is sustained after this additional review, the Claimant shall pay the costs of such additional review. Otherwise, the CCR shall pay the costs of the additional review.

c. If, at the conclusion of the medical dispute resolution process, it has been determined that the Claim satisfies the applicable requirements of a Compensable Medical Category, and the Claim has otherwise been deemed to qualify for compensation under this Stipulation, the Claim shall be governed by the procedures in Parts VIII-X.

3. **Disputes Concerning Exposure Requirements**. All disputes concerning whether a Claim meets the exposure requirements of any Compensable Medical Category shall be resolved in the manner prescribed in Part IV.B. of this Stipulation.

D. **Exceptional Medical Claims**

1. **Exceptional Medical Panel**. At the beginning of each twelve-month period after this Stipulation is effective, Class Counsel and Counsel for the CCR Defendants, or failing

agreement, a mutually selected, neutral third-party, shall select a panel of five physicians that shall decide all issues concerning Exceptional Medical Claims during that twelve-month period. This Exceptional Medical Panel shall consist of two Board-certified Pulmonary Specialists, one Board-certified Radiologist (who is either a Certified B-reader or a specialist in computed tomography), and two Board-certified Pathologists. If Class Counsel and Counsel for the CCR Defendants are able to agree on some, but not all five panel members, the individuals agreed upon by Class Counsel and Counsel for the CCR Defendants shall be members of the panel, and the remainder of the panel shall be selected by the mutually selected, neutral third-party. The Panel shall function by majority rule. If Class Counsel and Counsel for the CCR Defendants are unable to agree on such a neutral third party, Class Counsel and Counsel for the CCR Defendants shall each select a representative, and these two representatives shall together select the neutral third party.

2. **Application for Treatment as an Exceptional Medical Claim.** As set forth in Part III.G. of this Stipulation, any Claimant whose Claim has been determined to meet the exposure and timeliness criteria of Parts IV and VI of this Stipulation, and whose claim has either been rejected for failure to meet the requirements of any Compensable Medical Category, or who prior to such rejection concedes that the Claim cannot meet these requirements, may apply to the Exceptional Medical Panel for identification of the Claim as an Exceptional Medical Claim. The application must be supported by the report of a Board-certified Internist, Pulmonary Specialist, Pathologist, or Oncologist, as appropriate for the Compensable Medical Category claimed, who has not, within the five-year period prior to the effective date of this Stipulation, spent more than one-half of his or her professional time, or derived more than one-half of his or her professional income, either annually or in total, either reviewing or testifying in any forum on medical-legal issues related to asbestos. The physician's report shall contain a complete review of the Exposed Person's medical history and current condition, such additional material by way of analysis and documentation as shall be prescribed by the Panel in a separate memorandum, and a detailed

explanation why the Claim meets the standard for selection as an Exceptional Medical Claim set forth in Paragraph D.3. of this Part.

3. **Standard for Acceptance**. At six-month intervals, the Panel shall review all applications for identification as Exceptional Medical Claims that were submitted to it during the prior six months. The standard to be applied by the Panel for identification of Exceptional Medical Claims shall be that the Claimant, for reasons beyond his or her control, cannot satisfy the requirements for a given Compensable Medical Category in Paragraph B of this Part, but is able, through comparably reliable evidence, to show that the Exposed Person has an asbestos-related condition that is substantially comparable to that of an Exposed Person who would satisfy the requirements of a given Compensable Medical Category. In applying this standard, the Panel may take into consideration all aspects of the Exposed Person's medical history and condition. In this regard, the Panel shall have the authority, if the Panel deems it appropriate, to order additional appropriate, reasonable, noninvasive, and non-excessive testing or examination of the Exposed Person (including computed tomography (CT) scanning). The Panel shall nevertheless exert every reasonable effort to implement the intent of the requirements of the Compensable Medical Categories, which is to act as a "screen" to ensure inclusion only of Exposed Persons with asbestos-related conditions associated with those requirements. A decision of the Panel shall finally determine the issue. The Panel shall decide each application submitted to it as soon as practicable. Any Claim identified as an Exceptional Medical Claim by this Panel shall be considered to meet the medical criteria of the given Compensable Medical Category under this Stipulation. If the Claim has otherwise been determined to qualify for compensation under this Stipulation, the Claim shall be governed by the procedures in Part VIII-X.

To illustrate, the Panel should recognize that Counsel for the CCR Defendants and Class Counsel intend this Exceptional Medical Claim category to include Exposed Persons who do not, on their face, meet the requirements of Paragraphs B.2. or B.4. of this Part, but who the Panel determines, by clear and convincing evidence, have, for example, (i) an asbestos-related lung cancer that should qualify for compensation under this Stipulation because the

Claimant presents other objective evidence sufficient to warrant the conclusion that exposure to asbestos or asbestos-containing products manufactured or supplied by the CCR Defendant(s) or the Additional Releasee(s) is a substantial contributing cause of the lung cancer; or (2) an asbestos-related non-malignant condition that should qualify for compensation under this Stipulation because the Claimant can demonstrate, through a series of pulmonary function testing over a multi-year period, a consistent trend of decrease of VC, TLC, or FVC (with a preserved FEV-1/FVC ratio) that is substantially greater than expected over the same multi-year period, without any other identifiable cause for such a decrease.

4. **Resubmission**. Any Claimant who applies to have a Claim considered as an Exceptional Medical Claim and whose Claim is rejected by the Panel may resubmit that Claim to the Panel for reconsideration if new evidence becomes available, but a Claim may be resubmitted to the Panel no more frequently than once every two years.

5. **Exceptional Medical Claim Cap**. In each six-month period that this Panel reviews applications for identification as Exceptional Medical Claims, the Panel shall have the authority to select any number of Exceptional Medical Claims in each Compensable Medical Category up to a maximum of the following percentages of the total number of Claims that qualified for payment in each Compensable Medical Category during the prior six-month period; provided, however, that the Panel may identify as Exceptional Medical Claims in each Compensable Medical category in any year no more than the following percentages of the maximum number of Qualifying Claims that may be paid in each Compensable Medical Category during that year (as set forth in Part VIII and Exhibit A to this Stipulation):

Compensable Medical Category	Exceptional Medical Claim Percentage
Mesothelioma	5%
Lung Cancer	20%
Other Cancer	20%
Non-Malignant Conditions	6%

Any claims identified as Exceptional Medical Claims under this procedure shall be counted towards the maximum number of Qualifying Claims that may be paid in the relevant Compensable Medical Category in each year, as set forth in Part VIII and Exhibit A.

E. **Waiver of Medical Qualifications**

Nothing in this Stipulation shall prohibit Class Counsel and Counsel for the CCR Defendants from agreeing to waive the medical qualifications prescribed for any individual physician under this Stipulation.

VI. Timeliness of Claims

A. **Timeliness Requirement**. The CCR shall not reject any Claim submitted for compensation under this Stipulation on the basis of the statute of limitations or repose or any other applicable doctrine concerning staleness of claims, so long as the Claim was not time-barred as of the date that the Class Action Complaint was filed under the standards and burden of proof that would govern under the law that would have applied to a lawsuit by the Claimant for asbestos-related personal injury in an appropriate forum. The CCR may, however, reject any Claim submitted for compensation under this Stipulation that was time-barred as of the date that the Class Action Complaint was filed. Accordingly, with respect to any Claim submitted for compensation under this Stipulation, the CCR Defendant(s) agree to toll all applicable statutes of limitation or repose, or any other applicable doctrine concerning staleness of claims, as of the date that the Class Action Complaint was filed, except as provided in Parts XVI and XXII of this Stipulation.

B. **Disputes**

1. Any dispute as to whether a Claim is time-barred under Paragraph A of this Part shall be referred for decision to a single arbitrator assigned by rotation from the List of Arbitrators developed pursuant to Part XXVI.B. of this Stipulation.

2. The arbitrator shall render a decision as soon as practicable based on written submissions from the parties,, unless live testimony is appropriate. All testimonial evidence submitted to the arbitrator shall be made under oath or by sworn affidavit, or by written declaration subscribed to as true under penalty of perjury. The standard to be applied by the arbitrator shall be whether the Claim was time-barred as of the date that the Class Action Complaint was filed under the standards and burden of proof that would have governed in a lawsuit for asbestos-related injury by the Claimant in an appropriate forum. The arbitrator's decision shall finally determine the issue.

3. If a Claim has been referred to an arbitrator to resolve a dispute over exposure pursuant to Part IV.B. of this Stipulation, that same arbitrator shall also resolve any dispute as to whether the Claim is time-barred.

4. If the arbitrator determines that the Claim is not time-barred, and the Claim has otherwise been deemed to qualify for compensation under this Stipulation, the Claim shall be governed by the procedures in Parts VIII-X of this Stipulation.

VII. Compensation Schedule

A. **General**

The Compensation Schedule attached as Exhibit B to this stipulation establishes for each Compensable Medical Category minimum and maximum negotiated values and a negotiated average value range. These values shall be used for payment of Claims pursuant to Part VIII of this Stipulation. The Compensation Schedule also establishes for each Compensable Medical Category a negotiated average value for payment of Extraordinary Claims in that category, which shall be used to calculate the funds available for the payment of Extraordinary Claims pursuant to Part IX of this Stipulation.

B. **Possible Adjustment of Compensation Schedule**

1. At ten (10) year intervals, Class Counsel and Counsel for the CCR Defendants shall negotiate what adjustments, if any, should appropriately be made to the values established in the Compensation Schedule that have not otherwise been taken into account through the procedures of this Stipulation and the values on the existing Compensation Schedule.

2. Class Counsel and Counsel for the CCR Defendants shall commence negotiations on any adjustments to the Compensation Schedule no later than the beginning of Year 10 of the current ten (10) year period. Such negotiations shall continue throughout the first quarter of Year 10. If Class Counsel and Counsel for the CCR Defendants have not resolved the issue by the conclusion of the first quarter of Year 10, they shall refer the issue for non-binding mediation by a mutually selected, neutral mediator. If the mediator is unable to resolve the issue by the conclusion of the second quarter of Year 10, the issue shall be referred for decision to a mutually selected, neutral arbitrator. (The mutually selected neutral arbitrator may be chosen from the List of Arbitrators, developed pursuant to Part XXVI.B. of this Stipulation, but the arbitrator need not be chosen from the List of Arbitrators.) If Class Counsel and Counsel for the CCR Defendants cannot agree on a neutral arbitrator, each shall select a representative, and the two representatives shall together select a neutral arbitrator. The arbitrator's decision shall finally determine the issue. The arbitrator shall render a decision no later than the conclusion of the third quarter of Year 10.

3. In no event shall any adjustments to the values in the Compensation Schedule pursuant to this Paragraph B exceed the values in the Compensation Schedule for the prior ten (10) year period by more than twenty percent (20%).

VIII. Qualifying Claims Payment Procedures

All Qualifying Claims shall be subject to the following payment procedures.

A. **Case Flow**

1. **General**. Each year after this Stipulation is effective, the CCR shall pay up to but, in any event, no more than the

maximum number of Qualifying Claims in each compensable medical category set forth for that year in Exhibit A to this Stipulation. If the number of Qualifying Claims presented to the CCR in any Compensable Medical Category in a given year exceeds the maximum number that may be paid in that category in that year, then such excess Qualifying Claims shall be the first Qualifying Claims paid in the following year or years; provided, however, that such excess Qualifying Claims shall be counted towards the maximum number of Qualifying Claims that may be paid in the relevant Compensable Medical Category in the following year or years as set forth in Exhibit A.

2. **Possible Adjustment of Case Flow in First 10 Years**. If, after any successive five-year period that this Stipulation is effective, the total number of Qualifying Claims in any Compensable Medical Category for that five years exceeds, on an aggregate basis, by more than ten percent (10%) the maximum number of Qualifying Claims that may be paid in that category for that five years as set forth in Exhibit A, the maximum number of Qualifying Claims to be paid in that medical category for each future year in Exhibit A shall be adjusted upwards by ten percent (10%). The maximum number of Qualifying Claims to be paid in any Compensable Medical Category (as set forth in Exhibit A) may be adjusted upwards by ten percent (10%) no more than one time. An illustration of how this adjustment would work if the successive five year period occurs during the first five years that this Stipulation is effective is shown in Exhibit A*.

3. **Case Flow in Years After Year 10**

a. Exhibit A to this Stipulation sets forth the agreed-upon case flow for each Compensable Medical Category through the initial ten years that this Stipulation is effective. During Year 10 Counsel for the CCR Defendants and Class Counsel shall negotiate the case flow figures for the next period, based on the experience that the parties have had in the prior ten years and any other information that will help them predict a realistic and workable future case flow.

b. Class Counsel and Counsel for the CCR Defendants shall commence negotiations on case flow figures for the next period no later than the beginning of the Year 10 of the current ten

(10) year period. Such negotiations shall continue throughout the first quarter of Year 10. If Class Counsel and Counsel for the CCR Defendants have not resolved the issue by the conclusion of the first quarter of Year 10, they shall refer the issue for non-binding mediation by a mutually selected, neutral mediator. If the mediator is unable to resolve the issue by the conclusion of the second quarter of Year 10, the issue shall be referred for decision to a mutually selected, neutral arbitrator. (The mutually selected neutral arbitrator may be chosen from the List of Arbitrators, developed pursuant to Part XXVI.B. of this Stipulation, but the arbitrator need not be chosen from the List of Arbitrators.) If Class Counsel and Counsel for the CCR Defendants cannot agree on a neutral arbitrator, each shall select a representative, and the two representatives shall together select a neutral arbitrator. The arbitrator's decision shall finally determine the issue. The arbitrator shall render a decision no later than the conclusion of the third quarter of Year 10.

B. **Compensation Payments**

Any Claimant with a Qualifying Claim may elect to resolve the Claim through (a) the simplified payment procedures in this Paragraph B; (b) the individualized payment procedures in this Paragraph B; or (c) the Extraordinary Claim procedures under Part IX of this Stipulation. In making an offer to any Claimant under any of the foregoing procedures, the CCR may also offer the Claimant the option of receiving compensation in the form of periodic payments based upon terms established by the CCR in consultation with Class Counsel.

1. **Simplified Payment Procedures**. If the Claimant elects the "simplified payment procedures," the Qualifying Claim shall be resolved for an amount equal to the negotiated minimum value established for that Claimant's Compensable Medical Category set forth in the Compensation Schedule attached as Exhibit B. As set forth in Part III.C. of this Stipulation, the Claimant may elect such simplified payment procedures at the time that the Claim is first submitted to the CCR. Such an election may also be made at a later date; provided, however, that an election of simplified payment procedures must be made prior to the acceptance by the Claimant of a settlement offer from the CCR under the procedures set forth in Paragraph B.2. of this Part or in

Part IX of this Stipulation. Payment under the simplified payment procedures shall be made, generally in the order in which the Claims are submitted to the CCR, as soon as practicable, and, in any event, no later than thirty (30) days after receipt by the CCR of an appropriate release and any other appropriate settlement documentation; provided, however, that no payment shall be made until the CCR has received an appropriate, executed release and any other appropriate settlement documentation; and provided further that Claims for which simplified payment procedures are elected shall be governed by the case flow provisions established in Paragraph A of this Part and Exhibit A to this Stipulation.

2. **Individualized Payment Procedures**.

a. Any Claimant with a Qualifying Claim who has not elected simplified payment procedures under Paragraph B.1. of this Part, and who does not have a pending application for Extraordinary Claim treatment under Part IX of this Stipulation, shall be deemed to have elected "individualized payment procedures." At six-month intervals, and subject to the case flow provisions established in Paragraph A of this Part and Exhibit A to this Stipulation, the CCR shall evaluate all Qualifying Claims for which individualized payment procedures have been elected. That evaluation shall be based on relevant factors of the traditional tort principles of damages, including but not limited to type of claim, nature and extent of asbestos disease or injury, questions of medical causation, disability, age, number and age of dependents, special damages, pain and suffering, likelihood and amount of exposure to products manufactured or supplied by the CCR Defendants or the Additional Releasee(s), job history, location of the forum in which a lawsuit for asbestos-related injury or damage could properly be maintained by the Claimant, information concerning historical settlement values, jury verdicts, and judgments in comparable cases involving various plaintiffs' counsel in that forum and in other jurisdictions, type of release to be provided by the Claimant, and any other relevant criteria generally utilized in the settlement of litigated tort cases. Where a Claimant's right to recover damages for pain and suffering would be eliminated under the law that would have been applicable to a lawsuit for asbestos-related injury by that Claimant in an appropriate forum because the Exposed Person has died between the time that the Claim is submitted and

the time that the Claim is evaluated for payment by the CCR, as under California Probate Code § 573(c) or any similar statute, the Claim shall be evaluated by the CCR as though the Exposed Person had not died pending evaluation of the Claim.

b. As soon as practicable, and in any event no later than ninety (90) days after the beginning of the evaluation period, the CCR shall make a good-faith offer to each Claimant to resolve such a Qualifying Claim for an amount between the minimum and maximum negotiated values for the applicable Compensable Medical Category set forth in the Compensation Schedule attached as Exhibit B; provided, however, that the average amount offered in settlement to those Claimants with Qualifying Claims who have elected the individualized payment procedures in each Compensable Medical Category in any six-month period shall fall within the negotiated average value range for that Compensable Medical category set forth in the Compensation Schedule attached as Exhibit B. In other words, the total amount of settlement dollars offered to all Claimants with Qualifying Claims who have elected individualized payment procedures in each Compensable Medical Category for any six-month period must equal the amount that would result by multiplying the total number of such Qualifying Claims in that medical category by a number within the negotiated average value range established for that Compensable Medical Category set forth in the Compensation Schedule attached as Exhibit B.

c. If a Claimant accepts the CCR's offer, payment of the settlement amount shall be made, generally in the order in which the Claims are submitted to the CCR, as soon as practicable, and, in any event, no later than thirty (30) days after receipt by the CCR of notice of the Claimant's acceptance; provided, however, that no payment shall be made until the CCR has received an appropriate, executed release and any other appropriate settlement documentation.

3. **Fair Allocation of Resources**. As noted in Paragraphs B.1. and B.2. of this Part, the CCR shall pay Claimants with Qualifying Claims who elect simplified or individualized payment procedures generally in the order in which the Claims are submitted to the CCR (so-called "FIFO order"). In any year, however, where the number of Qualifying Claims presented to the

CCR in a given Compensable Medical Category or categories exceeds the maximum number that may be paid in that category or categories in that year (as set forth in Paragraph A of this Part and Exhibit A to this Stipulation), the CCR shall have authority to alter this principle of payment in FIFO order to ensure that a disproportionate number of the Claimants paid in that Compensable Medical Category or categories are not represented by one attorney or firm.

For example, if, in a given year, the number of Qualifying Claims presented to the CCR in a given Compensable Medical Category exceeds by ten percent (10%) the maximum number that may be paid in that category in that year (as set forth in Paragraph A of this Part and Exhibit A to this Stipulation), then, to the extent feasible, ten percent (10%) of the Qualifying Claims presented by each attorney or firm in that Compensable Medical Category in that year shall not be paid until the next year.

C. **Payment of Additional Qualifying Claims**

When, in any year, the total amount of settlement dollars paid by the CCR for Qualifying Claims in a given Compensable Medical Category is less than an amount equal to the maximum number of Qualifying Claims in that category that may be paid in that year (as set forth in Paragraph A of this Part and Exhibit A to this Stipulation) multiplied by the maximum number in the negotiated average value range for that Compensable Medical Category, the difference between these two amounts shall be used, in any subsequent year or years, to pay additional Qualifying Claims in any Compensable Medical Category where the number of Qualifying Claims presented in that category exceeds the maximum number of Qualifying Claims that may be paid in that category in that year (as set forth in Paragraph A of this Part and Exhibit A to this Stipulation). To the extent that there are additional Qualifying Claims in the Mesothelioma category that could be paid in this manner, those claims shall be given priority in payment over Qualifying Claims in any other Compensable Medical Category.

IX. Extraordinary Claim Procedure

A. **Nomination for Extraordinary Claim Treatment**. Any Claimant with a Qualifying Claim may be considered for Extraordinary Claim treatment. As set forth in Part III.C. of this

Stipulation. the Claimant may nominate the Claim for Extraordinary Claim treatment when the Claim is first submitted to the CCR. Such a nomination may also be made at any later date prior to the acceptance by the Claimant of a settlement offer from the CCR under the procedures set forth in Part VIII of this Stipulation; provided, however, that any Claim nominated for Extraordinary Claim treatment shall not be further processed for payment by the CCR under Part VIII of this Stipulation, unless and until the Claimant notifies the CCR that the Claim is withdrawn from consideration as an Extraordinary Claim.

B. **Joint Nomination for Extraordinary Claim Treatment**. The CCR may join in any nomination of a Claim for Extraordinary Claim treatment. If the CCR joins in the nomination, the CCR shall, as soon as practicable, and, in any event, within thirty (30) days after that joint nomination, pay to the Claimant the amount that the CCR would offer to the Claimant if the Claim were not selected as an Extraordinary Claim, but instead were processed under Part VIII of this Stipulation. If the Claim is ultimately selected as an Extraordinary Claim, this payment shall be counted in the sum of settlement payments for Extraordinary Claims in that year, as provided in Paragraph E.2. of this Part. If the Claim is ultimately not selected as an Extraordinary Claim, this payment shall be counted in the settlement payments in that Compensable Medical Category under Part VIII of this Stipulation for the time period when the Claim is not selected as an Extraordinary Claim. Any payment made under this Paragraph B shall be credited against any amount ultimately to be paid by the CCR to the Claimant. If a Claim is selected as an Extraordinary Claim but the Claimant rejects the settlement offer for the Claim and elects to resolve the claim through binding arbitration or the tort system, as prescribed in Part X of this Stipulation, any payment made under this Paragraph B shall be fully refunded by the Claimant to the CCR, or, at the CCR's option, credited against any arbitration award or judgment against the CCR Defendant(s) that is obtained by the Claimant, pursuant to the procedures in Part X of this Stipulation. No payment to a Claimant under this Paragraph B shall be made until the CCR has received from the Claimant an executed agreement reflecting the conditions of this Paragraph B.

C. **Criteria for Extraordinary Claims**. In general, a Qualifying Claim may be considered for treatment as an Extraordinary Claim when the Claimant meets certain criteria. These criteria shall include a combination of age, number and age of dependents, relevant economic factors, an unusually high percentage of exposure to the asbestos or asbestos-containing products of the CCR Defendant(s) or the Additional Releasee(s), and other similar factors that would demonstrate a truly extraordinary claim for compensatory damages against the CCR Defendant(s) if litigated as a tort case in an appropriate forum.

D. **Extraordinary Claims Panel**. The determination of which, if any, Qualifying Claims meet the criteria defined above for Extraordinary Claim treatment shall be made by an independent three-person panel (the Extraordinary Claims Panel) under the procedures set forth in Paragraph E below. Each year after the effective date of the Stipulation, Class Counsel and Counsel for the CCR Defendants shall each designate one Panel member who in turn shall designate, by agreement, a third member; each Panel member shall have a one-year term. Panel members may, however, be selected to serve additional one-year terms. The Panel shall function by majority rule.

E. **Selection and Payment of Extraordinary Claims**

1. At annual intervals, the Extraordinary Claims Panel shall apply the general guidelines in Paragraph C of this Part to select any Extraordinary Claims from the Qualifying Claims nominated for Extraordinary Claim treatment. In each year, the Extraordinary Claims Panel shall have the authority to select any number of Extraordinary Claims in each Compensable Medical Category up to a maximum number that shall be equal to the following percentages of the total number of Claims that have qualified for payment and may be paid in that Compensable Medical Category to that date (as set forth in Part VIII and Exhibit A to this Stipulation) minus the total number of Extraordinary Claims that have been previously selected by the Extraordinary Claims Panel in that Compensable Medical Category to that date:

Compensable Medical Category	**"Extraordinary" Claim Percentage**
Mesothelioma	3%
Lung Cancer	3%
Other Cancer	3%
Non-Malignant Conditions	1%

All Claims selected as Extraordinary Claims under this procedure shall be counted towards the maximum number of Qualifying Claims that may be paid in the relevant Compensable Medical Category in the year of their selection, as set forth in Part VIII and Exhibit A to this Stipulation.

2. The Extraordinary Claims Panel shall have authority, on behalf of the CCR, to make a settlement offer to any Claimant whose Claim is selected as an Extraordinary Claim in any amount that the Panel deems fit, with due regard for the factors that make such a Claim extraordinary, as outlined in Paragraph C of this Part; provided, however, that the total amount of settlement dollars offered to all Claimants whose Claims have been selected as Extraordinary Claims in all Compensable Medical Categories for each year may not exceed the amount that would result by multiplying the maximum number of Extraordinary Claims in each Compensable Medical Category that may be selected to that date, as set forth in Paragraph E.1. of this Part, by the negotiated average value for Extraordinary Claims for that category set forth in the Compensation Schedule attached as Exhibit B, minus any amounts that have been previously paid to Claimants whose Claims have been selected as Extraordinary Claims.

3. If a Claimant with an Extraordinary Claim accepts the settlement offer from the Extraordinary Claims Panel, payment of the settlement amount shall be made, generally in the order in which the Claims are submitted to the CCR, as soon as practicable, and, in any event, no later than thirty (30) days after receipt by the CCR of notice of the Claimant's acceptance; provided, however, that no payment shall be made until the CCR has received an appropriate, executed release and any other appropriate settlement

documentation. Any payment to a Claimant by the CCR with an Extraordinary Claim pursuant to Paragraphs B or F of this Part shall be credited against the settlement amount due to the Claimant from the CCR.

4. Any Claim nominated for Extraordinary Claim treatment that is not selected as an Extraordinary Claim by the end of the annual period in which the Claim was nominated for Extraordinary Claim treatment may be resubmitted to the Extraordinary Claims Panel in any subsequent year or years, until the Claimant elects to proceed under Parts VIII or X of this Stipulation.

F. **Advance Payment**. In any annual period, the Extraordinary Claims Panel shall have the authority to make full or partial advance payments for Claims that have been nominated but not yet selected for Extraordinary Claim treatment in that period. Such advance payments may be made in situations when the Panel determines that the Claim will, without question, be selected as an Extraordinary Claim at the end of the annual period, and the Claimant presents a case of extreme hardship or exigent circumstances that warrant full or partial advance payment of the Claim. Partial advance payment, rather than full advance payment, shall be preferred. All such advance payments shall be counted in the sum of the settlement payments for Extraordinary Claims in that year, as provided in Paragraph E.2. of this Part. Any advance payment shall be credited against the amount ultimately to be paid by the CCR to the Claimant. If a Claim is selected as an Extraordinary Claim but the Claimant rejects the settlement offer for the Claim and elects to resolve the claim through binding arbitration or the tort system, as prescribed in Part X of this Stipulation, any advance payment made under this Paragraph F shall be fully refunded by the claimant to the CCR, or, at the CCR's option, credited against any arbitration award or judgment against the CCR Defendant(s) that is obtained by the Claimant pursuant to the procedures in Part X of this Stipulation. No payment to a Claimant under this Paragraph F shall be made until the CCR has received from the Claimant an executed agreement reflecting the conditions of this Paragraph F.

X. Alternative Procedures for Determining Compensation Under This Stipulation in the Tort System or Through Binding Arbitration

Any Claimant with a Qualifying Claim who decides not to accept a settlement offer made pursuant to the procedures in Parts VIII or IX of this Stipulation may elect to resolve the Claim either through the tort system or through binding arbitration pursuant to the procedures set forth in this Part. The election shall be made by serving upon the CCR notice of an election of either suit in the tort system or of binding arbitration within ninety (90) days of receipt of a settlement offer from the CCR under Parts VIII.B.2. or IX.E.2. of this Stipulation; provided, however, that if a Claimant receives a settlement offer under both Parts VIII.B.2. and IX.E.2., the ninety (90) days shall run from receipt of the most recent settlement offer. The right of any such Claimant to make an election shall be subject to the following provisions. For purposes of this Part, the "applicable law" shall refer to the state or federal law that is or would be applicable to a lawsuit for asbestos-related injury or damage by the Claimant in an appropriate forum.

A. Case Flow

The maximum number of Claimants with Qualifying Claims in each Compensable Medical Category who, in any one year, may sue in the tort system or resort to binding arbitration against the CCR Defendant(s) shall not exceed one percent (1%) of either the total number of Claims that qualified for payment in each Compensable Medical Category during the previous year or the maximum number of Qualifying Claims that may be paid in each Compensable Medical Category during the previous year (as set forth in Part VIII and Exhibit A to this Stipulation), whichever is lower. Claimants electing to resolve their Claims under this Part shall proceed to the tort system or to binding arbitration in the order in which they make such an election, subject to these case flow requirements. Once the number of Claimants in any Compensable Medical Category who elect to resort to the tort system or to binding arbitration in any one year has reached the case flow maximum for that year as defined above, then any additional Claimants in that Compensable Medical Category making the election in that year shall be given first priority to proceed to the tort system or to binding arbitration in the next year, and shall

be counted in the case flow maximum (as defined above) for that year.

B. **Mandatory Settlement Conference**

Before any Claimant with a Qualifying Claim may proceed to the tort system or to binding arbitration, the Claimant must request the Court to conduct a mandatory settlement conference with respect to the Claim. This mandatory settlement conference may be conducted by the Court, by another judge or other neutral third-party designated by the Court, or, if both the Claimant and the CCR agree, by a mutually selected, neutral third-party. The settlement conference may be conducted by telephone, if either party so requests. If no settlement is reached within thirty (30) days of that mandatory settlement conference, the Claimant and the CCR shall submit to each other on that date a written settlement offer that will remain in effect for an additional thirty (30) days. If neither party accepts the other party's settlement offer during this period, then the Claimant may, upon certification from the Court that the Claimant has completed the settlement conference process, proceed to the tort system or to binding arbitration.

C. **Procedural Rules**

1. Any Claimant who elects to resolve a Claim through the tort system may pursue the Claim in any appropriate forum, subject to the procedures set forth in this Part.

2. Any Claimant who elects binding arbitration shall submit the Claim to a single, neutral arbitrator, whose decision shall bind both the Claimant and the CCR. The arbitrator shall be selected by rotation from the List of Arbitrators, developed pursuant to Part XXVI.B. below. Procedures shall be established to ensure that a final arbitration award shall be rendered within six (6) months of the qualifying Claimant's election to proceed to binding arbitration. Payment of such awards, however, shall be governed by Paragraph D of this Part.

3. From among the CCR Defendant(s), the suit in the tort system may name and the arbitration proceeding may involve claims against, only those CCR Defendant(s) identified by the Claimant in the submission to the CCR pursuant to Part III.B. of this Stipulation as a manufacturer or supplier of asbestos or asbestos-containing products to which the Claimant was exposed.

(This Stipulation does not in any way limit, however, a Claimant's right to name in a lawsuit in the tort system any defendant that is not a CCR Defendant or an Additional Releasee.) With respect to the CCR Defendant(s) named as defendants in the tort suit or arbitration proceeding, the only issues that may be decided in the suit or proceeding shall be (a) whether the Exposed Person has/had an asbestos-related disease or condition; (b) whether the Exposed Person's alleged exposure to any asbestos or asbestos-containing products of the CCR Defendant(s) was a substantial contributing factor in causing the Exposed Person's alleged asbestos-related condition; and (c) the amount of compensatory damages, if any, to be awarded. In addition, in any proceeding where, under the applicable law, the share of compensatory damages allocable to the CCR Defendant(s) is relevant to any issue, the CCR Defendant(s)' share of compensatory damages shall also be determined. No evidence not relevant to these issues shall be offered by the Claimant against the CCR Defendants(s).

4. In no event shall the amount of compensatory damages awarded in any binding arbitration proceeding under this Part be admissible in any later proceeding involving the Claimant and any non-CCR defendant, except to the extent that such a damages award is treated as a prior settlement between the Claimant and the CCR Defendant(s) under applicable law.

5. The CCR Defendant(s) agree that they will not object to the joinder of any tort suit against any CCR Defendant(s) pursuant to this Part with any tort suit against any non-CCR Defendant, provided that this joinder is ordered at least ninety (90) days prior to the beginning of trial; and provided further, that the CCR Defendant(s) shall have sufficient time to participate fully in all appropriate discovery and pretrial procedures. To the extent that the CCR Defendant(s) shall not have sufficient time prior to trial to participate fully in all appropriate discovery and pretrial procedures, Claimant shall agree to move jointly with the CCR Defendant(s) to continue the trial until such date as the CCR Defendant(s) have such sufficient time.

6. In no event shall the Claimant be permitted to seek or recover in the suit in the tort system or in the arbitration proceeding any damages against the CCR Defendant(s) for any punitive, aggravated, or exemplary damages of any sort. Nor may

any Claimant seek or recover damages for the actual percentage risk of contracting cancer. Any other damages available under the applicable law shall remain recoverable. The reason that no damages for increased risk of cancer may be sought or recovered is that, under Part XIV of this Stipulation, any Claimant may present both a Claim for a non-malignant and a malignant condition for processing under this Stipulation, irrespective of applicable law, so that a Claimant will have a new right to present a Claim for a malignant condition despite prior recovery for a non-malignant condition.

D. **Payment of Verdicts or Arbitration Awards**

1. Any Claimant who pursues a Claim through the tort system or through binding arbitration shall be entitled to receive from the CCR the amount of any damages award that may be collected under applicable law from any CCR Defendant(s) named in the tort suit or arbitration proceeding under Paragraph C.3. of this Part. That amount of the damages award shall be paid to the Claimant as follows, after receipt by the CCR of an appropriate, executed release and any other appropriate documentation: First, within thirty (30) days after the damages award is final (including any appeals if the Claim is resolved in the tort system), the Claimant shall receive an amount equal to the lesser of 1) one hundred and fifty percent (150%) of the CCR's last written settlement offer, pursuant to Paragraph B of this Part, or 2) the amount of the damages award referred to in this Paragraph. Second, if the amount of the damages award referred to in this Paragraph is greater than one hundred and fifty percent (150%) of the CCR's last written settlement offer, the Claimant shall receive from the CCR the balance between that damages award and the CCR's initial payment in five equal, annual installment payments, commencing with the first anniversary date of the CCR's initial payment; provided, however, that if an appeal is pursued and a damages award is sustained on appeal, the Claimant shall receive, within thirty (30) days after the damages award is final, an amount of the damages award that is equal to the amount of the award that the Claimant would have received under this Paragraph from the CCR by that date if no appeal had been taken, and the balance between that initial payment by the CCR and the total damages

award on the same schedule that would have been followed under this Paragraph if no appeal had been taken.

2. The CCR's obligation to pay the full amount of any damages award due to a Claimant who elects to resolve a Claim in the tort system or through binding arbitration under this Part shall not diminish or count against any other financial obligation of the CCR Defendants under this Stipulation, except as provided in Parts IX.B. and IX.F. of this Stipulation.

E. **No Election of Remedies**

Any prior recovery in the tort system for the same Claim from a defendant that is not a CCR Defendant or an Additional Releasee shall not affect in any way any Claimant's right of action against the CCR Defendant(s) pursuant to this Part; provided, however, that any damages award recovered or settlement received for that Claim shall be treated as a prior settlement under applicable law, and, accordingly, the CCR Defendant(s) shall be entitled to any set-offs, credits, or other reductions in any verdict or award against the CCR Defendant(s) on account of such prior damages award or settlement as prescribed by the applicable law.

XI. Claims Involving Extreme Financial Hardship or Other Exigent Circumstances

When a Claim presented to the CCR involves extreme financial hardship or other exigent circumstances (such as imminent death), the CCR shall exert every reasonable effort to compress the time frames for processing that Claim set forth in this Stipulation.

XII. Releases

A. **Definitions**. For purposes of this Stipulation, the following terms shall have the meanings set forth below. Terms used in the singular shall be deemed to include the plural, and vice versa.

1. "Deemed Release" shall mean an agreement deemed to be provided by a Settlement Class Member to the CCR Defendant(s) upon approval of the Stipulation of Settlement as a good faith, fair, adequate, and reasonable settlement, pursuant to which a Claim by that Settlement Class Member is settled and released against the CCR Defendant(s) and the Additional Releasee(s). Pursuant to a Deemed Release, such a Claim shall be

conclusively compromised and settled; provided, however, that the giving of a Deemed Release by any Settlement Class Member shall not prevent such Settlement Class Member from bringing suit or otherwise proceeding against the CCR Defendant(s) and the Additional Releasee(s) where permitted under Part XVI or XXII.

2. "Pro Tanto Jurisdiction" shall mean a jurisdiction in which a person or entity that has settled a claim with a plaintiff and that has received a release may not be held liable for contribution, and any judgment against non-settling defendants must be reduced by the amount paid by the released person or entity or by any greater amount or proportion specified in the release. Current examples of such jurisdictions include Alabama, California, Florida, Illinois, Indiana, Massachusetts, Michigan, Missouri, Montana, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Virginia, West Virginia, Washington, and Wyoming.

3. "Per Capita or Percentage Share Jurisdiction Without Contribution Bar" shall mean a jurisdiction in which a person or entity that has settled a claim with a plaintiff and that has received a release may be held liable for contribution unless the release provides that, upon a determination that the released person or entity is a joint tortfeasor, any verdict against non-settling defendants will be reduced by the share, whether per capita or based upon percentage of fault, of the released person or entity. Absent such a provision in the release, any judgment against non-settling defendants is reduced by the amount paid by the released person or entity or by any greater amount or proportion specified in the release, assuming that the released person or entity is proven to be a joint tortfeasor. A right of contribution exists in favor of any joint tortfeasor that has paid more than its share of the common liability, whether per capita or based upon percentage of fault. Current examples of such jurisdictions include Arkansas, Delaware, Georgia, Hawaii, Maine, Maryland, Minnesota, New Mexico, Pennsylvania, Puerto Rico, Rhode Island, and Wisconsin.

4. "Per Capita or Percentage Share Jurisdiction With Contribution Bar" shall mean a jurisdiction in which a person or entity that has settled a claim with a plaintiff and that has received a release may not be held liable for contribution, and any judgment against non-settling defendants is, or may be, reduced by the

released party's share of the common liability, whether per capita or based upon percentage of fault, or by a percentage fixed by statute, at least where such a reduction is greater than either the amount paid by the released person or entity or any amount specified in the release, or where the non-settling defendants elect such a reduction in lieu of other alternatives. Current examples of such jurisdictions include Connecticut, the District of Columbia, Iowa, Louisiana, Mississippi, Nebraska, New Jersey, New York, Texas, and the Virgin Islands.

5. "No Joint and Several Liability Jurisdiction" shall mean a jurisdiction in which joint and several liability has been abolished, non-settling defendants are not entitled to any reduction in a judgment against them because of a joint tortfeasor's settlement and release, and there is no right of contribution. Current examples of such jurisdictions include Alaska, Arizona, Colorado, Idaho, Kansas, Kentucky, North Dakota, Utah, and Vermont.

B. **Structure for Settlement**. Upon its approval by the Court as a good faith, fair, adequate, reasonable, and ethical settlement, this Stipulation of Settlement shall constitute a "structure for settlement" (see *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831, 843 (2d Cir. 1992)), which shall provide the exclusive remedy for all Settlement Class Members for any Claim against the CCR Defendant(s) and the Additional Releasee(s).

C. **Applicable Releases**. Whether a Settlement Class Member has provided a Deemed Release shall depend upon which of the definitions set forth in Paragraphs A.2.-5. of this Part most accurately describes the law of the jurisdiction in which a claim for contribution or indemnity is asserted against the CCR Defendant(s) or the Additional Releasee(s), as further explained in Paragraphs D to F of this Part.

D. **Pro Tanto Jurisdictions or No Joint and Several Liability Jurisdictions**.

1. Those Settlement Class Members whose Claims would be brought in a Pro Tanto Jurisdiction or a No Joint and Several Liability Jurisdiction shall be deemed to provide each of the twenty CCR Defendants with a Deemed Release;

2. If any such Settlement Class Member submits a Qualifying Claim to the CCR, prior to payment of the Qualifying Claim, that Settlement Class Member shall execute and provide to the CCR Defendant(s) an additional release containing all provisions included in the CCR Defendant(s)' customary release for the counsel representing the Settlement Class Member in the applicable jurisdiction. Where no history of such prior negotiated release exists, the CCR Defendant(s) and the Settlement Class Member's counsel shall negotiate in good faith the terms of the release to be executed and provided to the CCR Defendant(s); provided that, if no agreement can be reached, the release that the CCR Defendant(s) demonstrate is their standard release for the applicable jurisdiction shall be utilized.

E. **Per Capita or Percentage Share Jurisdictions Without a Contribution Bar**.

1. Those Settlement Class Members whose Claims would be brought in a Per Capita or Percentage Share Jurisdiction Without a Contribution Bar shall be deemed to provide each of the twenty CCR Defendants with a Deemed Release;

2. If any such Settlement Class Member submits a Qualifying Claim to the CCR, prior to payment of the Qualifying Claim, that Settlement Class Member shall execute and provide to the CCR Defendant(s) an additional release containing all provisions included in the CCR Defendant(s)' customary release for the counsel representing the Settlement Class Member in the applicable jurisdiction. Where no history of such prior negotiated release exists, the CCR Defendant(s) and the Settlement Class Member's counsel shall negotiate the terms of the release to be executed and provided to the CCR Defendant(s); provided that, if no agreement can be reached, the release that the CCR Defendant(s) demonstrate is their standard release for the applicable jurisdiction shall be utilized.

F. **Per Capita or Percentage Share Jurisdictions With a Contribution Bar**. When a Settlement Class Member in a Per Capita or Percentage Share Jurisdiction With a Contribution Bar submits a Qualifying Claim to the CCR, prior to payment of the Qualifying Claim, the Settlement Class Member shall execute and provide to the CCR Defendant(s) a release containing all provisions

included in the CCR Defendant(s)' customary release for the counsel representing the Settlement Class Member in the applicable jurisdiction. Where no history of such prior negotiated release exists, the CCR Defendant(s) and the Settlement Class Member's counsel shall negotiate in good faith the terms of the release to be executed and provided to the CCR Defendant(s); provided that, if no agreement can be reached, the release that the CCR Defendant(s) demonstrate is their standard release for the applicable jurisdiction shall be utilized.

XIII. Contribution and Indemnity Claims Arising in Tort

A. If any Settlement Class Member brings suit arising in tort against a non-CCR defendant or defendants alleging an asbestos-related injury and if such defendants assert claims for contribution or indemnity against any CCR Defendant(s) or Additional Release(s) who have not received deemed or actual releases fully protecting them against claims for contribution or indemnity, that Settlement Class Member shall:

1. move jointly with such CCR Defendant(s) or Additional Releasee(s) for severance and continuance of the trial of such contribution or indemnity claims;

2. refrain from volunteering or agreeing to assist any non-CCR defendant in pursuing its contribution or indemnity claim against such CCR Defendant(s) or Additional Releasee(s); and

3. refrain from entering into any settlement agreement with a non-CCR defendant under which the non-CCR defendant's duty to pay, or the amount of such payment, is dependent in any way on the pursuit and/or outcome of such defendant's contribution or indemnity claim against such CCR Defendant(s) or Additional Releasee(s);

4. if the asbestos-related injury alleged in such suit is a non-malignant condition, indemnify such CCR Defendant(s) or Additional Releasee(s) for the greater of (a) the amount or proportion provided in any release executed by the Settlement Class Member and provided to the CCR Defendant(s) pursuant to Part XII of this Stipulation; or (b) twenty percent (20%) of the amount of any judgment(s) on any such contribution or indemnity claim(s) entered and enforced against such CCR Defendant(s) or Additional Releasee(s) that arise out of that suit; and

5. if the asbestos-related injury alleged in such suit is a malignant condition, indemnify such CCR Defendant(s) or Additional Releasee(s) for the greater of (a) the amount or proportion provided in any release executed by the Settlement Class Member and provided to the CCR Defendant(s) pursuant to Part XII of this Stipulation; or (b) ten percent (10%) of the amount of any judgment(s) on any such contribution or indemnity claim(s) entered and enforced against such CCR Defendant(s) or Additional Releasee(s) that arise out of that suit.

B. The CCR will take all reasonable steps necessary (i) to defend as it deems appropriate any contribution or indemnity claim against any CCR Defendant(s) or Additional Releasee(s): and (ii) to ensure that neither the CCR Defendant(s) nor their counsel shall voluntarily take any steps to assist any non-CCR defendant in pursuing its contribution or indemnity claims against any CCR Defendant(s) or Additional Releasee(s).

C. To the extent that the CCR pays part of any judgment for contribution or indemnity in a suit by a Settlement Class Member, that payment shall be taken into account in determining any settlement amount later offered by the CCR to that Settlement Class Member under this Stipulation.

XIV. Right of Resubmission

A. Any Claimant who submits a Claim determined by the CCR not to meet the requirements for compensation under this Stipulation may resubmit the Claim at any time if the Exposed Person subsequently dies, has new pathological evidence, or receives a diagnosis of a malignant condition. Otherwise, a Claim may be resubmitted only if other evidence (such as exposure or medical evidence) supporting the Claim changes, and, in any event, no more frequently than once every two years.

B. Any Claimant who receives or has received compensation for any Non-malignant condition from the CCR, the CCR Defendants, or the Additional Releasee(s) under this Stipulation or otherwise, including payments pursuant to the procedures in Part X of this Stipulation, may submit a new Claim for compensation if the Exposed Person subsequently develops a malignant condition and has not previously released the right to such a Claim against the CCR Defendants. Any Claimant seeking compensation for the

subsequent development of a malignant condition must meet all the criteria applicable to the Compensable Medical Category for which compensation is sought, and all other requirements for compensation under this Stipulation; provided, however, that the CCR shall not be allowed to contest any criteria or requirements that the Claimant has previously been determined to satisfy in order to receive compensation for the Non-malignant Condition. Each Claimant shall be entitled to compensation from the CCR, the CCR Defendants, or the Additional Releasee(s) for only one Non-malignant Condition and only one subsequently-developed malignant condition. All amounts previously paid to a Claimant under this Stipulation or otherwise by the CCR, the CCR Defendant(s), or the Additional Releasee(s) for a Non-malignant Condition shall be taken into account in determining the settlement amount offered to the Claimant for the malignant condition.

XV. No Prejudice to Workers' Compensation Rights

This Stipulation is not intended to, and shall not affect, add to, or diminish the right of any Settlement Class Member to recover for asbestos-related personal injury pursuant to any workers' compensation or similar statutory provisions for compensation by an employee against an employer, including, but not limited to, the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, or the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq*. Accordingly, this Stipulation is not intended to, and shall not, affect any otherwise applicable provision of a workers' compensation or similar statutory provision that bars a Settlement Class Member from filing a tort suit against the CCR Defendant(s) or the Additional Releasee(s).

XVI. No Joint and Several Liability

A. Payments to Claimants by the CCR under any provision of this Stipulation (including Part X) shall be funded by the CCR Defendant(s) in accordance with the terms set forth in the CCR Defendants' Sharing Agreement, which is attached to this Stipulation as Exhibit C. Each CCR Defendant shall be liable only for its individual obligation under this Stipulation and that Sharing Agreement, and no CCR Defendant shall be jointly and severally liable with any other CCR Defendant for any payment due under this Stipulation or that Sharing Agreement. Should any CCR

Defendant fail for any reason to meet its financial obligations under this Stipulation and that Sharing Agreement, recourse for that CCR Defendant's obligations hereunder shall be limited to such defendant.

B. In the event that any CCR Defendant shall fail to meet its financial obligations under this Stipulation and the Sharing Agreement, that CCR Defendant shall be obliged to give notice of that default to Settlement Class Members in the manner ordered by the Court. Thereafter, any Settlement Class Member who has not received compensation under this Stipulation shall have the option of either 1) enforcing that CCR Defendant's obligations under this Stipulation; or 2) asserting full rights in the tort system against that CCR Defendant and any Additional Releasee(s) associated with that CCR Defendant. In addition, any Settlement Class Member who has received compensation under this Stipulation for a Non-Malignant Condition only shall have these same options, but only with regard to a Claim by such Settlement Class Member for a malignant condition. In the event that a Settlement Class Member elects to assert full rights in the tort system against a defaulting CCR Defendant and any Additional Releasee(s) associated with that CCR Defendant, that Settlement Class Member shall have one (1) year from the notice of default to bring such an action unless the applicable law provides for a longer period. Upon the notice of default, the tolling of all applicable statutes of limitation or repose, or any other applicable doctrine concerning staleness of claims, as provided in Part VI of this Stipulation, shall cease with respect to a defaulting CCR Defendant and any Additional Releasee(s) associated with that CCR Defendant, and any Settlement Class Member who elects to assert full rights in the tort system pursuant to this Paragraph B.

C. Nothing in this Stipulation shall be deemed to alter any applicable law concerning the joint and several liability of any CCR Defendant(s) and Additional Releasee(s) with any non-CCR defendants for a judgment in the tort system.

XVII. Establishment of Settlement Fund

A. The CCR shall be responsible for collecting from each CCR Defendant, and/or its insurers, as it becomes due, each CCR Defendant's share of indemnity payments and other costs required

to make the compensation payments provided in this Stipulation. Such collections shall be retained by the CCR in a segregated trust or bank account established for the purpose of funding the resolution and satisfaction of the CCR Defendant(s)' obligations under this Stipulation. This fund will be treated as a "qualified settlement fund" within the meaning of Treasury regulations under section 468B of the Internal Revenue Code of 1986, as amended, and the CCR shall be the administrator of such fund.

B. Plaintiff Class Representatives and the CCR Defendant(s) recognize that the obligations of each CCR Defendant under this Stipulation will have to be paid, at least in substantial part, by insurance provided under general liability insurance policies covering each such CCR Defendant. Accordingly, this Stipulation shall not become effective until all of the following conditions precedent have been satisfied: (1) A copy of this Stipulation has been provided to each insurer listed in Exhibit D to this Stipulation (which appear to be those insurers that might reasonably be called upon to pay a CCR Defendant's obligations under this Stipulation at any time during a period of ten (10) years from the effective date of this Stipulation); (2) each such insurer has been provided with written notice of, and an opportunity to participate in a hearing to be set by the Court for the purpose of determining, among other things, the fairness of this Stipulation and the issues described in 3(a) through 3(c) of this Paragraph; (3) each such insurer is a party to a written agreement, final judgment or a final decision pursuant to the procedures set forth in Appendix C to that certain Agreement Concerning Asbestos-Related Claims dated June 19, 1985 ("Wellington Agreement"), establishing that: (a) this Stipulation is a reasonable compromise and settlement of the CCR's Defendant(s)' liabilities and legal obligations to the members of the Class; (b) each CCR Defendant's allocated share, pursuant to the CCR Defendants' Sharing Agreement (attached to this Stipulation as Exhibit C), of all sums paid pursuant to the terms of this Stipulation is reasonable, and each CCR Defendant will be legally obligated and liable to pay its allocated share of all such sums; and (c) agreement to and participation in this Stipulation by each CCR Defendant does not: (i) breach any express or implied term or condition of any insurance policy insuring such CCR Defendant and issued by any of the insurers described in (1) above; or (ii)

otherwise provide any such insurer with a valid coverage defense for any obligations or liabilities incurred by such CCR Defendant under this Stipulation; and (4) each such insurer that is a party to the Wellington Agreement is also a party to a written agreement or final decision entered pursuant to the procedures set forth in Appendix C to the Wellington Agreement establishing that each such insurer will continue to fulfill all of its obligations pursuant to Sections VIII through and including XX of the Wellington Agreement with respect to any obligations or liabilities incurred under this Stipulation by each CCR Defendant insured by such insurer.

XVIII. Costs of Administering Stipulation

The costs of administering the procedures set forth in this Stipulation, including the costs of the dispute resolution procedures in Parts IV.B., V.C., VI.B., the Exceptional Medical Panel (Part V.D.), the Extraordinary Claims Panel (Part IX), and the procedures for binding arbitration in Part X shall be paid by the CCR Defendants, except to the extent provided in Part V.C.1.b. and V.C.2.b. If, however, a Claimant elects to resolve a Claim through the tort system under the procedures set forth in Part X, each party (*i.e.*, the Claimant and any CCR Defendant) shall bear its own costs.

XIX. Class Counsel Attorneys' Fees

Class Counsel shall be entitled to reasonable attorneys' fees. These fees shall be determined and approved by the Court, and paid by the CCR Defendants. This payment shall be in addition to all other payments required of the CCR or the CCR Defendants under this Stipulation, and shall not in any way diminish payments to Claimants under this Stipulation.

XX. Individual Claimant's Attorneys' Fees

Each Claimant who submits a Claim for processing under this Stipulation may be represented by Claimant's Counsel of the Claimant's choice. All fees for Claimant's Counsel shall be paid by the Claimant. Attorneys' fees payable by Claimants in connection with Claims paid under this Stipulation (other than pursuant to the procedures in Part X) shall not exceed twenty-five percent (25%) of the compensation paid to the Claimant; provided, however, that when the Claim has been paid as an Extraordinary

Claim under Part IX of this Stipulation, such attorneys' fees, shall not exceed the sum of 1) twenty-five percent (25%) of the maximum value for non-extraordinary Claims in the relevant Compensable Medical Category as set forth in the attached Compensation Schedule; and 2) twenty percent (20%) of the difference between that maximum value and the compensation paid to the Claimant. These limitations on attorneys' fees shall not apply to Claims paid by the CCR pursuant to the procedures in Part X (resolution of Claims in the tort system or through binding arbitration).

XXI. Withdrawal in the Event of Excessive Opt-Outs

The CCR Defendants shall have the right to withdraw, without obligation, from this Stipulation, if, at the close of the time period for individuals to opt out of the class pursuant to the Court's orders implementing Fed. R. Civ. P. 23(c)(2), there have been an excessive number of individuals who have opted out. Whether the number of individuals who have opted out is excessive shall be determined in the sole discretion of the Board of Directors of the CCR. The CCR Defendants shall give notice to Class Counsel that they are exercising this withdrawal right within forty-five (45) days after the close of the opt-out period.

XXII. Withdrawal Rights After Ten Years

A. Each CCR Defendant shall have the right to withdraw from this Stipulation ten (10) years after its effective date. Notification of the exercise of such withdrawal rights shall be given to Class Counsel at least sixty days prior to the tenth year anniversary of this Stipulation's effective date. Should any CCR Defendant exercise that withdrawal right, the amounts set forth in the Compensation Schedule attached to this Stipulation as Exhibit B shall be reduced by the proportion equivalent to that defendant's fixed percentage share as established in the CCR Defendants' Sharing Agreement (attached to this Stipulation as Exhibit C). Any withdrawing defendant shall have no right to a refund of any amounts already paid to the CCR or accrued under the Sharing Agreement as of the date that the CCR Defendant's withdrawal becomes effective. A withdrawing CCR Defendant shall also remain liable for its share under the Sharing Agreement for all Qualifying Claims on which the CCR or the Extraordinary Claim

Panel has made a settlement offer at any time prior to the date on which that CCR Defendant's withdrawal becomes effective, including all such claims on which compensation is ultimately determined pursuant to the provisions of Section X.

B. In the event that any CCR Defendant shall withdraw from the Stipulation, that CCR Defendant shall be obliged to give notice of that withdrawal to Settlement Class Members in the manner ordered by the Court. Thereafter, any Settlement Class Member who has not received, at any time prior to the date on which that CCR Defendant's withdrawal becomes effective, either compensation under this Stipulation or a settlement offer from the CCR or the Extraordinary Claim Panel, including compensation or settlement offers on any claims for which compensation is ultimately determined pursuant to Part X, shall have full rights in the tort system against that CCR Defendant and any Additional Releasee(s) associated with that CCR Defendant. In addition, any Settlement Class Member who has received, at any time prior to the date on which that CCR Defendant's withdrawal becomes effective, either compensation under this Stipulation or a settlement offer from the CCR or the Extraordinary Claim Panel for a Non-Malignant Condition only, including compensation or settlement offers on any Non-Malignant Claims for which compensation is ultimately determined pursuant to Part X, shall have this same right, but only with regard to a subsequent claim by such Settlement Class Member for a malignant condition. Each Settlement Class Member shall have one (1) year from the notice of withdrawal to bring such an action unless applicable law provides for a longer period. Upon the notice of withdrawal, the tolling of all applicable statutes of limitation or repose, or any other applicable doctrine concerning staleness of claims, as provided in Part VI of this Stipulation, shall cease with respect to a withdrawing CCR Defendant and any Additional Releasee(s) associated with that CCR Defendant.

XXIII. Continuing Obligations of Class Counsel

A. Class Counsel shall have the obligation to audit, on an annual basis, the processing and disposition of Claims submitted by Claimants to the CCR under this Stipulation. In connection with such an audit, Class Counsel shall have the right to examine all

books and records maintained by the CCR related to the processing of Claims under this Stipulation.

B. Class Counsel shall have the right to take any other actions reasonably necessary to ascertain or discharge Class Counsel's legal and ethical obligations in conjunction with their service as Class Counsel.

XXIV. No Delay to Tort System

This Stipulation is not intended to have any effect on any Pending or Prior Lawsuit. The parties intend that such Pending or Prior Lawsuits will continue to be handled in an orderly manner in the existing tort system.

XXV. Interest for Any Delay in Handling Claims

Whenever the CCR shall fail to meet any time requirement for the processing and handling of an individual Claim, interest for the period of each such delay shall be added to any compensation ultimately paid to that Claimant under this Stipulation. The annual rate of such interest shall be equal to the rate paid at the auction of short-term — *i.e.*, 13 week — United States government bills on the last auction date of the month preceding the commencement of the period of delay. This interest rate shall be determined by the money rates chart published in the *Wall Street Journal*.

XXVI. Arbitration

A. **General**. Any dispute arising out of this Stipulation that is not specifically addressed in this Stipulation shall be determined by a single arbitrator upon written submissions from the parties. The parties shall choose that arbitrator from the List of Arbitrators established under Paragraph B of this Part. The arbitrator's decision shall finally determine the issue.

B. The List of Arbitrators from which arbitrators shall be selected to decide disputes under this Part and under Parts IV.B. and VI.B. of this Stipulation shall be mutually agreed upon by Class Counsel and Counsel for the CCR Defendants. If Class Counsel and Counsel for the CCR Defendants are able to agree on some, but not all, arbitrators to be placed on the List, the arbitrators agreed upon by Class Counsel and Counsel for the CCR Defendants shall be placed on the List, and the remainder of the List shall be selected by a mutually selected, neutral third party.

If Class Counsel and Counsel for the CCR Defendants are unable to agree on such a neutral third party, Class Counsel and Counsel for the CCR Defendants shall each select a representative, and those two representatives shall together select the neutral third party.

XXVII. Miscellaneous Provisions

A. **No Effect on Prior Settlements, Releases, or Adjudications**. This Stipulation is not intended to, and shall not, affect the terms of any settlement or release entered into by a Settlement Class Member and the CCR Defendant(s) or Additional Releasee(s) prior to the date that the Class Action Complaint is filed. Similarly, this Stipulation is not intended to and shall not, waive any defense of the CCR Defendant(s) or the Additional Releasee(s) to a Claim based on res judicata or similar doctrines.

B. **No Admission of Liability**. Neither this Stipulation, nor any of its provisions, nor evidence of any negotiations or proceedings related to this Stipulation, nor any proceedings under this Stipulation, shall be offered or received in evidence in this class action or any other action or proceeding as an admission or concession of liability or wrongdoing of any nature on the part of any of the CCR Defendant(s) or anyone acting on their behalf, and the CCR Defendant(s) specifically deny any such liability or wrongdoing.

C. **Best Efforts**. All signatories to this Stipulation and their counsel shall exercise their best efforts to take all steps and expend all efforts which may become necessary to effectuate this Stipulation.

D. **Entire Agreement**. This Stipulation, including the attached Compensation Schedule and Exhibits A-D, is the entire agreement between the Plaintiff Class Representatives, Class Counsel, the CCR Defendant(s), and Counsel for the CCR Defendants concerning the disposition of Claims covered by the Stipulation. All antecedent or contemporaneous extrinsic representations, warranties, or collateral provisions concerning the negotiation and preparation of this Stipulation and attached Exhibits A-D, are intended to be discharged and nullified. In any dispute involving the Stipulation and attached Exhibits A-D, no signatory to this Stipulation shall introduce evidence of or seek to

compel testimony concerning any oral or written communication with respect to the negotiation or preparation of these documents.

E. **Modification**. No modification of this Stipulation may be made except by written agreement of Class Counsel, each of the CCR Defendant(s), and Counsel for the CCR Defendants.

F. **Notices**. All submissions or notices required under this Stipulation may be sent by first-class mail or by hand delivery to the recipient designated in this Stipulation. The timeliness of all submissions and notices shall be measured by the date of postmark (if sent by first-class mail), or by the date of receipt (if hand-delivered).

G. **Operational Date**. This Stipulation shall have perpetual existence, and the CCR shall begin operating under its terms (including making appropriate payments) at the close of the time period for individuals to opt out of the class pursuant to the Court's orders implementing Fed. R. Civ. P. 23(c)(2). Any obligations under this Stipulation shall cease, however, if any of the following occurs:

1. The CCR Defendant(s) exercise their right to withdraw from this Stipulation in the event of excessive opt-outs, as set forth in Part XXI of this Stipulation; or

2. The Court declines to enter an order approving the Stipulation as in good faith and fair, adequate, reasonable, and ethical, and concluding that the Class of Claimants has received adequate notice and has been adequately and ethically represented by Class Counsel;

3. The conditions precedent in Part XVII.B. are not satisfied; and

4. The Court's judgment approving the Stipulation is overturned on appeal to the United States Court of Appeals for the Third Circuit, or the United States Supreme Court.

H. **Execution by Counterparts**. This Stipulation may be executed in any number of counterparts and by different signatories to this Stipulation in separate counterparts, each of which when so executed shall be deemed an original and all of which taken together shall constitute one and the same Stipulation.

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Counsel for the CCR Defendants

Authorized Signature

Amchem Products, Inc.

A.P. Green Industries, Inc.

Armstrong World Industries, Inc.

CertainTeed Corp.

C.E. Thurston and Sons, Incorporated

Dana Corp.

Ferodo America, Inc.

Flexitallic, Inc.

GAF Corp.

I.U. North America, Inc.

Maremont Corp.

National Gypsum Company*

National Service Industries, Inc.

Nosroc Corp.

Pfizer, Inc.

Quigley Co. Inc.

Shook & Fletcher Insulation Co.

T&N plc

Union Carbide Chemicals and Plastics Company, Inc.

United States Gypsum Co.

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* National Gypsum Company's participation in the Stipulation of Settlement is subject to the approval of the Bankruptcy Court.

EXHIBIT A

CENTER FOR CLAIMS RESOLUTION
CASE FLOW MAXIMUMS

Year	Mesothelioma	Lung Cancer	Other Cancer	Non-Malignant Conditions
1	700	700	200	13,500
2	700	630	200	12,000
3	650	600	175	10,500
4	650	530	175	9,000
5	600	500	150	8,500
6	545	455	145	7,500
7	500	400	100	6,500
8	500	400	100	6,000
9	455	300	100	5,455
10	455	300	100	5,000
Total (Years 1-10):	5,755	4,815	1,445	83,955

EXHIBIT A*

CENTER FOR CLAIMS RESOLUTION
CASE FLOW MAXIMUMS(1)

Year	Mesothelioma	Lung Cancer	Other Cancer	Non-Malignant Conditions
1	700	700	200	13,500
2	700	630	200	12,000
3	650	600	175	10,500
4	650	530	175	9,000
5	600	500	150	8,500
6	600	500	160	8,250
7	550	440	110	7,150
8	550	440	110	6,600
9	500	330	110	6,000
10	500	330	110	5,500
Total (Years 1-10):	6,000	5,000	1,500	87,000

NOTE: (1) This schedule assumes that the yearly settlement caps will be increased by 10% starting in 1998.

EXHIBIT B

COMPENSATION SCHEDULE

Qualifying Claims

Compensable Medical Category	Minimum Value	Negotiated Average Value Range	Maximum Value
Mesothelioma	20,000	37,000 - 60,000	200,000
Lung Cancer	10,000	19,000 - 30,000	86,000
Other Cancer	5,000	9,500 - 12,500	32,000
Non-Malignant	2,500	5,800 - 7,500	30,000

Extraordinary Claims

Compensable Medical Category	Negotiated Average Value
Mesothelioma (3%)	300,000
Lung Cancer (3%)	125,000
Other Cancer (3%)	50,000
Non-Malignant (1%) Conditions	50,000

EXHIBIT C

CCR DEFENDANTS' SHARING AGREEMENT

CONCERNING THAT

STIPULATION OF SETTLEMENT BETWEEN THE CLASS OF CLAIMANTS AND DEFENDANTS REPRESENTED BY THE CENTER FOR CLAIMS RESOLUTION

(AN AMENDMENT TO THE PRODUCER AGREEMENT CONCERNING CENTER FOR CLAIMS RESOLUTION)

JANUARY 15, 1993

CCR DEFENDANTS' SHARING AGREEMENT CONCERNING THAT STIPULATION OF SETTLEMENT BETWEEN THE CLASS OF CLAIMANTS AND DEFENDANTS REPRESENTED BY THE CENTER FOR CLAIMS RESOLUTION (AN AMENDMENT TO THE PRODUCER AGREEMENT CONCERNING CENTER FOR CLAIMS RESOLUTION)

This Agreement (hereinafter, the "CCR Defendants' Sharing Agreement"), to amend the Producer Agreement Concerning Center for Claims Resolution with respect to that Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center For Claims Resolution and to provide for each Participating Producer's allocated shares of all amounts to be paid or incurred pursuant to the terms of that Stipulation, is made between and among each of the following Participating Producers: Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; CertainTeed Corp.; C.E. Thurston and Sons, Incorporated; Dana Corp.; Ferodo America, Inc.; Flexitallic, Inc.; GAF Corp.; I.U. North America, Inc.; Maremont Corp.; National Gypsum Company; National Service Industries, Inc.; Nosroc Corp.; Pfizer, Inc.; Quigley Co. Inc.; Shook & Fletcher Insulation Co.; T&N, plc; Union Carbide Chemicals and Plastics Company Inc.; and United States Gypsum Co. (hereinafter, collectively, "Participating Producers" or "CCR Defendants").

WHEREAS, Participating Producers are members of the Center for Claims Resolution (hereinafter, the "Center") and signatories to the Producer Agreement Concerning Center for Claims Resolution, as amended, (hereinafter, the "Producer Agreement"), which established the Center to provide for the administration, defense, payment, and disposition of asbestos-related claims filed or asserted against any Participating Producers;

WHEREAS, Participating Producers are the named defendants in the Class Action Complaint filed by the Class of Claimants in the United States District Court for the Eastern District of Pennsylvania;

WHEREAS, Participating Producers, on the advice of counsel, have determined that settlement with the Class of Claimants on the terms and conditions set forth in the Stipulation of Settlement

Between the Class of Claimants and Defendants Represented by Center for Claims Resolution (hereinafter, the "Class Action Stipulation"), to which this CCR Defendants' Sharing Agreement is attached, is a good faith, fair, and reasonable compromise and settlement of Participating Producers' liabilities and legal obligations to members of the Class, and thus in the best interests of Participating Producers;

WHEREAS, Participating Producers have determined that allocation of all amounts to be paid pursuant to the terms and conditions of that Class Action Stipulation, or incurred in connection with that Class Action Stipulation or any claims subject to settlement thereunder, on the basis set forth in this CCR Defendants' Sharing Agreement, is fair and reasonable;

WHEREAS, Participating Producers desire to amend the Producer Agreement, as necessary, in order to enter into the Class Action Stipulation and this CCR Defendants' Sharing Agreement to provide for the allocation of all amounts to be paid or incurred by Participating Producers pursuant to the terms of that Class Action Stipulation;

NOW, THEREFORE, pursuant to Section XIII.3 of the Producer Agreement, and in consideration of the mutual covenants contained herein and intending to be legally bound hereby, Participating Producers hereby amend the Producer Agreement as follows:

1. **The Class Action Stipulation**. Each Participating Producer shall enter into the Class Action Stipulation and this CCR Defendants' Sharing Agreement; shall comply with the terms and conditions of that Class Action Stipulation and this CCR Defendants' Sharing Agreement; and shall cooperate with and assist the Center in the furtherance of such terms and conditions and of their purposes.

2. **Allocated Shares for Compensation Payments**. Each Participating Producer shall be responsible for a fixed percentage share of (1) each compensation payment to be paid to any Claimant pursuant to the terms and conditions of the Class Action Settlement (including without limitation any payment of verdicts or arbitration awards pursuant to the terms and conditions of Part X of the Class Action Stipulation); and (2) any Liability Payments made with

respect to any Asbestos-Related Claim by any party who is not a Settlement Class Member that is based on, arises out of, or related to any claim for asbestos-related personal injury or damage by any Settlement Class Member. Each Participating Producer's fixed percentage share of each such compensation payment or any such Liability Payment shall be the percentage share set forth in letters dated January 11, 1993 to each such Participating Producer from the law firm of Shea & Gardner (the Special Counsel established pursuant to paragraph B.3 of Attachment A to the Producer Agreement); provided, however, that in the event that a Participating Producer shall withdraw from the Class Action Stipulation ten (10) years after its effective date, and the amounts set forth in the Compensation Schedule attached to the Class Action Stipulation are reduced by that withdrawing defendant's percentage share under this CCR Defendants' Sharing Agreement pursuant to Part XXII of the Class Action Stipulation, then the corresponding percentage shares of the non-withdrawing Participating Producers shall be increased proportionally by that withdrawing defendant's percentage share. To the extent that a Participating Producer's percentage shares of such compensation payments are not paid in a timely manner by one or more of its insurers, such Participating Producer shall pay in a timely manner the percentages of the compensation payments in question.

3. **Allocated Expenses**. All allocated expenses incurred by the Center in connection with the Class Action Settlement or any claims subject to settlement thereunder shall be apportioned among the Participating Producers based on the individual Allocated Expense Shares established as provided in Attachment A to the Producer Agreement and as modified by any share adjustments approved or adopted thereunder; provided, however, that in the event a Participating Producer shall withdraw from membership in the Center pursuant to Section IV of the Producer Agreement or have its membership terminated pursuant to Paragraphs 2-3 of Section III of the Producer Agreement, or in the event a Participating Producer shall withdraw from the Class Action Stipulation ten (10) years after its effective date pursuant to Part XXII of the Class Action Stipulation, then the Special Counsel established pursuant to paragraph B.3 of Attachment A to the Producer Agreement shall promptly adjust the Participating

Producers' Allocated Expenses Shares to reflect that event. Any Participating Producer that believes that application of any such adjustment is inequitable as applied to its particular situation, or that the calculation of its Allocated Expense Shares pursuant to any such adjustment has been performed inaccurately or incorrectly, may cause the matter to be presented to the Participating Producers pursuant to paragraph B.2 of Attachment A to the Producer Agreement, and, failing receipt of satisfactory action, may take the matter to alternative dispute resolution within the Center pursuant to paragraph E of Attachment A to the Producer Agreement. Such Participating Producer shall bear the burden of proof. To the extent that a Participating Producer's percentage shares of such allocated expense are not paid in a timely manner by one or more of its insurers, such Participating Producer shall pay in a timely manner the percentages of the allocated expenses in question.

4. **Unallocated Expenses**. Any unallocated expenses incurred by the Center in connection with the Class Action Settlement or any claims settled thereunder (and not otherwise paid by Supporting Insurers) shall be apportioned among the Participating Producers based on the Individual Unallocated Expense Shares established as provided in Attachment A to the Producer Agreement and as modified by any share adjustments approved or adopted thereunder; provided, however, that in the event a Participating Producer shall withdraw from membership in the Center pursuant to Section IV of the Producer Agreement or have its membership terminated pursuant to Paragraphs 2-3 of Section III of the Producer Agreement, or in the event a Participating Producer shall withdraw from the Class Action Stipulation ten (10) years after its effective date pursuant to Part XXII of the Class Action Stipulation, the Special Counsel established pursuant to paragraph B.3 of Attachment A to the Producer Agreement shall promptly adjust the Participating Producers' Unallocated Expense Shares to reflect that event. Any Participating Producer that believes that application of any such adjustment is inequitable as applied to its particular situation, or that the calculation of its Unallocated Expense Shares pursuant to any such adjustment has been performed inaccurately or incorrectly, may cause the matter to be presented to the Participating Producers pursuant to paragraph B.2 of Attachment A

to the Producer Agreement, and, failing receipt of satisfactory action, may take the matter to alternative dispute resolution within the Center pursuant to paragraph E of Attachment A to the Producer Agreement. Such Participating Producer shall bear the burden of proof. To the extent that a Participating Producer's percentage shares of such unallocated expense are not paid in a timely manner by one or more of its insurers, such Participating Producer shall pay in a timely manner the percentages of the unallocated expenses in question.

5. **Asbestos-Related Claims Not Subject to the Class Action Settlement**. Except as provided herein, the Center shall continue to administer and arrange for the evaluation, settlement, payment, or defense of all asbestos-related claims not subject to the Class Action Settlement, and each Participating Producer shall continue to have all of the rights and duties of a member with respect to such asbestos-related claims, in accordance with the provisions of the Producer Agreement and Attachment A thereto.

6. **Execution by Counterparts**. This Amendment may be executed in any number of counterparts and by different Participating Producers hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same amendment.

Authorized Signature

Amchem Products, Inc.

A.P. Green Industries, Inc.

Armstrong World Industries, Inc.

CertainTeed Corp.

C.E. Thurston and Sons, Incorporated

Dana Corp.

Ferodo America, Inc.

Flexitallic, Inc.

GAF Corp.

I.U. North America, Inc.

Maremont Corp.

National Gypsum Company*

National Service Industries, Inc.

Nosroc Corp.

Pfizer, Inc.

Quigley Co. Inc.

Shook & Fletcher Insulation Co.

T&N plc

Union Carbide Chemicals and Plastics Company Inc.

United States Gypsum Co.

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* National Gypsum Company's participation in the Class Action Settlement is subject to the approval of the Bankruptcy Court.

EXHIBIT D

The insurers set forth below are hereby identified pursuant to the Stipulation of Settlement, Part XVII (Paragraph B).

ADMIRAL INSURANCE CO.
AETNA CASUALTY & SURETY CO.
AETNA INSURANCE CO.
AFFILIATED FM INSURANCE CO.
AIU INSURANCE CO.
ALLIANZ INSURANCE CO.
ALLIANZ UNDERWRITERS INC.
ALLIANZ UNDERWRITERS INSURANCE CO.
AMERICAN BANKERS INS. CO. OF FLORIDA
AMERICAN CENTENNIAL INSURANCE CO.
AMERICAN EXCESS INSURANCE CO.
AMERICAN HOME ASSURANCE CO.
AMERICAN INSURANCE CO.
AMERICAN MOTORISTS INSURANCE CO.
AMERICAN REINSURANCE CO.
APPALACHIAN INSURANCE COMPANY OF PROVIDENCE
ARGONAUT INSURANCE CO.
ASSOCIATED INDEMNITY CORP.
ATLANTA INTERNATIONAL INSURANCE CO.
BELLEFONTE INSURANCE CO.
BIRMINGHAM FIRE INSURANCE CO.
BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA
BRITAMCO LIMITED
BRITISH NORTHWESTERN INSURANCE CO.
CAISSE INDUSTRIELLE D'ASSURANCE MUTUELLE
CALIFORNIA UNION INSURANCE CO.
CENTENNIAL INSURANCE CO.
CENTRAL NATIONAL INSURANCE CO. OF OMAHA
CHICAGO INSURANCE CO.
CITY INSURANCE CO.
COLUMBIA CASUALTY CO.
COMMERCIAL UNION ASSURANCE CO. LTD.
COMPAGNIE EUROPEENNE DE REASSURANCE
CONSTITUTION STATE INSURANCE CO.
CONTINENTAL CASUALTY CO.

CONTINENTAL INSURANCE CO.
DRAKE INSURANCE COMPANY OF NEW YORK
E.C.R.A.
EAGLE STAR INSURANCE CO. LTD.
EMPLOYERS
EMPLOYERS COMMERCIAL UNION INSURANCE CO.
EMPLOYERS COMMERCIAL UNION INSURANCE CO. OF AMERICA
EMPLOYERS INSURANCE OF WAUSAU
EMPLOYERS MUTUAL CASUALTY CO.
EMPLOYERS MUTUAL LIABILITY INSURANCE CO. OF WISCONSIN
EMPLOYERS REINSURANCE
EMPLOYERS' LIABILITY ASSURANCE CORP. LTD.
EMPLOYERS' SURPLUS LINES INSURANCE CO.
EVANSTON INSURANCE CO.
EXCESS INSURANCE COMPANY LTD.
FALCON INSURANCE COMPANY
FEDERAL INSURANCE CO.
FIDELITY & CASUALTY CO. OF NEW YORK
FIREMAN'S FUND INSURANCE CO.
FIREMAN'S FUND INSURANCE CO. OF ILLINOIS
FIRST STATE INSURANCE CO.
FIRST STATE OF BOSTON
FIRST STATE UNDERWRITERS AGENCY OF NEW ENGLAND REINSURANCE CORP.
GENERAL ACCIDENT & LIFE ASSURANCE CORP. LTD.
GENERAL REINSURANCE CORP.
GERLING GLOBAL REINSURANCE CO.
GIBRALTAR CASUALTY CO.
GLOBE INDEMNITY CO.
GOVERNMENT EMPLOYEES INSURANCE COMPANY
GRANITE STATE INSURANCE CO.
GREAT AMERICAN INSURANCE CO.
GUARDIAN ROYAL EXCHANGE ASSURANCE LTD.
HARBOR INSURANCE CO.
HARTFORD
HARTFORD ACCIDENT & INDEMNITY CO.
HIGHLANDS INSURANCE CO.
HOME INDEMNITY CO.

HOME INSURANCE CO.
HOUSTON GENERAL INSURANCE CO.
HUDSON INSURANCE CO.
INA
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA
INSCO LIMITED
INSURANCE COMPANY OF NORTH AMERICA
INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA
INTERNATIONAL INSURANCE CO.
INTERNATIONAL SURPLUS LINES INSURANCE CO.
INTERSTATE FIRE & CASUALTY CO.
JEFFERSON INSURANCE COMPANY OF NEW YORK
KEMPER
LA PRESERVATRICE FONCIERE TIARD
LANDMARK INSURANCE CO.
LE SECOURS
LEXINGTON INSURANCE CO.
LIBERTY MUTUAL INSURANCE CO.
LILLOISE D'ASSURANCES ET DE REASSURANCES
LLOYD'S SYNDICATES AND LONDON COMPANIES
LONDON (INSCO LIMITED)
LONDON GUARANTEE & ACCIDENT CO. OF NEW YORK
LUMBERMENS MUTUAL CASUALTY COMPANY
MARYLAND CASUALTY CO.
MEAD REINSURANCE CORP.
MICHIGAN MUTUAL INSURANCE CO.
NATIONAL FIRE
NATIONAL SURETY CORP.
NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA
NEW AMSTERDAM CASUALTY CO.
NORTH RIVER INSURANCE COMPANY
NORTH STAR REINSURANCE CORP.
NORTHBROOK EXCESS & SURPLUS INSURANCE CO.
NORTHBROOK INDEMNITY CO.
NORTHBROOK INSURANCE CO.
NORTHWESTERN NATIONAL INSURANCE CO.
NUTMEG INSURANCE CO.
OCEAN CASUALTY INSURANCE CO.

OLD REPUBLIC INSURANCE CO.
PACIFIC EMPLOYERS INSURANCE CO.
PENNSYLVANIA MANUFACTURERS' ASSOCIATION
INSURANCE CO.
PHOENIX ASSURANCE
PROTECTIVE NATIONAL INSURANCE CO. OF OMAHA
PRUDENTIAL ASSURANCE COMPANY LTD.
PRUDENTIAL REINSURANCE CO.
PURITAN INSURANCE CO.
RANGER INSURANCE CO.
RELIANCE INSURANCE CO.
REPUBLIC INSURANCE CO.
ROYAL GLOBE INSURANCE COMPANY
ROYAL INDEMNITY CO.
ROYAL INSURANCE COMPANY LTD.
SAFECO INSURANCE COMPANY OF AMERICA
SAFETY MUTUAL CASUALTY CORP.
ST. PAUL FIRE AND MARINE INSURANCE CO.
ST. PAUL GUARDIAN INSURANCE CO.
STANDARD ACCIDENT INSURANCE CO.
STONEWALL INSURANCE CO.
STONEWALL SURPLUS LINES INSURANCE CO.
SUN ALLIANCE & LONDON INSURANCE
THE STUYVESANT INSURANCE CO.
TOKIO MARINE AND FIRE INSURANCE CO., LTD.
TRANSPORT INDEMNITY CO.
TRAVELERS
TRAVELERS INDEMNITY CO.
TRAVELERS INSURANCE CO.
TWIN CITY FIRE INSURANCE CO.
U.S. FIRE INSURANCE CO.
UNIGARD MUTUAL INSURANCE CO.
UNION DES ASSURANCES DE PARIS
UNITED STATES FIDELITY & GUARANTY CO.
YOSEMITE INSURANCE CO.
ZURICH
ZURICH AMERICAN INSURANCE COMPANY OF ILLINOIS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

RESPONSE OF CCR DEFENDANTS TO THE ORDER TO SHOW CAUSE

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Attorneys for Defendants
Represented by the Center For Claims Resolution

March 17, 1993

* * * *

For the same reasons outlined above, permissive intervention under Rule 24(b) by non-party former asbestos suppliers is also inappropriate. As explained, non-party manufacturers do not have any basis upon which to challenge the settlement. Permitting them to intervene would cause undue delay and would be inconsistent with the policy, as stated by the Third Circuit "of encouraging settlement of complex litigation that otherwise could linger for years." *In re School Asbestos Litig.*, 921 F.2d at 1333. Accord *Arizona* v. *Motorola, Inc.*, 139 F.R.D. 141, 147 (D. Ariz. 1991) (permissive intervention of non-settlor should be denied where it would frustrate statutory policy of "encouragement of early settlement").[11]

C. The Settlement is Fair, Adequate and Reasonable.

We now turn to the fairness, adequacy, and reasonableness of the settlement, as directed by the March 1 Order. In considering these issues, two points should be kept in mind. First, the nine factors relating to the fairness determination identified in the March 1 Order are those traditionally applied in proceedings seeking approval of a proposed class settlement. The cases in which these factors originated, however, were brought as class actions for purposes of litigation, and actually were litigated for some period of time before settlement occurred and approval of the settlement was sought. See, *e.g.*, *Girsh* v. *Jepson*, 521 F.2d at 157; *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). As observed above, however, this class action was brought for purposes of settlement only, and has been conditionally certified only for such purposes. Hence, the nine factors typically considered in determining whether to approve a class settlement as fair, adequate, and reasonable, while not irrelevant in an action of this kind, require some adaptation before they can be appropriately applied to a settlement reached before a class action was commenced.

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[11] The CCR Defendants, however, would have no objection if any non-settling asbestos products supplier would like to participate at the fairness hearing as an *amicus curiae*.

Second, as also explained above, a final decision as to whether the settlement should be approved as fair, adequate, and reasonable will not be made at the hearing an March 22. Rather, the purpose of that hearing is simply to determine whether the proposed settlement is "within the range of possible approval," *Manual for Complex Litigation Second* § 30.44, at 241; and hence whether notice should be issued to the class and a formal fairness hearing scheduled. Accordingly, we will address each of the considerations identified in the March 1 Order under this preliminary standard. A full evidentiary showing of the fairness, adequacy, and reasonableness of the proposed settlement will be made by the Representative Plaintiffs and the CCR Defendants, after notice is issued, at the formal fairness hearing.

1. General Considerations

As this Court is aware, the asbestos personal injury litigation has been in full swing since at least the mid to late 1970s. The litigation has been enormously complex, the volume of cases has been staggering, and the transaction costs associated with the litigation have been extremely high. Thus, as the MDL

* * * *

e. Limitations on Claimants' Right To Sue.

Under any settlement, the plaintiff surrenders his or her right to bring suit against the defendant in exchange for the advantages obtained by settling. So here, under the settlement, each class member agrees to resolve his claim against the CCR Defendants in exchange for the performance of a set of promises made by the CCR Defendants in that settlement.

Unlike other settlements, however, this settlement goes significantly further, and provides that claimants — who have qualifying claims and who are not satisfied with the offers made to them under the procedures in the settlement — will have a limited right to have their compensation determined in binding arbitration or the tort system. See Stipulation, Part X, at pp. 67-73.[18] It is

[18] The percentage of qualifying claims per year that may elect to have the amount of their compensation determined in binding arbitration or the tort system is limited to one percent (1%); however, claimants in excess of this number who make this election shall have priority to have their compensation amounts determined in this manner during the next year. Stipulation, Part X.A., at pp. 67-68. This limitation is consistent with the CCR Defendants' experience that more than ninety-nine percent (in fact 99.8%) of the cases against them settle.

true that, in such proceeding or lawsuit, the issues that may be contested by both sides would be limited and payment of the judgment would be made in accordance with the terms of the settlement. *Id.*, at p. 70. Such modified rights are, if anything, more generous than the absolute waiver of the right to bring suit that is required under most settlements.[19]

* * * *

[19] Moreover, the limitation on issues in the binding arbitration or court proceedings under the settlement represents a fairly common "issues trade" in the asbestos litigation, whereby the plaintiffs waive their right to seek punitive damages in exchange for a waiver by the defendants of certain conduct or

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

MEMORANDUM OF CLASS REPRESENTATIVES IN RESPONSE TO RULE TO SHOW CAUSE

By Rule to Show Cause dated March 1, 1993, this Honorable Court has requested the parties to submit, by way of memoranda, their positions regarding certain preliminary matters to be considered by the court, prior to a preliminary hearing on March 22, 1993. The plaintiffs, as class representatives, submit the following on the issues specified by the court.

I. BACKGROUND OF THE LITIGATION

This action was filed on January 15, 1993, seeking approval of the stipulation of settlement and certification of a settlement class for persons who have future claims for asbestos-related personal injury against one or more of the defendants represented by the CCR. The CCR Defendants answered plaintiffs' complaint and joined in plaintiffs' request that the settlement be approved.

The underlying basis for this action is an agreement entered into by the CCR Defendants, by which they have agreed to estab-

* * * *

[Tr. 10] their rights are not affected or impaired by the stipulation of settlement in any way. See *In re School Asbestos Litigation*, 921 F.2d 1330, 1333 (3d Cir. 1990).

III. FAIRNESS, ADEQUACY, AND REASONABLENESS OF THE SETTLEMENT

The plaintiffs incorporate by reference the discussion of these issues set forth by the CCR Defendants in their response to the Rule to Show Cause. In addition, plaintiffs submit the following description of the method by which the settlement procedures will

operate, to assist the court in making its preliminary review of this issue.

A. Description of the Settlement

1. General Description

In general, the Settlement provides for compensation to be paid to class members who have or may in the future contract an asbestos-related medical condition and who had occupationally-related exposure to asbestos or asbestos-containing products manufactured or supplied by one or more of the 20 Defendants. All claims for compensation will be processed by the Center For Claims Resolution (CCR), a non-stock, not-for-profit corporation that has been designated to handle such claims.

2. The Basic Requirements for Compensation

To qualify for compensation, class members (or their attorneys) will have to submit (i) evidence that the class member (or the occupationally exposed person upon whom the class member's claim is based) had sufficient occupational exposure to asbestos or asbestos-containing products manufactured or supplied

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

OBJECTION OF CCR DEFENDANTS TO DISCOVERY REQUESTS NOTICED BY SHELVA WEISE ET AL. AND MOTION FOR PROTECTIVE ORDER

On April 7, 1993, objectors Shelva Weise et al. filed five Notices of Deposition and two Requests for Production of Documents. Pursuant to Rule 26 of the Fed. R. Civ. P., the defendant members of the Center For Claims Resolution ("CCR") believe this discovery is improper and unauthorized at this time. The grounds for this objection and motion are set forth more fully below.

1. Shelva Weise et al. have sought to notice the depositions of four named class representatives and one designated class counsel. In addition, these objectors have served on the defendants and one named plaintiff Requests for Production of Documents. These discovery requests are inappropriate at this time, as the objectors themselves recognized on March 26, 1993 when they filed their "Motion for Leave to Conduct Discovery on Intervenor Plaintiffs' Jurisdictional and Pre-Trial Motions."[1] In that Motion, the objectors argued that *leave* should be granted to conduct this discovery with respect to certain "threshold issues concerning recusal, jurisdiction, and the propriety of certification of this class action." Br. in Support of Mot. at 1 (emphasis added). The Court, however, has not granted such leave and, consequently, no discovery should proceed.

2. Moreover, on April 15, 1993, the Court rendered a Memorandum Opinion and Order denying these objectors intervenor status. In that Order, the Court explicitly dismissed the

[1] A copy of this Motion is attached hereto as Exhibit A.

threshold motions filed by the objectors "without prejudice to their being reasserted as objections to the class settlement."[2] Since the motions which provided the predicate for discovery have been dismissed, and no new objections have been filed, there is no basis for the proposed discovery at this time.

3. Finally, the CCR defendants believe that, at the appropriate time, certain discovery by the objectors, as it relates to the fairness of the settlement, should be allowed to proceed.[3] This Court has ordered, however, that, given the confidential nature of the discovery objectors may request, all discovery should be supervised by Special Master Burbank. See Order dated January 29, 1993, attached hereto as Exhibit D. Accordingly, until the Special Master has had an opportunity to review the discovery requests and CCR's substantive objections to those requests, no discovery should be had.

Thus, for all these reasons, the CCR defendants object to the discovery served by objectors and seek a Protective Order precluding any discovery from going forward unless or until leave for this to proceed has been granted.

Respectfully submitted,

/s/ JOHN D. ALDOCK
Wendy S. White

Shea & Gardner
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

[2] A copy of this Order is attached as Exhibit B.

[3] The CCR Defendants set forth their position on the timing of discovery in this action in their "Memorandum in Opposition to Objectors' Requests for Leave to Conduct Discovery on Threshold Issues" (filed March 30, 1993), attached hereto as Exhibit C.

Of Counsel:

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Princeton, New Jersey 08540

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Attorneys for Defendants
Represented by the Center for
Claims Resolution

DATED: April 26, 1993

* * * *

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

CCR DEFENDANTS' MEMORANDUM IN OPPOSITION TO OBJECTORS' REQUESTS FOR LEAVE TO CONDUCT DISCOVERY ON THRESHOLD ISSUES

Objectors seek leave to engage in discovery at this time in connection with the threshold issues pending before the Court. While the CCR defendants may have a more limited view as to what discovery should be allowed in connection with the fairness hearing, we agree that certain discovery will be appropriate before that hearing. The fairness hearing, and the discovery preceding it that will be supervised by the Special Master, will address the fairness of the proposed settlement and issues going to final class certification, including adequacy of class counsel.

We show in this memorandum, however, that no discovery should be permitted until after (1) the Court has resolved certain

threshold legal issues and (2) notice is approved for dissemination to the class members. The CCR defendants have moved for a schedule to resolve, prior to dissemination of the notice, certain jurisdictional and other preliminary legal questions. Those questions include only the key threshold issues that raise pure questions of law and that can be decided without delay for discovery. By contrast, there is no need or reason to hold up approval and dissemination of the notice for discovery concerning the fairness of the settlement and final class certification. Indeed, it would be inappropriate for the Court to decide the nature and scope of permissible discovery before dissemination of the notice has begun and other absent class members have an opportunity to register objections.

We thus show that to the extent that objectors' "motions" address the key threshold issues to be resolved before dissemination of the notice, no discovery is warranted because the issues turn on undisputed facts and raise pure questions of law. We also show that the remaining issues raised by the objectors' "motions" should be handled after approval and dissemination of the notice, and that discovery on those issues should be supervised by the Court and the Special Master at that time.[1]

I. DISCOVERY IS NOT NECESSARY OR APPROPRIATE FOR THE OBJECTION TO CERTIFICATION OF THE CLASS UNDER THE STANDARDS OF RULE 23

The objectors' "Motion to Decertify" argues that this case cannot meet the various requirements of Rules 23(a) and 23(b) when viewed as a litigation class. While the CCR defendants do not disagree with that position, it misses the fundamental point: this case involves the certification of a class *for settlement purposes*

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[1] When the Baron & Budd objectors filed their six "motions" on March 17, only the recusal motion suggested any need for discovery. It was not until the CCR defendants moved for a prompt schedule to resolve the threshold legal issues that objectors reversed course and claimed to need discovery on all of their objections. The circumstances thus suggest that the discovery motion seeks to delay, rather than advance, the proceedings.

only.[2] Courts and commentators have agreed that the Rule 23 criteria are applied differently, and are more easily satisfied, in the settlement context than in a litigation action.[3] Hence all of objectors' arguments as to why this action cannot be certified as a litigation class are inapplicable, and discovery relating to those contentions is equally beside the point.

Discovery is also inappropriate now because the final decision as to certification of the class is a matter to be addressed in connection with the fairness hearing, not now. When, as here, a class is conditionally certified for purposes of settlement only, the "actual class ruling is deferred" until the final fairness hearing, at which time the Court decides both whether the settlement should be approved and whether the class should be finally

* * * *

[2] It is well-settled that "[t]here is no impediment to determining a class action for the purpos[illegible] settlement only." *Girsh* v. *Jepson*, 521 F.2d 153, 155 n.3 (3d Cir. 1975); accord *Greenfield* v. *Villager Indus., Inc.*, 483 F.2d 824, 826 (3d Cir. 1973); *Philadelphia Hous. Auth.* v. *American Radiator & Standard Sanitary Corp.*, 323 F. Supp. 364, 366 (E.D. Pa. 1970); Manual for Complex Litigation Second § 30.45, at 242-44 (1985); 2 H. Newberg & A. Conte, Newberg on Class Actions § 11.27 (3d ed. 1992).

[3] See, *e.g.*, 2 H. Newberg & A. Conte, *Newberg on Class Actions* § 11.28, at 11-57 to -58 (3d ed. 1992); *Manual for Complex Litigation Second* § 30.45, at 243; *In re A.H. Robins Co.*, 85 B.R. 373, 378 (E.D. Va. 1988), *aff'd*, 880 F.2d 709 (4th Cir. 1989); *In re First Commodity Corp.*, 119 F.R.D. 301, 308 (D. Mass 1987).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

OBJECTION OF PLAINTIFF CLASS REPRESENTATIVES TO DISCOVERY REQUESTS NOTICED BY SHELVA WEISE, ET AL. AND MOTION FOR PROTECTIVE ORDER

Objectors Shelva Weise, et al. on April 7, 1993 filed five Notices of Deposition and two Requests for Production of Documents. Pursuant to Rule 26 of the Federal Rules of Civil Procedure, the plaintiff class representatives hereby object to this discovery on the grounds that said discovery is improper and unauthorized at this time.

Plaintiff class representatives hereby join in the objection of the CCR Defendants to said Discovery Requests and adopt by reference the Objection and Motion filed by Counsel for the CCR Defendants on April 26, 1993.

Respectfully submitted,

DATED: April 28, 1993

/s/ RONALD L. MOTLEY

/s/ JOSEPH F. RICE

/s/ GENE LOCKS
Counsel for the Class

Ronald L. Motley, Esquire
Joseph F. Rice, Esquire
Ness, Motley, Loadholt,
Richardson & Poole
151 Meeting Street, Suite 600
Charleston, SC 29404

* * * *

presence of asbestos-induced injury by plaintiffs' lawyers, businesses, school districts, and public utilities. I have examined literally thousands of persons to determine whether or not they had sustained an asbestos-related physical injury. I have also treated persons who had sustained asbestos-related injuries. I have testified in dozens of trials and depositions, in both state and federal courts, on the issue of whether a given plaintiff has sustained an asbestos-related injury and if so, the extent of the medical expense that he or she will likely incur in the future as a result of the asbestos-related injury. I am thoroughly familiar with the cost of detection and treatment of asbestos disease both locally and nationally.

4. A person who has been occupationally exposed to asbestos is at risk for the development of the non-malignant diseases of asbestosis and pleural thickening, as well as asbestos-related malignancies such as lung cancer, mesothelioma, and various intestinal cancers. A person who was occupationally exposed to asbestos in the past but who has not yet manifested any asbestos-related disease and suffers no physical symptoms attributable to asbestos disease should nonetheless be monitored to enable the early detection of asbestos-related disease, particularly malignancies. Such a person should have, at most, an annual evaluation conducted by a qualified physician, which would include a medical history, chest x-rays, screening pulmonary function testing, and physical examination. In most instances, after a negative initial evaluation and with the absence of symptoms attributable to asbestos exposure, annual chest x-rays are sufficient to detect early changes associated with asbestos exposure.

5. Based on my experience and investigation, the cost of a medical evaluation to detect the presence of asbestos-related disease, including history, physical, chest x-rays, and screening pulmonary function testing should not exceed $500 in any part of the United States.

/s/ THOMAS LEE KURT

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

DECLARATION OF ROBERT FIORE

I, Robert Fiore, state as follows:

1. I am 48 years old and a citizen of the State of New Jersey. I am executing this affidavit on behalf of myself and the Skill Trades Association, Inc. ("STA"), an association of trade unionists representing all the skilled trades workers at the Newark Housing Authority ("NHA"). These workers include plumbers, carpenters, welders, painters, and masons.

2. I have been employed as an electrician by NHA for 29 years. During that time, I have been exposed to asbestos in pump and tank rooms and in boiler rooms. I have been exposed to asbestos through work on elevator systems (particularly, brake shoes) and through work on electrical wires insulated with asbestos. I have also worked in areas where asbestos was disturbed by other workers. The other skilled trades at NHA have been exposed to asbestos in much the same function.

3. Although exposed to asbestos for a large portion of my work career, and therefore a member of the proposed class in the above-styled case, I have no known manifestation of asbestos-related disease, such as pleural plaques, other pulmonary impairment, or more serious disease such as mesothelioma or lung cancer.

4. To my knowledge, none of my NHA co-workers have suffered or are currently suffering from asbestos-related disease, despite their long-term occupational exposure to asbestos. I realize, however, that they may contract an asbestos-related disease in the future.

5. STA, along with the National Asbestos Victims Legal Action Organizing Committee (NAVLAOC), has a long history advocating our views concerning asbestos in the workplace. At NHA, as in many other workplaces, there was extreme laxity in the use of asbestos. After STA recognized the dangers of working around asbestos, we began pushing for significant changes in working conditions and to promote abatement. In particular, we discovered that $5-$6 million that had been earmarked in the late 1980's by the federal government for asbestos abatement at NHA, had been used improperly for other purposes. We exposed this in 1989, and since that time moneys have been reallocated and abatement has gone forward.

5. STA opposes certification of this class action because it is unfair to asbestos victims who wish to have access to the tort system, and because if unfairly grants no compensation to certain asbestos victims who have some asbestos-related impairment, but have not manifested particular diseases. We are taking this stand on behalf of other workers who are unaware of this action or its full implications, but who will suffer if the proposed settlement is approved.

6. As I said above, I am 48 years old and have been exposed to asbestos for nearly 30 years. Thirty years ago there was extreme carelessness, and even callousness, concerning the continuing exposure of myself and my co-workers to this highly dangerous toxin. I have come to live with the possibility that I may fall ill some day, and it doesn't worry me. I have not yet undertaken any medical monitoring, nor do I suffer emotional distress or fear that someday asbestos disease will strike me down. In addition, co-workers of mine who have strived to improve asbestos education and promote responsible abatement practices feel much the same way. We want to make the best of a difficult situation, but are not emotionally debilitated.

7. As a member of the National Asbestos Victims Legal Action Organizing Committee, STA fully supports NAVLAOC's efforts to stop the proposed *Carlough* settlement from being approved and will participate in the above-styled case to that end.

Signed under the penalties of perjury pursuant to 28 U.S.C. §1746. Executed on 26 July 1993.

/s/ ROBERT FIORE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

DECLARATION OF MYLES O'MALLEY

I, Myles O'Malley state as follows:

1. I am 50 years old and a citizen of the State of New York. From 1972 to 1984, I was a member of the United Brotherhood of Carpenters, first in New Orleans, La., and finally in Brooklyn, NY. During those years I also worked intermittently for non-union construction companies performing small-scale commercial and residential renovation and demolition.

2. In Louisiana, I worked on large-scale projects such as the building of the Dome Stadium and the refurbishment of oil processing vessels at the Tenneco Oil Refinery in Chalmette, La. In the New York area I have worked on projects, union and non-union, which have exposed me to a variety of materials whose likelihood of containing asbestos was great. For instance, I have cut with a circular saw cement board, commonly referred to as "transite." I have worked on fire doors exposing their internal core. I have enclosed spray fire proofing material with sheetrock and I have installed a variety of ceiling tiles. I have worked on projects where the wall and ceiling dust was so thick in the air that visibility was impaired. I have worked on a window replacement project where asbestos blankets were used to catch broken glass. These blankets would become so frayed that the workers would leave the job at the end of the day with small round balls of asbestos cloth clinging to their clothing. In short, I have been occupationally exposed to asbestos and am a member of the proposed class in the above-styled class action.

3. I currently suffer a deficit on my Pulmonary Function Test indicating chronic obstructive lung disease. I regularly experience shortness of breath and tightness in my chest. Since I

do not smoke, I attribute these conditions to my exposure to asbestos.

4. Through my work with various groups (explained below), I have been an advocate for the rights of asbestos victims, and I teach classes on responsible asbestos abatement. Although I am resolute in my work on behalf of asbestos victims and in my desire to expand public appreciation of the hazards of asbestos, I do not fear the day when I may become seriously ill with an asbestos-related disease. That may or may not occur, but in the meantime I, like many of my colleagues in the asbestos victims' movement, am not suffering emotionally but direct my energies both intellectually and emotionally toward keeping others from getting exposed to asbestos.

5. I have been the executive director of The White Lung Association of New Jersey ("WLANJ") since its founding in 1982. WLANJ is located at 390 Broad Street, Newark, New Jersey, 07104. WLANJ is a nonprofit charitable organization whose purposes are to advocate for the rights and protection of asbestos victims and to prevent the further incidence of asbestos-related diseases among asbestos abatement workers.

6. WLANJ is in regular contact, through its newsletter and educational programs, with 15,000 asbestos victims and others who have been occupationally exposed to asbestos. Many of the individuals whom we serve have developed various asbestos related diseases such as lung cancer and mesothelioma, the former disease resulting in death 95% of the time; the latter resulting in death invariably. In addition, many individuals with whom we work have developed scarred lung tissue which impairs the quality of their lives. Many other members have been exposed to asbestos, but have not been diagnosed with asbestos-related diseases. This is frequently the case because significant scarring of the lung can occur without It being detected on x-ray. In some cases, occupational exposure to asbestos can result in lung cancer without

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DECLARATION OF KATHERINE KINSELLA

1. My name is Katherine Kinsella. I am a Senior Vice President and Senior Consultant to The Kamber Group, the largest independently-owned communications company in Washington, D.C. In February 1993, The Kamber Group and I were retained by Class Counsel and counsel for the twenty member companies of the Center For Claims Resolution ("CCR") to design a plan for notifying class members in the settlement class action, *Carlough* v. *Amchem Products, Inc.*, C.A. No. 93-CV-0215 (E.D. Pa.).

2. The Kamber Group was founded thirteen years ago by Victor Kamber, who had been special assistant to the president of the Building and Industrial Trades Department of the AFL-CIO. The Kamber Group handles a variety of communication tasks for a multitude of labor unions, along with many other clients.

3. I have over twenty years of experience in the field of communications and, in my almost eleven years with The Kamber Group, have held creative and management oversight responsibility for a variety of clients — ranging from political candidates and national associations to commercial enterprises. For example, at The Kamber Group, I directed a $2.3 million annual national advertising campaign for three years for the National Education Association, a direct response print advertising campaign for the Consumer's United Insurance Company, and a radio advertising campaign for PEPCO, the Washington, D.C. area public electric utility.

4. In 1986, I developed a national notification campaign for asbestos claimants in the Johns-Manville bankruptcy reorganization. That notification campaign included press, direct mail, and a $1.7 million advertising campaign, including both T.V. and print advertisements. One purpose of the notification was to inform individuals with current or potential personal injury asbestos-related claims against Johns-Manville of the impact of Johns-Manville's reorganization on their rights, and to give them a voice in the reorganization proceedings. In approving the notification plan, the District Court in the Manville reorganization referred to it as "an extensive campaign designed to provide the maximum amount of publicity * * * that was reasonable to expect of man and media." *Johns-Manville Corp.*, 68 B.R. 618, 626 (Bankr. S.D.N.Y. 1986),

aff'd, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. Kane* v. *Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

5. I understand that the class in *Carlough* includes all persons who were exposed occupationally, or through the occupational exposure of a spouse or household member, to asbestos or asbestos-containing products for which one or more of the 20 CCR member companies may bear legal liability, and who had not filed a personal injury lawsuit based on that exposure as of January 15, 1993. The occupational exposure must have occurred in the United States or its territories, or while working aboard U.S. military, merchant, or passenger ships, and the occupationally exposed persons must have resided in the U.S. or its territories as of January 15, 1993. Legal representatives and family members of such occupationally exposed persons who had not, as of January 15, 1993, filed a lawsuit based on that exposure, are also included in the class.

6. I also understand that "occupational exposure" to asbestos generally means that an individual's job responsibility involved working with or around asbestos or asbestos-containing products. Such exposures usually occurred in industrial settings. "Occupational exposure" to asbestos does not include "environmental exposure," such as that potentially experienced by office workers in buildings where asbestos products were present.

7. In order to help me design a notification plan, CCR counsel provided me with certain information: First, concerning the over 200,000 asbestos personal injury claims that have been brought against one or more CCR defendants from the early 1970s (when the first asbestos-related personal injury claims were filed) through the spring of 1993, CCR counsel provided me: 1) a list of state jurisdictions (city or county) or federal judicial districts where the CCR's data shows that more than 100 claims have been filed against one or more CCR defendants, and the number of claims filed in those jurisdictions; 2) a list of jobsites, jobsite locations (to the extent available), and the number of claims at each jobsite, where the CCR data shows that more than 100 claims alleging asbestos exposure at that jobsite have been filed against one or more CCR defendants; 3) a list of the names and addresses of approximately 1,000 attorneys, which is the most complete list that the CCR has of attorneys who have represented plaintiffs who have

filed claims against one or more CCR defendants; and 4) a list of over 1,000 state and federal courts that have handled (either at trial or on appeal) claims filed against one or more CCR defendants. Second, CCR counsel gave me a list of the types of asbestos or asbestos-containing products for which one or more of the 20 CCR defendants may bear legal liability, and the occupations where exposure to these products potentially occurred. Finally, CCR counsel gave me a list of over 9,000 plaintiffs, sorted by plaintiffs' counsel, whose suits against one or more CCR defendants were filed and reported to the CCR from January 15, 1993 through July 31, 1994. The CCR will update this list periodically until two weeks prior to the close of the notification period. I used all of this information, along with the knowledge I gained through my experience in the Manville notification campaign and the resources of The Kamber Group, to design a notification plan for the class in *Carlough*.

8. The notice plan that I designed has several aspects: 1) individual notice, by first class mail, to any potential class member whose name and address can be ascertained through reasonable effort, including any individual who identifies himself or herself as a potential class member, either by calling a special 800 number or by calling or writing to Class Counsel — phone numbers and addresses that will be widely disseminated to potential class members through a variety of notification efforts; 2) notice, through a notification package including various notification materials, to the over 1,000 counsel on the CCR's list who have represented plaintiffs in claims against one or more CCR defendants; 3) notice, through a notification package including various notification materials, targeted to numerous unions and labor bodies at the national, state, and local levels, that may have current or retired members who may be members of the *Carlough* class; 4) notice, through a notification package including various notification materials, targeted to numerous trade or other organizations that may have members in the class, or that may have members that may be able to assist in the notification effort; 5) notice, through a notification package including various notification materials, targeted to numerous trade, industrial or legal publications whose readers may include class members or counsel that routinely represent plaintiffs in the personal injury

litigation; 6) an extensive paid media strategy, using both two rounds of print advertising in newspapers in numerous media markets and in *Parade* magazine, and one round of television advertising; and 7) a strategy designed to encourage public service announcements concerning the class action and proposed settlement in *Carlough* in newspapers, television, radio, and wire services in numerous media markets throughout the United States. In addition, notification packets containing various notification materials will be sent to the over 1,000 state and federal courts that have handled (at trial or on appeal) asbestos personal injury claims against one or more CCR defendants.

9. As noted above, one of the key objectives of all the parts of this notification campaign that supplement the individual mail notice is to encourage potential class members whose names and addresses cannot be ascertained through reasonable efforts to call an 800 number or to contact Class Counsel, so that a complete individual notice packet may be sent by first class mail to those potential class members.

10. Before explaining each aspect of this notification campaign, I will first describe the various notice materials to be used in this campaign.

NOTIFICATION MATERIALS

11. The primary notification document is a full Notice, which is 27-page document that is attached to this Declaration as Exhibit A. This full Notice is a combination notice under Federal Rule of Civil Procedure 23(c) and (e), which means that it gives class members notice of both the class action and the proposed settlement. Pursuant to Rule 23(c), this document notifies class members of the class action, explains the procedures for opting out of the class and the consequences of remaining in the class, and informs each class member who does not opt out of his or her right to enter an appearance in the class action through counsel. The Notice includes an Exclusion Request form that class members who wish to opt out must complete and return to the Court. Pursuant to Rule 23(e), the Notice also summarizes the terms of the proposed settlement — both briefly in the body of the Notice and in greater detail in a 14-page Appendix, informs class members how to obtain a full copy of the settlement agreement, and explains

how class members may review additional materials relevant to the class action and proposed settlement.

12. Attached to this Declaration as Exhibit B is a document entitled "Questions and Answers on the Class Action Lawsuit and Proposed Settlement." This document is essentially an explanation of the main points of the full Notice in a question and answer format. It takes important chunks of information concerning the class action and settlement, and breaks them down into smaller units that can be more easily understood. My own experience and the experience of The Kamber Group is that the question and answer format is an extremely effective method of communicating complex material.

13. Attached to this Declaration as Exhibit C is the layout of an advertisement that is designed to run in various newspapers (primarily the Sunday editions), and in *Parade*. The advertisement will be one-half page in most newspapers, and one full page in tabloid-style newspapers and in *Parade*.[1] The ad gives basic information about the class action, the proposed settlement, the procedures for opting out and the consequences of remaining in the class, and the right to enter an appearance through counsel. The ad has an attention-grabbing headline, directed in bold letters to "ALL PERSONS WHO HAVE WORKED WITH OR AROUND ASBESTOS OR ASBESTOS-CONTAINING PRODUCTS, THEIR SPOUSES, HOUSEHOLD AND FAMILY MEMBERS AND LEGAL REPRESENTATIVES"; in addition, a list of asbestos-containing products, and occupations where exposure to these products potentially occurred, is included in the ad. The ad urges any potential class members with questions to call the special 800 telephone number or to contact Class Counsel to obtain a complete individual notice packet.

14. Attached to this Declaration as Exhibit D is the text of a 30-second television advertisement. This ad is designed to catch the attention of potential class members, to alert potential class members to the class action and settlement, to encourage them to

[1] Due to the size of a page in *Parade*, the headline of the advertisement will be slightly smaller than shown in Exhibit C. The text of the ad in Parade, however, will be identical to Exhibit C.

look in their newspapers for the advertisement described in Paragraph 13 above, and to stimulate them to call the special 800 telephone number to receive a complete individual notice packet. The ad will be both oral and visual, with a rolling text on the screen, which will increase its notification potential. The 800 number will be repeated twice during the ad.

15. Attached to this Declaration as Exhibit E are camera-ready materials (an article and a short advertisement) concerning the class action and settlement. These are materials that unions and other organizations are likely to include in their journals or other publications for their members. These camera-ready materials are designed to be used in publications, such as those distributed by many unions and labor bodies, that will not accept paid advertising and that thus will not run the one-half page advertisement (Exhibit C) in their publications. Similar materials were distributed to unions and other organizations in the Johns-Manville notification campaign.

16. Attached to this Declaration as Exhibit F are lists of the CCR defendants, and of asbestos and asbestos-containing products and occupations reproduced from the full Notice. These lists will be included in the notification materials sent to unions and similar trade or professional organizations.

17. Attached to this Declaration as Exhibit G is a press release and newscast script for distribution to numerous media outlets. Like the other notification materials, these documents give basic information concerning the class action and settlement. These materials are designed to be distributed to newspapers, television, radio, and wire services in numerous media markets across the United States.

18. Attached to this Declaration as Exhibit H is the script to be followed by the 800 telephone operator when answering calls placed to the special 800 number that all the notification materials urge potential class members to telephone to obtain a complete individual notice packet. The script ensures that erroneous information concerning the class action and settlement will not be disseminated by the 800 operators. Pre-stuffed individual notice packets will be labeled so that the correct materials (the individual

notice packets or the Stipulation of Settlement itself) are mailed to potential class members who call the 800 number.

19. Finally, attached to this Declaration as Exhibits I through N are cover letters to be sent, along with the various notification materials, to potential class members, plaintiffs' attorneys, unions and labor bodies, trade and other organizations, trade, industrial, or legal publications, media outlets, and state and federal courts.

INDIVIDUAL NOTICE

20. The first task in designing the notification plan for the *Carlough* class was to determine for which potential class members names and addresses could be ascertained through reasonable effort. As noted in Paragraph 7 above, CCR counsel gave me a list of over 9,000 plaintiffs (sorted by plaintiffs' counsel) whose suits for asbestos-related personal injuries against one or more CCR defendants were filed and reported to the CCR from January 15, 1993 through July 31, 1993. With respect to the names and addresses of other potential class members, CCR counsel and Class Counsel informed me of the following: 1) the vast majority of exposure to asbestos or asbestos-containing products manufactured or supplied by one or more of the CCR defendants (or for which a CCR defendant may otherwise bear legal liability) occurred at jobsites, such as shipyards or construction sites, that were operated by third parties; 2) the majority of these exposures occurred years ago; and 3) a large number of the workers exposed to asbestos at these jobsites were union members. Using all this information, the notification plan calls for the following efforts to give individual notice to potential class members.

21. Under the notification plan, complete individual notice packets, including the full Notice (Exhibit A), the Questions and Answers (Exhibit B), and an appropriate cover letter (Exhibit I), will be sent, by first class mail, to counsel for all plaintiffs (or to the plaintiffs directly, if unrepresented by counsel) who have filed lawsuits against one or more CCR defendants from January 15, 1993 through July 31, 1993. This list will be continually updated throughout the proposed ninety-day notification period, with complete individual notice packets sent to new entrants on the list up until two weeks prior to the close of the notification period.

22. Using the lists from CCR counsel of the types of asbestos or asbestos-containing products and occupations where exposure to these products potentially occurred, my experience in the Johns-Manville notification campaign, the knowledge of The Kamber Group concerning labor organizations, reference books describing various unions, and phone calls to certain national union headquarters, I drew up a list of 56 national or international unions that may have current or retired members in the *Carlough* class.[2] This list of 56 unions, including their current membership figures, is attached to this Declaration as Exhibit O. The total current membership of these 56 unions is approximately 9.2 million.[3] Based on the experience of The Kamber Group in working with labor unions, I know that lists of the names and addresses of current or retired members of these unions are not publicly available. Accordingly, under the notification plan, a letter will be sent (see Exhibit P) to each of these 56 unions to ask for names and addresses of any current or retired members who worked with or around asbestos or asbestos-containing products, or, if such names and addresses cannot be made available, for some alternative means, such as a mailing by the union at our expense, through which notice of the *Carlough* class action and proposed settlement may be mailed to current or retired union members. Follow-up phone calls to all 56 unions on this list will be made. To the extent permitted by the unions, complete individual notice packets (consisting of Exhibits I, A, and B) will be sent, by first class mail, to all names and addresses generated through these efforts. If, however, some of these unions are willing to enclose notification materials to their current or retired members along with some other union mailing, such as pension checks, but are willing to send only a one-page notification rather than a complete individual notice packet, we will provide those unions with copies of the short ad

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[2] Reference books that were used to draw up this list were the *Directory of U.S. Labor Organizations* (BNA, 1984-85 & 1992-93 eds.), and *Organizations Affiliated with American Federation of Labor and Congress of Industrial Organizations* (AFL-CIO, Jan. 31, 1992).

[3] This number was computed from the *Directory of U.S. Labor Organizations* (BNA, 1992-93 ed.).

(Exhibit E) for insertion in these mailings, and will pay all costs associated with this mailing.

23. The Department of Labor maintains lists of local unions affiliated with the 56 national and international unions listed in Exhibit O. For any national or international union that declines our request, outlined in Paragraph 22 above, for help in mailing notification to their current or retired members, letters will be sent to certain local unions affiliated with that national or international union to make the same request for help in the notification campaign that was made to the national or international union. The local unions that will be contacted will be those in areas where the listings I have of CCR case filings and jobsites shows that there have been large numbers of claims filed against one or more CCR defendants. The letter that will be sent to these local unions will be essentially identical to the letter attached as Exhibit P. To the extent permitted by these local unions, complete individual notice packets (consisting of Exhibits I, A, and B) will be sent, by first class mail, to all names and addresses generated through these efforts. As with the national and international unions, if certain local unions are willing to mail to current or retired members only a one-page notification concerning the *Carlough* class action and settlement, rather than a complete individual notice packet, the short ad (Exhibit E) will be used, and we will pay all costs associated with this mailing.

24. As noted in Paragraph 7 above, CCR counsel provided me with a list, by name and address, of approximately 1000 attorneys, which is the most complete list that the CCR has of attorneys who have represented plaintiffs who have filed claims against one or more CCR defendants. Under the notification plan, an information and notification packet, consisting of an appropriate cover letter (Exhibit J), and Exhibits A, B, C, E, and F will be sent, by first class mail, to each attorney on this list. The cover letter will ask each attorney to furnish to me the names and addresses of any potential class members known by the attorney so that complete individual notice packets (Exhibits I, A and B) may be mailed to those potential class members. The letter to these attorneys will make clear that I will keep the names of potential class members furnished to me confidential, and that I will not

disclose those names to the settling parties (other than as part of a list of class members who receive individual notice).

25. Finally, every notification document designed for distribution to unions or other organizations or to mass media (Exhibits C — E & G) urges class members to call a special 800 telephone number. A script that the 800 telephone operators will follow is attached as Exhibit H. Every potential class member who calls the 800 number, and who has not already received a complete individual notice packet (consisting of Exhibits I, A and B) will be sent such a packet by first-class mail. In this way, the notification materials should help generate a substantial list of additional potential members of the *Carlough* class to whom a complete individual notice packet may be mailed.

NOTIFICATION THROUGH PLAINTIFFS' ATTORNEYS

26. As noted in Paragraph 24 above, information and notification packets, consisting of Exhibits J, A, B, C, E, and F will be mailed to over 1,000 attorneys who have represented plaintiffs against one or more CCR defendants. In addition to asking each attorney for the names of potential class members, the cover letter (Exhibit J) will also ask each plaintiffs' attorney to use the notification materials to help notify potential class members of the class action and proposed settlement in any way that the attorney can.

NOTIFICATION THROUGH UNIONS AND OTHER LABOR BODIES

27. As explained in Paragraph 22 above, Exhibit O is a list of 56 national and international unions (with a total membership of some 9.2 million) that are likely to have current or retired members who are members of the *Carlough* class. Under the notification plan, information and notification packets will be sent to the President, Secretary-Treasurer, General Counsel, Health & Safety Director, Retiree/Pension Director, and Publication Editor at each of the 56 unions. These are the key officials in every union, and should include any officials conceivably responsible for notifying the union membership of the *Carlough* class action and settlement, or involved with those responsible in the union for giving such notice. The packet will consist of a cover letter (Exhibit K), Exhibits A, B, C, E, and F. These mailings will urge each union

to use all reasonable means to notify its current members and retirees concerning the class action and settlement; and the camera-ready materials (Exhibit E) will be available for immediate use in any publications distributed by the unions to their current members and retirees.

28. Identical information and notification packets will be sent to the President, Secretary-Treasurer, and publication editors of five trade and industrial departments of the AFL-CIO (the Building and Construction Trades Department, the Industrial Union Department, the Maritime Trades Department, the Metal Trades Department, and the Transportation Trades Department). Identical packets will be mailed to the same officials in the AFL-CIO State Federations, the AFL-CIO Central Labor Councils, the State Building Trades Councils, and the Local Building Trades Councils. All of these organizations constitute national, state, or local federations comprised of various combinations of the 56 unions listed in Exhibit O. In addition, identical packets will be sent to the President and Secretary-Treasurer at the approximately 10,000 to 15,000 local labor unions affiliated with these 56 national unions in areas where the CCR case and jobsite listings show that there have been large numbers of claims filed against one or more CCR defendants. Again, the purpose of these mailings is to encourage union officials to use the materials provided to notify their current members and retirees concerning the class action and settlement.

29. As a follow-up to these notification efforts to potentially affected unions, telephone calls will be made to all 56 national unions, and to those labor organizations and local unions in areas where there have been large numbers of claims filed against one or more CCR defendants, to urge them to use the materials provided to notify their current members and retirees of the class action and proposed settlement.

NOTIFICATION THROUGH TRADE OR OTHER ORGANIZATIONS

30. A similar notification plan will target trade or other organizations whose members may potentially be in the class, or whose members may be able to assist in the notification effort. Using the lists from CCR counsel of the asbestos or asbestos-containing products and occupations where exposure to these

products potentially occurred, my experience in the Johns-Manville notification campaign, reference books listing and describing various trade and other organizations, and, in some cases, telephone calls to the organizations themselves, I drew up a list of 40 trade or other organizations that may potentially have members in the *Carlough* class, or that may have members that may be able to assist in the notification effort.[4] This list (with the approximate number of members in each organization) is attached to this Declaration as Exhibit Q. The total membership in those 40 organizations exceeds 38.7 million. Under the notification plan, an information and notification packet will be sent to each of these 40 organizations. As with the packets sent to the various labor organizations, the information and notification packet sent to these organizations will include a cover letter (Exhibit M), and Exhibits A, B, C, E and F. These mailings will urge each organization to use all reasonable means to notify its members concerning the class action and settlement; and the camera-ready materials (Exhibit E) will be available for immediate use in any publications distributed by the organization to its members.

NOTIFICATION THROUGH TRADE, INDUSTRIAL, AND LEGAL PUBLICATIONS

31. Relying upon the same information and experience that I used to derive the lists of unions and trade or other organizations with potential class members (see Paragraphs 22 and 30 above), various reference works listing and describing numerous trade, industrial, and professional publications, and, in some cases, telephone calls to the publication in question, I derived a list of 41 trade, industrial, or legal publications whose readers may include individuals who worked with or around asbestos or asbestos-containing products, or counsel that routinely represent plaintiffs in the asbestos personal injury litigation.[5] This list of publications,

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[4] Reference books that were used to draw up this list of associations were the *Associations Yellow Book* (Vol. 1, No. 2, Winter 1992), and the *Encyclopedia of Associations* (26th ed. 1991).

[5] Reference books that were used to draw up this list of publications were *Bacon's Media Alerts* (10th ed. 1992), and *Gebbie Press - All in One Directory* (1990).

including circulation figures, is attached to this Declaration as Exhibit R. The total circulation of these 41 publications is approximately 4.5 million. Under the notification plan, an information and notification packet will be sent to each of these publications. These packets will include a cover letter (Exhibit M), and Exhibits A, B, C, E and F. The cover letter will urge each publication to use these notification materials to publicize the class action in *Carlough* and the proposed settlement to its readers.

NOTIFICATION THROUGH PAID MEDIA

32. A fifth element of the notification plan is a paid media strategy designed to notify class members of the class action and proposed settlement, and to encourage them to call the special 800 number or to call or write Class Counsel to receive a complete individual notification packet. The paid media strategy has three elements: two rounds of print advertising that will be placed in the newspapers (primarily the Sunday editions) in numerous key media markets and in *Parade* magazine; and a thirty-second television advertisement that will be aired throughout the week prior to the first round of print advertising.

33. Before designing the paid media plan, I ascertained the primary demographic features of the class members to be notified. I was informed by CCR counsel that the majority of occupational exposure to asbestos or asbestos-containing products occurred before the end of the 1970s, that the CCR member companies had ceased supplying most of those products by the early 1980s, and that the latency period for the development of asbestos-related disease is, in many cases, 20 years or more. Using this information, and similar information that I obtained in my experience with the Johns-Manville notification campaign, I determined that the primary target group for notification would likely be males of ages 45 and older. Accordingly, the paid media plan that I designed is weighted towards this group, although media vehicles selected are designed also to target males and females of ages 35 or greater.

34. As a first step in designing the paid media plan, I used the case and jobsite lists furnished to me by CCR counsel (see Paragraph 7 above) to identify the media markets (referred to as Areas of Dominant Influence, or ADIs) where this data showed that

cases had been filed against one or more CCR defendants from the early 1970s forward. I then went through each ADI and identified the dominant newspaper or newspapers, and any secondary newspaper where the case or jobsite lists showed that a significant number of cases had been filed. Once I had assembled this list of newspapers, I checked to make sure that the list included newspapers in the top 50 U.S. media markets, areas where large shipyards had been located, and major retirement areas. At the end of this process, I had assembled a list of 292 newspapers, covering 136 ADIs. Those newspapers and ADIs are listed in Exhibit S.

35. Under the notification plan, a first round of print advertising will run in all 292 newspapers (136 ADIs). The approximate circulation of those 292 newspapers is 46 million. The one-half page print advertisement that will be published in each of the 292 newspapers is attached as Exhibit C. (The ad will be a full page in tabloid-style newspapers.) The ad will be run in the Sunday edition of those newspapers (unless the newspaper does not publish on Sunday, in which case the ad will be run during the week). Local Sunday newspapers were selected because they generally have the largest circulation of any day of the week, and because Sundays generally provide more leisure time for an individual to read the newspaper. To the extent possible, the ad will be placed in the sports section of the newspaper.

36. Under the notification plan, a second round of print advertising will be run in 59 media markets or ADIs, which are listed in Exhibit T. These 59 ADIs include 114 newspapers, with an approximate total circulation of 28 million. These 59 ADIs and 114 newspapers were selected because large absolute numbers of claims were filed against one or more CCR defendants in these ADIs, or large numbers of claims were filed in these ADIs as compared to the population in the ADI. This second round of print advertising, which will be run two weeks after the first round, will again consist of the same one-half or full page ad (attached as Exhibit C) and again will be run, to the extent possible, in the sports section in the Sunday newspapers in these 59 ADIs.

37. The same ad (Exhibit C) will also be placed during this time period in a full page of *Parade*, which is the largest general circulation magazine in the United States. *Parade* has a circulation of over 36 million and a readership of 73 million; it is included in

the Sunday edition in 351 local newspapers in the U.S. In addition, *Parade* reaches 35.9% of all men in the U.S. who are forty and older and who are not employed in professional, managerial, sales, or clerical positions, and 38% of all women in the U.S. who are forty and older and who are not employed in professional or managerial positions. The advertising in *Parade* will not only constitute a third round of advertising in numerous media markets, it will reach 11.8 million U.S. households that are outside the 136 ADIs where print advertising will be purchased.

38. I also used the list of ADIs derived from the case and jobsite lists (see Paragraph 34 above) to decide in which ADIs television advertising should be purchased. In selecting ADIs for television, I looked at several factors: areas where there have been a large absolute number of claims filed against one or more CCR defendants from the early 1970s forward; areas where there have been a large number of claims filed against one or more CCR defendants as compared to the population in the ADI; contiguous ADIs in areas where there are concentrations of cases against one or more CCR defendants; ADIs where major shipyards were located; ADIs that are major retirement markets; and ADIs that are the major ADI in an entire state. At the end of this process, I had assembled a list of 80 ADIs, which are listed in Exhibit U.

39. Under the notification plan, a thirty-second television ad will be aired in these 80 ADIs throughout the week before the first round of paid newspaper advertising appears in Sunday newspapers. The text of the thirty-second television ad is attached as Exhibit D to this Declaration. As explained above in Paragraph 14, the ad will have both a visual and an audio component, which should increase the likelihood that viewers note the information conveyed in the ad, particularly the special 800 number. That number will be repeated twice during the ad. As the text of the thirty-second ad (Exhibit D) makes clear, the purpose of the ad is to alert potential class members to the class action and settlement, to encourage them to look in their newspapers for the print advertisement, and, finally, to stimulate them to call the 800 number to receive a complete individual notice packet.

40. The television ad will run at all times of the day. The so-called "daypart mix" for the ad is attached as Exhibit V. The daypart and percent of media weight in each daypart were selected

based on programs available and to maximize coverage of the target demographic groups. As Exhibit V illustrates, news programming would be utilized for almost 50% of the daypart mix, in order to highlight the importance and immediacy of the message. Moreover, news programming has the potential of reaching all parts of the target audience, particularly those who are 50 years old or greater. Prime time programming was selected for part of the mix, since it traditionally draws the heaviest viewership. Weekend sports programming will be used where available to target specifically older males. The Early Fringe programming will be used to reach the non-working segment of the target audience, such as spouses and retirees, while Late Fringe and Adult Independent Prime will be used to reach younger members of the target audience, as well as those still in the work force.[6]

41. The strength of a purchase of television advertising time is evaluated by a concept known as "T.V. Households' Gross Rating Points" or "GRPs," which measure the "reach" and "frequency" of a given ad. For the thirty-second ad at issue here, the notification plan calls for a media buy of 400 T.V. Household GRPs in 56 of the 80 media markets or ADIs, and 200 T.V. Household GRPs in the remaining 24 ADIs. The 56 markets (which are listed as "A Markets" in Exhibit V) were selected because they are the largest markets in terms of audience, or because, from the early 1970s forward, they produced the greatest number, relative to their size, of claims against one or more CCR defendants. The 24 remaining markets (which are listed as "B Markets" on Exhibit V) either produced fewer claims against one or more CCR defendants in this time period relative to their size, are smaller media markets in general, and, in some cases, receive some coverage from the larger 56 markets.

42. The 80 markets selected for the media buy include 64 million T.V. Households, which is 69% of all T.V. Households in the United States. A media buy of 400 T.V. Household GRPs in the 56 larger markets means that, during the week of coverage, the thirty-second ad will reach 86.4% of TV Households within those

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[6] To determine an appropriate "daypart mix" for television ad, I relied on a Telmar software program, which in turn relies on standard data produced by MRI, Arbitron, and others.

markets, with a frequency of 4.6 times. A media buy of 200 T.V. Household GRPs in the 24 smaller markets means that, during the week of coverage, the thirty-second T.V. ad will reach 73.7% of T.V. Households within those markets, with a frequency 2.7 times. With this level of media buy, the ad should generate 250,286,000 target audience impressions among adults thirty-five years or older, which means that the ad should be seen 250,286,000 times.[7]

PUBLIC SERVICE MEDIA STRATEGY

43. A sixth element of the notification plan is a public service media strategy. This strategy is designed to provide notice of the class action and proposed settlement to potential class members through major print, radio and television outlets throughout the United States. Accordingly, a cover letter (Exhibit M), and a press release or newscast script (Exhibit G) will be mailed to all national radio stations and wire services. In addition, the same materials will be mailed to all major print, radio, and television outlets in the 136 media markets listed in Exhibit S. As explained above, these 136 media markets include the top 50 U.S. media markets, as well as other media markets where concentrations of claims against one or more CCR defendants have been filed. The top 50 U.S. media markets contain 67.12% of the U.S. population. The cover letter accompanying these materials (Exhibit M) will ask that these media outlets assist in publicizing the *Carlough* class action and proposed settlement. In certain large or otherwise significant media markets, follow-up telephone calls will be made to the media outlets receiving these notification packets to encourage them to use the materials sent to them.

NOTIFICATION TO STATE AND FEDERAL COURTS

44. Finally, complete information and notification packets (consisting of Exhibits A, B, C, E, and F) and an appropriate cover letter (Exhibit N), will be sent to the over 1,000 state and federal courts that have handled asbestos personal injury claims (either at

[7] These reach, frequency, and impressions numbers were computed using a Telmar software program which computes reach and frequency by demographics and media markets. This program relies on standard data produced by MRI, Arbitron, and others.

trial or on appeal) against one or more CCR defendants.[8] The cover letter will explain that these materials are being provided to the courts as a courtesy, and will ask the courts to help in the notification effort in any way that they can.

TIMING

45. The notification campaign outlined above would be largely completed within 7 or 8 weeks from its commencement. Mailings of individual notice packets to individuals who have filed claims since January 15, 1993, or whose names and addresses were ascertained from unions or plaintiffs' attorneys, would be completed, to the extent possible, within weeks 3-6. Mailings of notification materials to plaintiffs' attorneys, national and local unions, other labor bodies, trade or other organizations, trade, industrial and legal publications, mass media outlets, and state and federal courts, would be completed in this same time period. The paid television advertisement would run in weeks 4 or 5, with the first round of paid print advertisement on the Sunday at the beginning of week 5 or 6. The second round of paid print advertisement would appear on the Sunday at the beginning of week 7 or 8. The advertisement in *Parade* would also run in this same time period. The mailing of individual notification packets to potential class members who telephone the special 800 number, or to plaintiffs who file claims against one or more CCR defendants after July 31, 1993, would continue throughout the notification period.

MISCELLANEOUS MATTERS

46. I understand that the settling parties plan to obtain a post office box in the name of the Clerk of the Court for receiving Exclusion Requests from class members. They will have the box checked on a daily basis, and they will maintain a list and copies of all Exclusion Requests received.

47. I will maintain records concerning implementation of the notification plan outlined above. Those records will include a list

[8] The addresses for these 1,306 state or federal courts will be obtained from *BNA's Directory of State and Federal Courts, Judges, and Clerks* (4th ed., 1992), and *Want's Federal-State Court Directory* (1993 ed.).

of names and addresses of potential class members to whom individual notice packets (consisting of Exhibits A, B and I) were mailed.

COST

48. As I understand it, the entire cost of the notification campaign will be paid by the CCR defendants. I estimate that the campaign will cost between approximately $5 million and $6 million.

CONCLUSIONS

49. With respect to individual notice to potential class members, the notification plan set forth above includes reasonable efforts to obtain names and addresses of potential class members. Moreover, all the other notification efforts — the notification to plaintiffs' attorneys, unions and other labor bodies, trade or other organizations, trade, industrial and legal publications, the paid and public service media efforts, and the state and federal courts — are designed to encourage potential class members to identify themselves by calling the special 800-number, so that individual notice packets may be sent to them. The inclusion in the individual notice packet of both the full notice (Exhibit A) and the Questions and Answers (Exhibit B) is an attempt to give class members as much information concerning the class action and proposed settlement as possible, in a readable form. In my view, the individual notice components of this notification campaign are as strong as we can reasonably make them.

50. The notice targeted to various labor unions, labor bodies, trade or other organizations, various trade, industrial and legal publications, is also quite comprehensive. To derive the list of 56 national and international unions where notice will be targeted (Exhibit O), I used various reference books and other resources to identify unions with potential class members both within and outside the AFL-CIO. I placed telephone calls to several of these unions. I also looked at historical lists of trade unions, and traced the history of certain unions to discover their current affiliations and titles. To determine the list of 40 trade or other organizations (Exhibit Q) and the 41 trade, industrial and legal publications (Exhibit R), I used several reference books, and often made telephone calls to the organization or publication in question. My

view is that these lists of unions, labor bodies, trade and other organizations, and trade, industrial and legal publications that I compiled are quite thorough. The union officials that will receive notification materials in the 56 unions, in various labor bodies, and in the thousands of affiliated locals, will include virtually every union official that could have some responsibility for the notification of potential class members of the *Carlough* class action and proposed settlement. In short, my view is that the mailing of notification packets to the unions, labor bodies, trade and other groups, and trade, industrial and legal publications will result in notification of thousands of potential class members.

51. The paid media portion of the notification plan outlined above is also extremely strong. The ADIs and newspapers where print advertising will appear include both major media markets and many smaller areas where over twenty years of the asbestos litigation has shown that a significant number of claims have been filed against one or more CCR defendants. The full-page advertisement itself should catch the eye of anyone who worked with or around asbestos or asbestos-containing products, and the inclusion of a product and occupation list in the ad should aid individuals in determining whether or not they are in the class. The paid media portion of the notification plan should be effective to reach both individuals who worked with or around asbestos or asbestos-containing products, and also the spouses and household members who were exposed to asbestos through the occupational exposure of another. The use of both television and print advertising should help reach potential class members who use only one of those two media, and should reinforce the notification among potential class members who both watch television and read newspapers. In many media markets, the notification message will be delivered both through television and three rounds of print media (two rounds of newspaper advertising and the advertisement in *Parade*). The paid media plan in this notification effort is much more extensive and expensive than the plan I designed (and the court approved) for the Johns-Manville notification in 1986.

52. The public service media plan here is also quite comprehensive, since it covers media outlets on a nationwide basis. My experience indicates that many media outlets will run public service articles or announcement concerning this class action, and

that many additional potential class members will receive notification through the public service media.

53. In sum, my experience indicates that the notification campaign outlined above is strong and comprehensive, and should result in broad-scale notification to potential class members of this class action and proposed settlement.

* * * *

I declare under penalties of perjury that the foregoing is true and correct.

DATED: August 14, 1993 /s/ KATHERINE KINSELLA

* * * *

EXHIBIT E

ARTICLE

CLASS ACTION AND PROPOSED SETTLEMENT TO RESOLVE UNFILED ASBESTOS CLAIMS

A proposed settlement to a class action lawsuit seeking personal injury damages for future asbestos claimants will establish an out-of-court administrative system to handle such claims. The class action, filed by three asbestos plaintiffs' counsel, is called *Carlough* v. *Amchem Products, Inc. et al.*, C.A. No. 93-CV-0215 (E.D. Pa.), and is pending in the U.S. District Court in Philadelphia. The defendants in the class action are the 20 member companies of the Princeton, N.J. Center For Claims Resolution (CCR), which are listed below.

The class action includes individuals who were exposed occupationally, or through the occupational exposure of a spouse or household member, to asbestos or asbestos-containing products for which the 20 CCR companies may bear legal liability, and who had not filed a lawsuit by January 15, 1993, based on that exposure to asbestos. Family members or legal representatives of such occupationally exposed individuals are also included in the class. *Individuals who meet the requirements for class membership are class members whether or not they currently have an asbestos-related medical condition.*

"Occupational exposure" to asbestos generally means that an individual's job responsibility involved working with or around asbestos or asbestos-containing products. These exposures usually occurred in industrial settings or during construction activities. "Occupational exposure" to asbestos does not include "environmental exposure," such as that potentially experienced by office workers in buildings where asbestos products were present. Included in the complete "Notice of Rule 23(b)(3) Class Certification," which may be obtained by calling 1-800-847-2727, is a list of asbestos or asbestos-containing products and the occupations in which exposure to these products potentially occurred.

In essence, the proposed settlement will set up a system to compensate class members who meet specific asbestos exposure requirements if and when they contract certain asbestos-related medical conditions. Compensation will also be available in death cases. Compensation amounts reflect amounts paid by the 20 defendant companies to similar claimants whose cases have been settled in the last four years. Over the first 10 years of the settlement, over $1 billion will potentially be paid to approximately 100,000 class members.

If the settlement is approved by the Court, it will settle all claims for asbestos-related personal injury (including claims based on premises ownership or vicarious liability) against the 20 CCR companies by all members of the class who do not exclude themselves from the class. Claims settled will include 1) personal injury, damage or death and all forms of mental or emotional harm; 2) loss of support, services, consortium, society and other valuable services made by spouses, parents, children or other relatives, (including wrongful death and survival actions); 3) punitive, aggravated, or exemplary damages of any sort.

The 20 CCR member companies participating in the proposed settlement are: Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; CertainTeed Corporation; C.E. Thurston and Sons, Incorporated; Dana Corporation; Ferodo America, Inc.; Flexitallic, Inc.; GAF Corporation; I.U. North America, Inc.; Maremont Corporation; Asbestos Claims Management Corporation (formerly known as National Gypsum Company); National Services Industries, Inc.; Nosroc Corporation;

Pfizer Inc.; Quigley Company, Inc.; Shook & Fletcher Insulation Co.; T&N plc; Union Carbide Chemicals and Plastics Company Inc.; and United States Gypsum Company.

A class member may elect to exclude him/herself from the class. The exclusion request must be made in writing postmarked no later than January 24, 1994, and returned to the Clerk of the Court, c/o P.O. Box 40745, Philadelphia, Pennsylvania 19107. An "Exclusion Request" form may be obtained by calling 1-800-847-2727.

Class members who do not exclude themselves from the class will be bound by the results of the class action and a settlement of that class action. The court-appointed Class Counsel, who are listed below, will act as counsel for the class at no expense to class members. Class members who do not exclude themselves from the class may also be represented in the class action by counsel that that class member separately hires.

A hearing will be held by the U.S. District Court in Philadelphia in Courtroom 11A, United States Courthouse, Philadelphia, Pennsylvania, on February 22, 1994, to determine if the proposed settlement should be approved by the Court as fair, adequate and reasonable.

Class members object to the proposed settlement in writing and/or at the fairness hearing. Written objections must be filed with the Clerk of the Court at the address listed below, and postmarked no later than February 8, 1994. Any class member wishing to be heard orally at the hearing should notify the Clerk at the address listed below no later than February 8, 1994.

This article is a summary only. To request a complete individual notice packet and/or exclusion form, call toll free 1-800-847-2727, or contact the court-appointed Class Counsel:

Gene Locks, Esquire

Greitzer and Locks
22nd Floor
1500 Walnut Street
Philadelphia, PA 19102
(215) 893-0100
(215) 985-2960 (FAX)

Ronald L. Motley, Esquire
or
Joseph F. Rice, Esquire

Ness, Motley, Loadholt,
Richardson & Poole
151 Meeting Street, Suite 600
P.O. Box 1137
Charleston, SC 29402
(800) 666-7503
(803) 571-7513 (FAX)

* * * *

ATTENTION

ALL PERSONS WHO HAVE WORKED WITH OR AROUND ASBESTOS OR ASBESTOS-CONTAINING PRODUCTS (WHETHER OR NOT CURRENTLY SUFFERING FROM AN ASBESTOS-RELATED MEDICAL CONDITION)

A proposed class action settlement involving individuals who were exposed occupationally, or through the occupational exposure of a spouse or household member, to asbestos or asbestos-containing products is now pending in the United States District Court in Philadelphia. Family members or legal representatives of exposed persons are also class members.

If you, or a spouse or household member worked with or around asbestos or asbestos-containing products, you may be a class member, and your rights may be affected by this class action and proposed settlement.

If you are a class member, you may exclude yourself from the class. If you are a class member and you do not exclude yourself from the class, you have the right to participate in the class action through counsel, and you will be bound by the results of the class action and any settlement.

For further information about the class action and proposed settlement, and the procedures for exclusion from the class, see your local Sunday newspaper or weekly, or call

1-800-847-2727
or Class Counsel
1-800-666-7503

* * * *

EXHIBIT O

CENTER FOR CLAIMS RESOLUTION
UNION LIST

Allied Industrial Workers of America International Union
(Formerly: International Union United Automobile Workers of America)
Membership: 47,500

Aluminum, Brick and Glass Workers International Union
(Merger of United Brick & Clay Workers of America and United Glass & Ceramics Workers of North America)
Membership: 42,000

Amalgamated Clothing and Textile Workers Union
Membership: 237,000

American Flint Glass Workers Union
Membership: 20,000

Association of Western Pulp and Paper Workers
Membership: 15,000

Brotherhood of Locomotive Engineers
Membership: 20,000

Brotherhood of Maintenance of Way Employees
Membership: 55,000

Brotherhood of Railroad Signalmen
Membership: 9,602

Glass, Molders, Pottery, Plastics and Allied Workers International Union
(Includes: Glass Bottle Blowers Association of the United States & Canada and International Brotherhood of Pottery & Allied Workers, and International Molders & Allied Workers Union)
Membership: 86,400

International Association of Bridge, Structural and Ornamental Iron Workers
Membership: 140,000

International Association of Fire Fighters
Membership: 151,000

International Association of Heat & Frost Insulators and Asbestos Workers
Membership: 12,000

International Association of Machinists and Aerospace Workers
(Includes: Marine and Shipbuilding Workers of America)
Membership: 500,000

International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers
(Includes: United Cement, Lime, Gypsum and Allied International Union)
Membership: 79,000

International Brotherhood of Electrical Workers
Membership: 730,000

International Brotherhood of Firemen and Oilers
Membership: 25,000

International Brotherhood of Painters and Allied Trades of the United States and Canada
Membership: 143,000

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America
Membership: 1,500,000

International Chemical Workers Union
Membership: 40,000

International Longshoremen's Association
(Includes: International Brotherhood of Longshoremen)
Membership: 60,000

International Longshoremen's and Warehousemen's Union
Membership: 50,000

International Organization of Masters, Mates and Pilots
(Affiliated — Longshoreman)
Membership: 10,000

International Plate Printers, Die Stampers and Engravers Union of North America
Membership: 400

International Union of Bricklayers and Allied Craftsmen
(Includes: United Brick and Clay Workers of America)
Membership: 84,000

International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers
Membership: 150,000

International Union of Elevator Constructors
Membership: 22,000

International Union of Operating Engineers
Membership: 375,000

International Union of Petroleum and Industrial Workers
Membership: 4,000

International Woodworkers of America, U.S.
Membership: 25,000

Laborers' International Union of North America
(Formerly: International Hod Carriers, Building and Common Laborers Union of America, and Journeyman Stonecutters Association of North America)
Membership: 500,000

Mechanics Educational Society of America
Membership: 3,000

Metal Polishers, Buffers, Platers and Allied Workers International Union
Membership: 6,000

National Industrial Workers Union
Membership: 580

National Marine Engineers' Beneficial Association
Membership: 53,000

National Maritime Union
Membership: 20,000

National Organization of Industrial Trade Unions
Membership: 10,000

Oil, Chemical and Atomic Workers International Union
Membership: 110,000

Operative Plasterers' and Cement Masons' International Association of the United States and Canada
Membership: 39,000

Pacific Coast Marine Fireman, Oilers, Watertenders and Wipers Association
Membership: 1,691

Seafarers International Union of North America
Membership: 85,000

Service Employees International Union
Membership: 1,000,000

Sheet Metal Workers' International Association
Membership: 126,000

Stove, Furnace and Allied Appliance Worker's International Union of North America
Membership: 5,000

Transport Workers Union of America
Membership: 96,000

Transportation Communications International Union
(Formerly: Brotherhood of Railway, Airline and Steamship Clerks (BRAC))
(Includes: Brotherhood of Railway Carmen; Railway Patrolmen International Union; American Association of Railway Supervisors; and Transportation Communications Employees Union)
Membership: 130,000

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States & Canada
Membership: 220,000

United Automobile, Aerospace and Agricultural Implement Workers of America International Union
Membership: 900,000

United Brotherhood of Carpenters and Joiners of America
(Includes: International Union of Wood, Wire and Metal Lathers and Tile, Marble, Terrazo Finishers, Shopworkers and Granite Cutters International Union)
Membership: 53,000

United Mine Workers
Membership: 186,000

United Paperworkers International Union
(Includes: United Paperworkers of America; International Brotherhood of Paperworkers; and International Brotherhood of Pulp, Sulphite and Paper Mill Workers of the United States and Canada)
Membership: 202,000

United Rubber, Cork, Linoleum and Plastic Workers of America
Membership: 100,000

United Steelworkers of America
(Includes: United Stone and Allied Product Workers of America)
Membership: 459,000

United Textile Workers of America
Membership: 18,000

United Transportation Union
(Brotherhood of Locomotive, Firemen and Enginemen and Brotherhood of Railroad Trainmen)
Membership: 145,000

United Union of Roofers, Waterproofers and Allied Workers
(Formerly: United Slate, Tile and Composition Roofers, Damp and Waterproofing Workers)
Membership: 25,000

Utility Workers Union of America
Membership: 55,000

TOTAL MEMBERSHIP: 9,181,173

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AMENDMENT TO STIPULATION OF SETTLEMENT OF JANUARY 15, 1993 BETWEEN THE CLASS OF CLAIMANTS AND DEFENDANTS REPRESENTED BY THE CENTER FOR CLAIMS RESOLUTION

A. The Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center For Claims Resolution, dated January 15, 1993, and filed that day in the above-captioned action, is hereby amended as-follows:

1. The following is added as the final sentence of Part I.N., at page 9: "An Exposed Person has been occupationally exposed to asbestos when that individual's job responsibility involved working with or around asbestos or asbestos-containing products. These exposures usually occurred in industrial settings or during construction activities. 'Occupational exposure' to asbestos does not include 'environmental exposure,' such as that potentially experienced by office workers in buildings where asbestos products were present."

2. In Part III.F., at page 16, the second sentence is revised to read as follows: "The Claimant shall have sixty (60) days from the receipt of that notice to 1) seek reconsideration of the CCR's decision by submitting a written statement to the CCR giving grounds for reconsideration; 2) submit additional information concerning the Claim to the CCR; or 3) invoke the dispute resolution procedures, as set forth in Part IV.C., Part V.C., or Part VI.B. of this Stipulation (depending on the reasons for non-qualification of the Claim)."

3. Part V.B.2., at pages 26-28, is replaced with the following:

"2. Lung Cancer

"The Lung Cancer category shall have the following requirements:

"a. A diagnosis by a Board-certified Pathologist, Pulmonary Specialist, or Oncologist of primary lung carcinoma; *and*

"b. Exposure sufficient to meet the minimum exposure requirements set forth in Part IV of this Stipulation occurring at least twelve (12) years prior to Manifestation of the lung cancer; *and*

"c. One of the following:

"i. Evidence of a Non-Malignant Condition sufficient to meet the requirements of Paragraph B.4 of this Part; *or*

"ii. Chest x-rays which, in the opinion of a Certified B-reader, demonstrate asbestos-related bilateral pleural plaques or asbestos-related bilateral pleural thickening; *and* evidence of fifteen (15) years of occupational exposure to asbestos, to be calculated as specified in subparagraphs (1)-(3) and Paragraph iii below.

"(1) Each year that an Exposed Person can demonstrate that his or her primary occupation, during a substantial portion of a normal work year for that occupation, involved working in areas immediate to where asbestos-containing products were being installed, repaired, or removed under circumstances that involved regular airborne emissions of visible asbestos dust, shall count as one (1) year.

"(2) Each year that an Exposed Person can demonstrate that his or her primary occupation, during a substantial portion of a normal work year for that occupation, involved the direct installation, repair, or removal of asbestos-containing products, shall count as two (2) years;

"(3) Each year that an Exposed Person can demonstrate that his or her primary occupation, during a substantial portion of a normal work

year for that occupation, involved the direct manufacture of asbestos-containing products using raw asbestos fiber, or the direct installation, repair, or removal of asbestos-containing products in a shipyard during World War II (1941-46), shall count as four (4) years.

"iii. For purposes of calculating the years of exposure prescribed above in Paragraph ii above, each year of exposure prior to 1976 shall be counted fully; each year of exposure from 1976 through 1979 shall be counted one-half; and exposures after 1979 shall not be counted. For each year from 1972-75, however, for which the CCR can demonstrate, by a preponderance of the evidence, that the Exposed Person's exposure to asbestos in his or her occupation or trade was, during a substantial portion of that work year, in compliance with the OSHA 8-hour time-weighted average airborne concentration for asbestos exposure at that time, then that year shall count one-half for purposes of calculating the years of exposure prescribed in Paragraph ii. Similarly, for each year from 1976-79 for which a Claimant can demonstrate, by a preponderance of the evidence, that the Exposed Person's exposure to asbestos in his or her occupation or trade was, during a substantial portion of that work year, in excess of the OSHA 8-hour time-weighted average airborne concentration for asbestos exposure at that time, then that year shall count fully for purposes of calculating the years of exposure prescribed in Paragraph ii. Finally, for every year after 1979 for which a Claimant can demonstrate, by a preponderance of the evidence, that the exposed Person's exposure to asbestos in his or her occupation or trade was, during a substantial portion of that work year, in excess of the OSHA 8-hour time-weighted average airborne concentration for asbestos exposure at that time, than that year shall count one-half for purposes of calculating the years of exposure prescribed in Paragraph ii."

4. Part V.C.3., at page 43, is revised to read as follows: "All disputes concerning whether a Claim meets the exposure requirements of any Compensable Medical Category shall be resolved in the manner prescribed in Part IV.C. of this Stipulation."

5. In Part VIII.B.2.a., at page 57, the third sentence is revised to read as follows: "That evaluation shall be based on relevant factors of the traditional tort principles of damages, and the CCR shall weigh and evaluate these factors in accord with its historical practices. Factors to be considered shall include, but not be limited to, type of claim, nature and extent of asbestos disease or injury, questions of medical causation, disability, age, number and age of dependents, special damages, pain and suffering, likelihood and amount of exposure to products manufactured or supplied by the CCR Defendants or the Additional Releasee(s), job history, location of the forum in which a lawsuit for asbestos-related injury or damage could properly be maintained by the Claimant, information concerning historical settlement values, jury verdicts and judgments in comparable cases involving various plaintiffs' counsel in that forum and in other jurisdictions, type of release to be provided by the Claimant, and any other relevant criteria generally utilized in the settlement of litigated tort cases."

6. Part X.A., at pages 67-68, is replaced with the following:

"A. Case Flow

"1. The maximum number of Claimants with Qualifying Claims in each Compensable Medical Category who, in any one year, may sue in the tort system or resort to binding arbitration against the CCR Defendant(s) shall not exceed the following percentages of either the total number of Claims that qualified for payment in each Compensable Medical Category during the previous year or the maximum number of Qualifying Claims that may be paid in each Compensable Medical Category during the previous year (as set forth in Part VIII and Exhibit A to this stipulation), whichever is lower:

Compensable Medical Category	Percentage
Mesothelioma	2%
Lung Cancer	2%
Other Cancer	1%
Non-Malignant Conditions	0.5%

"2. Claimants electing to resolve their Claims under this Part shall proceed to the tort system or to binding arbitration in the order in which they make such an election, subject to the case flow requirements in Paragraph A.1. above. Once the number of Claimants in any Compensable Medical Category who elect to resort to the tort system or to binding arbitration in any one year has reached the case flow maximum for that year as defined in Paragraph A.1. above, then any additional Claimants in that Compensable Medical Category making the election in that year shall be given first priority to proceed to the tort system or to binding arbitration in the next year, and shall be counted in the case flow maximum (as defined above) for that year.

"3. As stated in Paragraph A.2. above, Claimants who elect to resolve their Claims under this Part shall generally proceed to the tort system or to binding arbitration in the order in which they make such an election (so-called "FIFO order"). In any year, however, in which the number of Claimants in any Compensable Medical Category who elect to resort to the tort system or to binding arbitration exceeds the case flow maximum for that year, the Court shall have the authority, upon application from CCR Counsel, Class Counsel, or the AFL-CIO representative (as defined in Part XXIII.C. below), to alter this principle of FIFO order for that year so as to prevent a disproportionate number of Claimants in a Compensable Medical Category represented by one attorney or firm from proceeding to the tort system or to binding arbitration in that year."

7. The following is added as Part XXIII.C. and D., at page 97:

"C. A representative of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), as designated by the President of that organization, shall have the right to participate equally with Class Counsel in their implementation of this Part, including the right to participate in all phases of the annual audit, and to examine all books and records maintained by the CCR related to the proceeding of Claims under this Stipulation. The AFL-CIO representative shall also have the right to participate equally with Class Counsel in raising with the Court issues pertaining to or arising out of the foregoing matters.

"D. Class Counsel and the AFL-CIO representative shall jointly determine the position that Class Counsel shall take concerning the selection of all arbitrators and medical panel members under the Stipulation. This shall include: (1) the group of five Board-Certified pathologists selected pursuant to Part V.C.1.a.i.; (2) the group of five physicians selected pursuant to Part V.C.2.a.i.; (3) the Exceptional Medical Panel selected pursuant to Part V.D.1; (4) the Extraordinary Claims Panel selected pursuant to Part IX.D.; and (5) the List of Arbitrators developed pursuant to Part XXVI.B."

8. Exhibit D is amended as indicated on the attached revised Exhibit D.

9. Execution by Counterparts. This Amendment to the stipulation may be executed in any number of counterparts and by different signatories to this Amendment to the Stipulation in separate counterparts, each of which taken together shall constitute one and the same Amendment to the Stipulation.

CLASS COUNSEL

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Philadelphia, PA 19102

/s/ RONALD L. MOTLEY
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Counsel for the CCR Defendants

Authorized Signature

Amchem Products, Inc. _____(s)_____

A. P. Green Industries, Inc. _____(s)_____

Armstrong World Industries, Inc. _____(s)_____

The Asbestos Claims Management Corp.* (formerly National Gypsum Company) _____(s)_____

CertainTeed Corp. _____(s)_____

C.E. Thurston and Sons, Incorporated _____(s)_____

Dana Corp. _____(s)_____

Ferodo America, Inc. _____(s)_____

Flexitallic, Inc. _____(s)_____

GAF Corp. _____(s)_____

I.U. North America, Inc. _____(s)_____

Maremont Corp. _____(s)_____

National Service Industries, Inc. _____(s)_____

Nosrock Corp. _____(s)_____

Pfizer, Inc. _____(s)_____

Quigley Co. Inc. _____(s)_____

Shook & Fletcher Insulation Co. _____(s)_____

T&N plc _____(s)_____

Union Carbide Chemicals and Plastics Company, Inc. * _____(s)_____

United States Gypsum Co. _____(s)_____

DATED: September 24, 1993

* * * *

EXHIBIT D

The insurers set forth below are hereby identified pursuant to the Stipulation of Settlement, Part XVII (Paragraph B).

ADMIRAL INSURANCE CO.
AETNA CASUALTY & SURETY CO.
AETNA INSURANCE CO.
AFFILIATED FM INSURANCE CO.
AIU INSURANCE CO.
ALLIANZ INSURANCE CO.
ALLIANZ UNDERWRITERS INC.
ALLIANZ UNDERWRITERS INSURANCE CO.
AMERICAN BANKERS INS. CO. OF FLORIDA
AMERICAN CENTENNIAL INSURANCE CO.
AMERICAN EXCESS INSURANCE CO.
AMERICAN HOME ASSURANCE CO.
AMERICAN INSURANCE CO.
AMERICAN MOTORISTS INSURANCE CO.
AMERICAN REINSURANCE CO.
APPALACHAIN INSURANCE COMPANY OF PROVIDENCE
ASSOCIATED INDEMNITY CORP.
ATLANTA INTERNATIONAL INSURANCE CO. BELLEFONTE INSURANCE CO.
BIRMINGHAM FIRE INSURANCE CO.
BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA
BRITAMCO LIMITED

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* The participation of The Asbestos Claims Management Corp. (formerly National Gypsum company) in the Class Action Settlement is subject to the approval of the Bankruptcy Court.

BRITISH NORTHWESTERN INSURANCE CO.
CAISSE INDUSTRIELLE D'ASSURANCE MUTUELLE
CALIFORNIA UNION INSURANCE CO.
CENTENNIAL INSURANCE CO.
CENTRAL NATIONAL INSURANCE CO. OF OMAHA
CHICAGO INSURANCE CO.
CITY INSURANCE CO.
COLONIA INSURANCE CO.
COLONIA VERSICHERUNG AKTIENGESELLSCHAFT
COLUMBIA CASUALTY CO.
COMMERCIAL UNION ASSURANCE CO. LTD.
COMPAGNIE EUROPEENNE DE REASSURANCE
CONSTITUTION STATE INSURANCE CO.
CONTINENTAL CASUALTY CO.
CONTINENTAL INSURANCE CO.
DRAKE INSURANCE COMPANY OF NEW YORK E.C.R.A.
EAGLE STAR INSURANCE CO. LTD.
EMPLOYERS
EMPLOYERS COMMERCIAL UNION INSURANCE CO.
EMPLOYERS COMMERCIAL UNION INSURANCE CO. OF AMERICA
EMPLOYERS INSURANCE OF WAUSAU
EMPLOYERS MUTUAL CASUALTY CO.
EMPLOYERS MUTUAL LIABILITY INSURANCE CO. OF WISCONSIN
EMPLOYERS REINSURANCE
EMPLOYERS' LIABILITY ASSURANCE CORP. LTD.
EMPLOYERS' SURPLUS LINE INSURANCE CO.
EVANSTON INSURANCE CO.
EXCESS INSURANCE COMPANY LTD.
FALCON INSURANCE COMPANY
FEDERAL INSURANCE CO.
FIDELITY & CASUALTY CO. OF NEW YORK
FIREMAN'S FUND INSURANCE CO.
FIREMAN'S FUND INSURANCE CO. OF ILLINOIS
FIRST STATE INSURANCE CO.
FIRST STATE OF BOSTON
FIRST STATE UNDERWRITERS AGENCY OF NEW ENGLAND RESURANCE CORP.
GENERAL ACCIDENT & LIFE ASSURANCE CORP. LTD.
GENERAL REINSURANCE CORP.
GERLING GLOBAL REINSURANCE CO.
GIBRALTAR CASUALTY CO.

GLOBE INDEMNITY CO.
GOVERNMENT EMPLOYEES INSURANCE COMPANY
GRANITE STATE INSURANCE CO.
GREAT AMERICAN INSURANCE CO.
GUARDIAN ROYAL EXCHANGE ASSURANCE LTD.
HAFTPFLICHTVERBAND DER DEUTSCHEN INDUSTRIES V.a.G.
HARBOR INSURANCE CO.
HARTFORD
HARTFORD ACCIDENT & INDEMNITY CO.
HIGHLANDS INSURANCE CO.
HOME INDEMNITY CO.
HOME INSURANCE CO.
HOUSTON GENERAL INSURANCE CO.
HUDSON INSURANCE CO.
INA
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA
INSCO LIMITED
INSURANCE COMPANY OF NORTH AMERICA
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
INTERNATIONAL INSURANCE CO.
INTERNATIONAL SURPLUS LINES INSURANCE CO.
INTERSTATE FIRE & CASUALTY CO.
JEFFERSON INSURANCE COMPANY OF NEW YORK
KEMPER
LA PRESERVATRICE FONCIERE TIARD
LANDMARK INSURANCE CO.
LE SECOURS
LEXINGTON INSURANCE CO.
LIBERTY MUTUAL INSURANCE CO.
LILLOISE D'ASSURANCES ET DE REASSURANCES
LLOYD'S SYNDICATES AND LONDON COMPANIES
LONDON (INSCO LIMITED)
LONDON GUARANTEE & ACCIDENT CO. OF NEW YORK
LUMBERMENS MUTUAL CASUALTY COMPANY
MARYLAND CASUALTY CO.
MEAD REINSURANCE CORP.
MICHIGAN MUTUAL INSURANCE CO.
MUTUELLE GENERALE FRANCAISE
MUTUELLES UNIES ASSURANCES

NATIONAL FIRE
NATIONAL SURETY CORP.
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA
NEW AMSTERDAM CASUALTY CO.
NORTH RIVER INSURANCE COMPANY
NORTH STAR REINSURANCE CORP.
NORTHBROOK EXCESS & SURPLUS INSURANCE CO.
NORTHBROOK INDEMNITY CO.
NORTHBROOK INSURANCE CO.
NORTHWESTERN NATIONAL INSURANCE CO.
NUTMEG INSURANCE CO.
OCEAN CASUALTY INSURANCE CO.
OLD REPUBLIC INSURANCE CO.
PACIFIC EMPLOYERS INSURANCE CO.
PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE CO.
PHOENIX ASSURANCE
PROTECTIVE NATIONAL INSURANCE CO. OF OMAHA
PRUDENTIAL ASSURANCE COMPANY LTD.
PRUDENTIAL REINSURANCE CO.
PURITAN INSURANCE CO.
RANGER INSURANCE CO.
RELIANCE INSURANCE
REPUBLIC INSURANCE CO.
ROYAL GLOBE INSURANCE COMPANY
ROYAL INDEMNITY CO.
ROYAL INSURANCE COMPANY LTD.
SAFECO INSURANCE COMPANY OF AMERICA
SAFETY MUTUAL CASUALTY CORP.
ST. PAUL FIRE AND MARINE INSURANCE CO.
ST.PAUL GUARDIAN INSURANCE CO.
STANDARD ACCIDENT INSURANCE CO.
STONEWALL INSURANCE CO.
STONEWALL SURPLUS LINES INSURANCE CO.
SUN ALLIANCE & LONDON INSURANCE
THE STUYVESANT INSURANCE CO.
TOKIO MARINE AND FIRE INSURANCE CO., LTD.
TRANSPORT INDEMNITY CO.
TRAVELERS
TRAVELERS INDEMNITY CO.
TRAVELERS INSURANCE CO.
TWIN CITY FIRE INSURANCE CO.

U.S. FIRE INSURANCE CO.
UNIGARD MUTUAL INSURANCE CO.
UNION DES ASSURANCES DE PARIS
UNITED STATES FIDELITY &
GUARANTY CO.
ZURICH
ZURICH AMERICAN INSURANCE COMPANY OF
ILLINOIS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civ. A. No. 93-0215

EDWARD J. CARLOUGH, et al.,
Plaintiffs,

v.

AMCHEM PRODUCTS, INC., et al.,
Defendants and
Third Party Plaintiffs,

v.

ADMIRAL INSURANCE COMPANY, et al.
Third Party Defendants.

MEMORANDUM

Reed, J. October 6, 1993

This lawsuit is a class action for asbestos-related personal injuries. This memorandum opinion addresses whether this Court has subject matter jurisdiction over this case.

I. BACKGROUND

On January 15, 1993, counsel for the plaintiff class (or the "*Carlough* class") filed the complaint in this action along with motions for class certification and for approval of a proposed settlement agreement ("proposed settlement" or "settlement") between the plaintiff class and the defendants. The complaint alleges that the defendants, members of the Center for Claims Resolution ("the CCR defendants"), are liable to the plaintiff class under the legal theories of (1) negligent failure to warn, (2) strict liability, (3) breach of express and implied warranty, (4) negligent infliction of emotional distress, (5) enhanced risk of disease, (6) medical monitoring, and (7) civil conspiracy. In their complaint,

the named plaintiffs allege that jurisdiction is based upon diversity of citizenship and that the amount in controversy for each member of the plaintiff class exceeds $100,000.

On the same day as the complaint was filed, the CCR defendants answered the complaint and joined in plaintiffs' request that the class be certified and the settlement agreement approved.

On January 29, 1993, the Honorable Charles R. Weiner of this Court conditionally certified an opt-out class consisting of:

> 1. All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant or passenger ships), either occupationally or through occupational exposure of a spouse or household member, to asbestos or to asbestos containing products for which one or more of the defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury or damage, or death in any state or federal court against the defendant(s) (or against entities for whose actions or omissions the defendant(s) bear legal liability).
>
> 2. All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph 1 above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph 1 above in any state or federal court against the defendant(s) (or against entities for whose actions or omissions the defendant(s) bear legal liability).

Also on January 29, 1993, Judge Weiner assigned to me the scheduling and review of settlement procedures and the resolution of objections of the settlement itself. On March 1, 1993, I issued a Rule to Show Cause ordering that a preliminary hearing be held, and memoranda of law submitted, as to, *inter alia*, the relevant considerations in ultimately evaluating the fairness, adequacy and reasonableness of the settlement. At that time, numerous motions and objections were filed relating to certain threshold matters such

as justiciability and diversity jurisdiction.[1] Because these jurisdictional issues relate to the very power of the Court to hear this case and ultimately bind the parties to the settlement, on June 2, 1993, I issued a Scheduling Order setting dates for briefing and argument on all objections to this Court's subject matter jurisdiction. Various objectors filed memoranda of law explaining the legal bases for their objections, to which the named plaintiffs and the CCR defendants (hereinafter the "settling parties") responded. A hearing was held on August 23, 1993 at which time the objectors and the settling parties were heard.

This memorandum addresses the four principal threshold issues raised by the objectors: standing, collusion, mootness and satisfaction of the amount in controversy for purposes of diversity jurisdiction. I do not address all of the objections raised in the memoranda of law and/or at the August 23, 1993 hearing. However, because of the significance of this lawsuit and the large number of parties claiming an interest, it is necessary to consider these threshold issues in considerable detail.

II. DISCUSSION

A. Standing

It is fundamental that a federal court lacks jurisdiction to hear any matter that is not a justiciable case or controversy under Article III of the U.S. Constitution, and that an action is not justiciable if the plaintiff does not have standing to sue. *Bender v. Williamsport Area School District*, 475 U.S. 534, 541-42 (1986). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). This question is answered by determining whether the plaintiff has a "personal stake in the outcome of the controversy." *Id.* at 498-99. Such a personal stake assures "concrete adverseness which sharpens the presentation of the issues." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The Supreme Court has held that a party has the requisite personal stake

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[1] On April 15, 1993, Judge Weiner dismissed these motions without prejudice to their being filed as objections to the fairness of the proposed settlement.

if s/he can demonstrate that: (1) s/he personally has suffered a concrete injury in fact, (2) the injury is fairly traceable to the challenged conduct, and 3) the injury is likely to be redressed by a favorable decision. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)).

The plaintiff always bears the burden of establishing the elements of standing. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). And, these elements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case[.]" *Id.* As such, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

Although these three elements appear straightforward, the Supreme Court has more than once acknowledged that "the concept of 'Article III standing' has not been defined with complete consistency in all of the various cases decided by [the] Court which have discussed it[.]" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Valley Forge*, 454 U.S. at 475). The Article III policies which are served by the standing requirement, however, have remained clear and constant. It is thus helpful to look to these policies when applying the elements of standing to a particular case.

First and foremost, the standing requirement preserves the separation of powers by limiting the matters that the judicial branch may address. *Lujan*, 112 S. Ct. at 2136; *Allen*, 468 U.S. at 752. In essence, standing doctrine is "founded in concern about the proper — and properly limited — role of the courts in a democratic society." *Warth*, 422 U.S. at 498. Under our tripartite system of government, pronouncements about general social problems are left to the legislature. Thus, if a plaintiff lacks a personal stake in the litigation at hand, the court finds itself in the position of extending its role beyond that intended for the judiciary under Article III. *Allen*, 468 U.S. at 750.

Second, the standing requirement improves judicial decision-making because it "assures a factual setting in which the litigant asserts a claim of injury in fact[.]" *Valley Forge*, 454 U.S. at 472. This factual setting prevents a federal court from passing judgment

on ill-defined issues or controversies which could "pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court." *Id.* In other words, the injury complained of must be sufficiently concrete to inform the court of the consequences of its decision. Indeed, the Supreme Court has recognized that judicial review is effective largely because it avoids issues presented in an abstract form. *United States v. Richardson*, 418 U.S. 166, 194 (1974) (Powell, J., concurring).

Third, the standing requirement assures that the federal courts do not become "a vehicle for the vindication of the value interests of concerned bystanders." *United States v. Students Challenging Regulatory Agency Procedures(SCRAP)*, 412 U.S. 669, 687 (1973). The federal courts are reserved for litigants whose lives will be directly affected by the outcome of the lawsuit. And, the injury-in-fact requirement serves to distinguish those litigants from others with a mere interest in the issue. *Id.* at 689 n.14. Without this requirement, the federal courts would be reduced to "publicly funded forums for the ventilation of public grievances[.]" *Valley Forge*, 454 U.S. at 473. Connected with this policy, of course, is the notion that those directly concerned with the questions at issue are likely to present their cases more effectively.

In this lawsuit, the objectors claim that many of the members of the *Carlough* class do not have Article III standing because they have not sustained an "injury in fact." The objectors note that the *Carlough* class includes those who have been occupationally exposed to asbestos but who do not manifest any asbestos-related condition (hereinafter "the exposure-only plaintiffs"). And, in their memoranda of law, the objectors point to several state and federal cases which have held that "subclinical injury resulting from exposure to asbestos is insufficient to constitute actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law." *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); *see also Alim v. Vaughn* 1992 U.S. Dist. LEXIS 12503 (E.D. Pa. Aug. 18,1992); *Hannibal v. Lyons*, 1990 U.S. Dist. LEXIS 8261 (E.D. Pa. July 2, 1990); *Giffear v. Johns-Manville Corp.*, 1993 Westlaw 349881 (Pa. Super. Sept. 16, 1993); *Marinari v. Asbestos Corp.*, 612 A.2d 1021 (Pa. Super. 1992). The objectors argue that the lack of a cause of action under

applicable state tort law mandates a finding that the exposure-only plaintiffs have alleged no injury in fact for purposes of Article III standing.[2]

In response, the settling parties argue that exposure to a toxic substance is sufficient injury in fact and that, for purposes of Article III standing, it is irrelevant whether the plaintiffs' injuries support a valid legal claim.

It is true that prior to 1970, the test for Article III standing was the so-called "legal interest" test. *See Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-80 (1938); G. Nichol, *Injury and The Disintegration of Article III*, 74 Calif. L. Rev. 1915, 1920 (1986). Under that test, a plaintiff only had Article III standing "if the actions of the defendant harmed a 'legal interest' of the plaintiff." *Alabama Power Co.*, 302 U.S. at 478-80. In other words, plaintiffs had to show injury sufficient to sustain a valid cause of action to have standing to sue in federal court.

In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), however, the Supreme Court jettisoned the "legal interest" test and adopted the "injury in fact" test. According to the Supreme Court in *Camp*, "[t]he 'legal interest' test goes to the merits" and is thus "quite distinct from the problem of standing." *Id.* at 152-53 & n.1. With the adoption of the injury in fact test, the Supreme Court "intended the injury standard to insulate the case or controversy determination from the sway of the claim on the merits." Nichol, *supra*, at 1923-24. In the years since the *Camp* decision, the Supreme Court has stressed that the requirement of standing "focuses on the party seeking to get his [or her] complaint before a federal court *and not on the issues [s/]he wishes to have adjudicated*." *Valley Forge*, 454 U.S. at 484 (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (emphasis added)). For example, in *Davis v. Passman*, 442 U.S. 228 (1979), the Supreme Court reversed the lower court's holding as to standing, and stated:

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[2] The objectors concede, and I agree, that those members of the plaintiff class who already manifest an asbestos-related condition have Article III standing to bring this lawsuit.

> The Court of Appeals appeared to confuse the question of whether petitioner had standing with the question of whether she asserted a proper cause of action.... The nature of petitioner's injury ... is relevant to the determination of whether she has "alleged such a personal stake in the outcome of the controversy . . . " And under the criteria we have set out, petitioner clearly has standing to bring this suit.... Whether petitioner has asserted a cause of action, however, depends not on the quality or extent of her injury, but on whether the class of litigants of which petitioner is a member may use the courts to enforce the right at issue.

Id. at 239-40 n.18 (citations omitted).[3]

In sum, the Supreme Court has made clear that the Article III determination "in no way depends on the merits of the plaintiff's [claim]." *Whitmore*, 495 U.S. at 155 (quoting *Warth*, 422 U.S. at 500).[4] As one commentator put it:

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[3] Many other courts have recognized that standing looks only to the existence of a factual injury and not the magnitude of legal significance of that injury. *National Wildlife Fed'n v. Burford*, 871 F.2d 849, 852 (9th Cir. 1989); *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 258 n.5 (2nd Cir. 1989), *opinion modified on other grounds*, 890 F.2d 569 (2nd Cir. 1989); *Haskell v. Washington Township*, 864 F.2d 1266, 1275 (6th Cir. 1988); *Coalition for Environment v. Volpe*, 504 F.2d 156, 168 (8th Cir. 1974); *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 61 (S.D. Ohio 1991); *Honey v. George Hyman Constr. Co.*, 63 F.R.D. 443, 446-47 (D.D.C. 1974).

[4] Also, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), the Supreme Court held that the plaintiffs' allegations of environmental and health injuries caused by the construction of two nuclear plants were sufficient to satisfy the injury in fact requirement for Article III standing. The plaintiffs in *Duke Power* challenged the constitutionality of the Price-Anderson Act which imposes an aggregate limit on utility company liability for nuclear accidents. The Court held that, for purposes of Article III standing, it was of no moment that plaintiffs' injuries were not directly related to the constitutional attack on the statute. *Id.* at 78-79. The Court stated that, except for certain taxpayer suits, no subject matter nexus between the right asserted and the injury alleged was required. *Id.* In other

> The terminology employed - injury "in fact" rather than "in law," layperson's injury rather than lawyer's injury — suggests the Court's desire to convert the case or controversy hurdle to a straightforward and objective measurement uninfluenced by the attractiveness of the cause of action ...
> ...
> By employing a test of simple harm, the justices could free the system of constitutional review from ill-fitting common law forms. Injury in fact... could be ascertained without "premature value judgments" about... the merits of the claim ...

Nichol, *supra*, at 1924. This Court has expressly recognized this principle in the context of another nationwide asbestos case:

> Standing, which derives from the article III case or controversy requirement, is met when the plaintiff can demonstrate "injury in fact." To what extent that injury is legally cognizable under the laws of the various jurisdictions is a separate inquiry.

In re Asbestos School Litigation, 104 F.R.D. 422, 425 n.1 (E.D. Pa. 1984) (citation omitted), *amended in other respects*, 107 F.R.D. 215 (E.D. Pa. 1985), *aff'd in part and rev'd in part on other grounds*, 789 F.2d 996 (3d Cir. 1986).

Other lower courts have also recognized the distinction between the existence of an "injury in fact" and the legal significance of that injury by holding that, for purposes of determining Article III standing, the plaintiff's legal theories must be accepted as valid. *See Chiles v. Thornburgh*, 865 F.2d 1197, 1202 (11th Cir. 1989) ("just as we accept the validity of the plaintiff's factual assertions, we must also accept the validity of the plaintiff's theory of a cause of action"); *Goldwater v. Carter*, 617 F.2d 697, 701-02 (D.C. Cir.) ("For purposes of the standing issue,

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words, the Court did not look to the plaintiffs' cause of action to determine whether they had alleged sufficient injury in fact. The *Duke Power* holding, therefore, supports the settling parties' contention that I need not look to the character or merits of the plaintiffs' claims in this case when determining whether they have alleged injury in fact for purposes of Article III standing.

we accept, as we must [plaintiff's] pleaded theories as valid."), *vacated on other grounds*, 444 U.S. 996 (1979); *see also United States v. Nichols*, 841 F.2d 1485, 1498 (10th Cir. 1988). *But see Robinson v. Vaughn*, 1992 U.S. Dist. LEXIS 19518 (E.D. Pa. Dec. 2, 1992) (court cited to Pennsylvania tort law and held that prisoner exposed to asbestos did not have injury in fact).[5] It is because of this distinction that many federal courts have dismissed cases for failure to state a claim only after concluding that they have subject matter jurisdiction over the case. *See, e.g., Angus v. Shiley, Inc.*, 989 5.2d 142 (3d Cir. 1993); *LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.*, 739 F.2d 4 (1st Cir. 1984); *Indiana Hi-Rail Corp. v. CSX Transp., Inc.*, 818 F. Supp. 1254 (S.D. Ind. 1993); *Ronwin v. Smith Barney Harris Upham & Co.*, 807 F. Supp. 87 (D. Neb. 1992), *aff'd without op.*, 996 F.2d 1221 (8th Cir. 1993); *Grant v. Coca-Cola Bottling Co.*, 780 F. Supp. 246 (D.N.J. 1991); *Hough v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 757 F. Supp. 283 (S.D.N.Y.), *aff'd without op.*, 946

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[5] The Honorable Louis C. Bechtle (then Chief Judge) in *Robinson* held that the plaintiff, a prisoner who claimed he was exposed to asbestos while incarcerated, failed to establish that he suffered an injury in fact because he had not been diagnosed with an asbestos-related condition. *Robinson*, 1992 U.S. Dist. LEXIS 19518, at *5. Judge Bechtle held this after looking to Pennsylvania tort law under which "mere exposure to asbestos, absent some manifestation of an asbestos-related disease, does not give rise to a cause of action." *Id.* at *4-*5 (citing *Marinari*, 612 A.2d at 1028). Judge Bechtle also stated that "mere exposure to asbestos in prison, and a prison official's failure to warn about the presence of asbestos, is insufficient as a matter of law to establish a constitutional deprivation." *Id.* at *5.

Given the analysis reflected in this memorandum, I respectfully disagree with Judge Bechtle's holding as to injury in fact and agree with his statement that mere exposure to asbestos cannot give rise to a constitutional claim. Indeed, on an earlier occasion, I reached the merits of a prisoner's claim that he was exposed to asbestos in prison and held that, because he did not suffer from an asbestos-related illness, he failed to establish a constitutional deprivation. *Alim v. Vaughn*, 1992 U.S. Dist. LEXIS 12503, *4 (E.D. Pa. Aug. 18, 1992).

F.2d 883 (2d Cir. N.Y. 1991); *Wilson v. Briscoe*, 1990 U.S. Dist. LEXIS 9514 (D.D.C. July 30, 1990).

Almost directly on point is *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992). In that case, the defendants were manufacturers of heart valves that later proved faulty. The plaintiff class included those implanted with a heart valve that had not fractured. Those plaintiffs wished to recover for their fear or anxiety that their heart valves might fracture in the future. In its decision approving the proposed settlement, the district court held that these class members might not have had a valid cause of action under applicable tort law. *Id.* at 147-48. Indeed, before the settlement was reached, the defendants had moved to dismiss the claims of these plaintiffs for failure to state a claim upon which relief could be granted. However, because the district court was informed of the settlement negotiations, it delayed ruling on the defendants' motion. *Id.* Ultimately, the court approved the settlement and never ruled on the motion to dismiss.

The *Bowling* court was under a duty, as are all federal courts, to satisfy itself that those plaintiffs with properly functioning heart valves had standing to sue for damages. The fear and anxiety of those plaintiffs along with the medical expenses involved with monitoring their heart valves was enough to satisfy the injury in fact requirement. This is true even though they might not have stated a valid legal claim. And, as long as the plaintiffs had standing to bring their action in federal court, the court had subject matter jurisdiction to decide whether the proposed settlement was fair.[6]

Going beyond the case law, it is easy to understand the logic behind the change from the "legal interest" test to the "injury in fact" test. If federal courts must look to whether plaintiffs in

[6] This is true even though the court stated that it would have granted the defendants' motion to dismiss these plaintiffs' claims had the parties not reached a settlement agreement. Indeed, it is not uncommon for parties to settle before the court rules on a pending motion to dismiss for failure to state a claim upon which relief can be granted. Any question as to whether a plaintiff's claim is cognizable becomes irrelevant once the case has settled.

federal court under diversity jurisdiction have stated a valid cause of action in order to find that they have standing to sue in federal court, state law and not federal law would control the scope of Article III standing. Indeed, the same factual injury might be sufficient to confer standing in the federal courts of one state but not in the federal courts of another. Federal standing law, therefore, would not only depend on state law, it would vary from state to state. Because standing is a question of federal constitutional law, *Phillips Petroleum Co.*, 472 U.S. at 804, such a lack of uniformity would be undesirable. Also, if a plaintiff had to show a valid cause of action to confer Article III jurisdiction, federal courts could never entertain diversity cases where the existence of the asserted claim under state law was unclear. This is so because standing to sue must clearly exist before a federal court is permitted to reach the merits of a case. Of course, federal courts are often called upon to decide unsettled issues of state law. *See, e.g., Silver v. Mendel*, 894 F.2d 598, 606 (3d Cir.), *cert. denied*, 496 U.S. 926 (1990).

Therefore, I conclude that the applicable legal precedent requires that the question of whether the exposure-only plaintiffs have standing to bring this lawsuit in federal court does not depend on whether they have stated a valid cause of action under applicable tort law. The standing analysis does not end here, however. I must still determine whether, pursuant to federal precedent, the harm alleged by the exposure-only plaintiffs, namely exposure to asbestos, constitutes injury in fact which is fairly traceable to the defendants' conduct and is likely to be redressed by a favorable decision.

1. Injury in Fact

To satisfy the first requirement of standing, the exposure-only plaintiffs must demonstrate that they have suffered an injury in fact which is concrete and particularized, and actual or imminent rather than merely conjectural or hypothetical. *Lujan*, 112 S. Ct. at 2136. By this the Supreme Court means "that the injury must affect the plaintiff in a personal and individual way." *Lujan*, 112 S. Ct. at 2136 n.1. Put another way, "an interest need only be expressible in terms of the individuals's satisfactions or experiences; but such satisfaction or experiences need not be unique to the litigant." L.

Tribe, *American Constitutional Law* § 3-16, at 117 (2d ed. 1988) (emphasis omitted).

The severity of the injury is immaterial. The Supreme Court and the Court of Appeals for the Third Circuit have explained that "[t]hese injuries need not be large, an 'identifiable trifle' will suffice." *Public Interest Research Group, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 71 (3d Cir. 1990) (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973)), *cert. denied*, 498 U.S. 1109 (1991). Indeed, other kinds of non-economic harm have been accepted as Article III injury in fact, including aesthetic harm and emotional distress. *Sierra Club v. Morton*, 405 US. 727, 734-41 (1972) (non-quantifiable aesthetic and environmental injuries); *Clayton v. White Hall School Dist.*, 875 F.2d 676, 679 (8th Cir. 1989) (emotional and psychological distress).

In *Duke Power*, the Supreme Court addressed the issue of whether exposure to a toxin is sufficient to confer Article III standing. In that case, the plaintiffs claimed that the future exposure to radiation from two nuclear power plants under construction constituted injury in fact entitling them to challenge the constitutionality of a statute which limited the liability for accidents at nuclear power plants. At the time the suit was brought, the plants were still under construction, and, therefore, plaintiffs had sustained no radiation-related diseases as a result of future emissions. The district court found "immediate" injury to the plaintiffs in "the production of small quantities of nonnatural radiation which would invade the air and water" and "a 'sharp increase' in the temperature of two lakes presently used for recreational purposes . . . ." *Duke Power*, 438 U.S. at 73-74. The Supreme Court agreed that *each* of these effects constituted injury in fact for purposes of Article III standing analysis:

> It is enough that several of the "immediate" adverse effects were found to harm appellees. Certainly the environmental and aesthetic consequences of the thermal pollution of the two lakes in the vicinity of the disputed power plants is the type of harmful effect which has been deemed adequate in prior cases to satisfy the "injury in fact" standard. *And* the emission of non-natural radiation into appellees environment would also seem a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants.

Id. at 73-74 (emphasis added, citations omitted).

The objectors point to language in *Duke Power* which appears to limit its holding on standing. At the beginning of the above-cited paragraph, the Supreme Court cautioned that it:

> need not determine whether all the putative injuries identified by the District Court, particularly those based on the possibility of a nuclear accident and the present apprehension generated by this future uncertainty, are sufficiently concrete to satisfy constitutional requirements. It is enough that several of the "immediate" adverse effects were found to harm appellees.

Id. at 73. However, the Court went on to select two of the injuries identified by the district court upon which to base its holding that the plaintiffs did indeed have standing: 1) the environmental and aesthetic consequences of the thermal pollution of the two lakes, and 2) the health and genetic consequences of exposure to small emissions of radiation. *Id.* at 73-74. Because the settling parties rely on the Court's holding only as to the second injury, I conclude that the Court's failure to rule on the concreteness of the other putative injuries is irrelevant.

Alternatively, the objectors argue that *Duke Power's* discussion of exposure to radiation as injury in fact is *dictum*. They claim that the Court held that the environmental and aesthetic consequences of thermal pollution constitute sufficient injury in fact while downplaying plaintiffs' future exposure to radiation. In support of this argument, the objectors point out that the first sentence in the Court's holding states that thermal pollution "[c]ertainly" constitutes injury in fact, while the second sentence states only that exposure to radiation "would also seem" to be injury in fact. *Id.* at 73-74.

This argument must also fail. The law of standing requires that a plaintiff allege only one injury in fact, not that all injuries alleged constitute injury in fact. Therefore, in its holding, the

Court chose the two injuries which, on their own, would be sufficient injury in fact for purposes of standing. The Court used stronger language when describing its holding as to the environmental and aesthetic injury simply because the law on that issue was clear. In other words, the Court was "certain" about its holding because environmental and aesthetic injury was "the type of harmful effect which has been deemed adequate in prior cases to satisfy the 'injury in fact' standard." *Id.* at 73-74 (citing *SCRAP*, 412 U.S. at 669 and *Sierra Club*, 405 U.S. at 734). The Court's holding as to the health and/or genetic consequences of exposure was not as easily gleaned from the case law at that time. However, the effect of the Court's ultimate decision that such harm was sufficient to confer Article III standing is no less binding.[7]

Finally, the objectors argue that *Duke Power* is an old case and that Supreme Court decisions concerning standing have become more stringent in the fifteen years since. The objectors claim that since its holding in *Duke Power*, the Supreme Court has added another element to the injury in fact analysis: that the harm be not only concrete and particularized, but also "actual or imminent, not conjectural or hypothetical." *Lujan*, 112 S. Ct. 2136; *Whitmore*, 495 U.S. at 155; *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). However, the holding in *Duke Power* is in line with the requirement that the injury be actual or imminent. The Court expressly held that exposure to radiation constituted "direct and present injury[.]" *Duke Power*, 438 U.S. at 74. This it held in spite of the fact that the construction of the nuclear power plants was not yet completed. In this case, the exposure-only plaintiffs have

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[7] This Court previously recognized the dual holdings in *Duke Power*:

> *Cf. Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 73-4, 98 S. Ct. 2620, 2630-31, 57 L.Ed. 2d 595 (1978) (Finding that the proximity to a nuclear power plant and the "environmental and aesthetic consequences" of thermal lake pollution *and* exposure to "non-natural radiation" confer standing to assert a Fifth Amendment "taking" claim.)

Pearl v. Allied Corp., 566 F. Supp. 400, 403 (E.D. Pa. 1983) (emphasis added).

already been exposed to a toxin. Thus, even if *Duke Power* represents the most permissive end of the Supreme Court's spectrum of standing decisions, this case still falls within its holding.[8]

Moreover, the objectors' argument that *Duke Power* is no longer good law is odd in the face of the Supreme Court's recent decision in *Helling v. McKinney*, 61 U.S.L.W. 4648 (U.S. June 18, 1993). In *Helling*, the Supreme Court held that an allegation of intentional exposure of a prisoner to second-hand tobacco smoke, without present injury, states a valid claim for relief under the Eighth Amendment. *Helling* suggests that prisoners exposed to second-hand tobacco smoke may now have a valid cause of action. And, a necessary predicate to the Supreme Court's reaching the merits of the plaintiff's case in *Helling* was the implicit conclusion that mere exposure to second-hand smoke satisfied the injury in fact test of Article III.

Even before *Helling*, other courts had specifically held that exposure to a toxin constitutes injury in fact under Article III. *See, e.g., In re "Agent Orange" Prod. Liab. Litig. (Ivy v. Diamond Shamrock Chemicals Co.)*, 996 F.2d 1425 (2d Cir. 1993); *Ashton v. Pierce*, 541 F. Supp. 635, 637 (D.D.C. 1982), *aff'd*, 716 F.2d 56 and 723 F.2d 70 (D.C. Cir. 1983). Indeed, the Second Circuit's recent decision in the Agent Orange litigation is directly on point here. *Ivy*, 996 F.2d at 1433-35. *Ivy* turned on the effect of the settlement of a prior Agent Orange class action lawsuit in which the class had included "future claimants," that is, persons who had been exposed to Agent Orange but did not yet manifest any disease. Subsequently, several individuals whose disease manifested itself after the settlement filed new lawsuits. In seeking to avoid the binding effect of the class action settlement, they argued that, at the time of the class action, they lacked injury in

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[8] The objectors also seek to distinguish *Duke Power* as involving a challenge to government action, not a personal injury case. But the objectors cite no authority for their contention that standing is more relaxed for claims against the government than in private litigation. Furthermore, *Duke Power* itself held that there need be no subject-matter nexus between the right asserted and the injury in fact. *Duke Power*, 438 U.S. at 78-80.

fact for purposes of Article III standing because they manifested no disease as a result of their exposure to Agent Orange. They argued that, because of their lack of standing, their claims were not within the Article III jurisdiction of the court that approved the class action settlement and, therefore, could not have been settled. *Id.* at 1433-35.

The Second Circuit rejected that argument. It held that "some types of injury to the body occur prior to the appearance of any symptoms; thus, the manifestation of the injury may well occur after the injury itself," and rejected the argument that "'injury in fact' means injury that is manifest, diagnosable or compensable."[9] *Id.* at 1434 (citations omitted). Instead, the Second Circuit agreed that the plaintiffs' injury in fact occurred at the time of exposure. *Id.* at 1434 (citing *Duke Power*, 438 U.S. at 74).

In another case involving a settlement in an asbestos class action, objectors argued that those members of the class who had not yet manifested an asbestos-related illness did not allege Article III injury in fact. *In re Joint Eastern & Southern Dist. Asbestos Litig. (In re Johns-Manville Corp.)*, 129 B.R. 710, 834 (E. & S.D.N.Y. 1991). In response to these objections, the Honorable Jack B. Weinstein held:

> Since asbestos-related illnesses progress over time, the injury can be presumed to have occurred though the victim may not be aware of it.

Id. Judge Weinstein found that "[t]he question of whether compensable injury has occurred is not subject to doubt by any court[,]" because latent injury has been recognized throughout the

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[9] Throughout their memoranda, the objectors argue that "injury" in the context of asbestos cases must mean "disease" or "illness." This is not so for purposes of Article III standing. Nowhere in any of the standing cases is there such a limited definition of "injury in fact." The objectors may not, of their own accord, define injury and then claim that the exposure-only plaintiffs do not allege such an injury. Again, in asserting their Article III injury, the exposure-only plaintiffs rely on their actual exposure to asbestos as well as the resultant medical monitoring expenses, emotional harm, and increased risk of later developing a serious illness.

law (including in statutes of limitation decisions, in medical monitoring claims, in bankruptcy proceedings, and in insurance cases). After reviewing various areas of the law regarding the factual injury of asbestos exposure, Judge Weinstein reasoned:

> If persons exposed to asbestos fibers have a sufficient injury to warrant insurance coverage, they must have suffered a quantum of harm adequate to satisfy the constitutional case or controversy minimum injury-in-fact.
>
> * * * *
>
> Early status for Article III standing to be heard is particularly necessary in mass-tort-latent-disease cases. Often settlements and alternate dispute resolution techniques will be instituted even before litigation is threatened to provide protection against a looming storm cloud of future controversies. The courts need to be in a position to intervene as necessary.

Id. at 835-36.

Finally, in *Ashton*, the district court held that persons exposed to leadbased paint, but who did not yet manifest disease, had standing because their "alleged exposure to the risk of lead poisoning as a result of the continued presence of lead-based paint in [Washington,] D.C. public housing clearly constitutes a sufficient claim of injury in fact." *Ashton*, 541 F. Supp. at 637 (citing *Duke Power*, 438 U.S. at 74). In fact, many federal class action cases have involved a class that included persons who had been exposed to a toxin but manifested no disease. *See, e.g., In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 861 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1584 (1991) (holding that persons who had been exposed to PCBs could sue for medical monitoring expenses because "regardless of whether all plaintiffs alleged demonstrable physical injury, they all clearly alleged monetary injury"); *In re A.H. Robins Co.*, 880 F.2d 694, 880 F.2d 709 (4th Cir. 1989) (affirming district court's settlement of claims by class of persons with potential future injuries caused by use of Dalkon Shield contraceptive device).[10] Although in many of those cases there is

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[10] *See also Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 147-48 (S.D.

no express finding as to Article III standing, it is clear to me that the courts were satisfied as to their Article III jurisdiction because a finding of such jurisdiction is a necessary predicate to taking action on the merits.

Based upon the foregoing analysis, I conclude that exposure to a toxic substance constitutes sufficient injury in fact to give a plaintiff standing to sue in federal court.[11] The objectors do not

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Ohio 1992) (approving settlement of emotional distress claims on behalf of a 51,000-person class composed of individuals with "properly functioning ... heart valves" who feared that these valves might fracture in future), *appeal dismissed without op.*, 995 F.2d 1066 (6th Cir. 1993); *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 60-62 (S.D. Ohio 1991) (the court certified the class based on the class members' actual exposure to radiation and hazardous waste); *In re Fernald Litig.*, 1989 U.S. Dist. LEXIS 17764 (S.D. Ohio 1989) (approving settlement on behalf of class of persons exposed to radiation from uranium processing plant who had not yet manifested disease); *Pearl*, 566 F. Supp. at 401 (E.D. Pa. 1983) (denying motion to dismiss class action complaint of persons exposed to urea formaldehyde insulation, notwithstanding claim that class members suffered no detectible harm).

[11] The objectors rely heavily on the Supreme Court's most recent standing decision in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992). In that case, environmental groups challenged a regulation of the Secretary of the Interior which required other agencies to confer with him under the Endangered Species Act ("ESA") only with respect to federally funded projects in the United States and on the high seas. The plaintiffs claimed that the Secretary erred as to the geographic scope of the ESA's consultation requirement.

The Court held that plaintiffs did not allege sufficient Article III injury in fact because they failed to show that one or more of their members would be directly affected apart from the members' special interest in the subject. Also, the Court explained "that the injury must affect the plaintiff in a personal and individual way." *Lujan*, 112 S. Ct. at 2136 n.1. In this case, the plaintiffs have already been personally exposed to asbestos. Their injury is not speculative as was the injury alleged in *Lujan*, it is actual. I find, therefore, that the Court's holding in *Lujan* supports a finding that the exposure-only plaintiffs have alleged sufficient injury in fact.

dispute, nor could they, that asbestos is a toxin. *See In re Joint Asbestos Lit.*, 129 B.R. at 739 ("The capacity of asbestos fibers to cause serious injuries is no longer disputed."). In this case, the class consists of persons who have been exposed to asbestos either occupationally or through the occupational exposure of a spouse or household member. Accordingly, by definition, each class member sues on the basis of *actual* exposure and not future exposure to asbestos. Without more, the exposure-only plaintiffs have alleged sufficient injury in fact.

Apart from the authority dealing with exposure to a toxin as Article III injury in fact, I conclude that the available medical data on the health consequences of exposure to asbestos also require a conclusion that the exposure-only plaintiffs have alleged a demonstrable physical injury which satisfies the Article III injury in fact requirement.

The Pennsylvania Supreme Court recently characterized the immediate consequences of exposure to asbestos as a "direct injury." *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 505-6 (Pa. 1993). The court summarized current medical evidence which shows that:

> asbestos fibers in the respiratory tract interact with the membranes of the cells lining the trachea and cause the release of enzymes and superoxides which either damage or kill individual cells. If sufficient cells are damaged, tissue (an accumulation of cells) is damaged or destroyed. This injury occurs within minutes after asbestos fibers enter the cells.

Id. The court went on to hold that, for purposes of triggering an insurer's duty to indemnify, "the medical evidence of discrete cellular injuries occurring upon exposure to asbestos justifies the conclusion that exposure to asbestos causes immediate 'bodily injury' ...", even if disease is not manifested until much later. *Id.* at 506. Judge Weinstein in *In re Joint Asbestos Lit.* agreed:

> Since asbestos-related illnesses progress over time, the injury can be presumed to have occurred though the victim may not be aware of it.

In re Joint Asbestos Lit., 129 B.R. at 834. Thus, to show injury in fact, the exposure-only plaintiffs are not relying on speculative

future harm, but on their *present* injuries resulting from exposure to asbestos.

In sum, the weight of recognized medical research on asbestos-related diseases shows that exposure to asbestos causes immediate cellular changes. And, only those who have been exposed to asbestos are members of the plaintiff class. They have been personally affected by defendants' conduct in a concrete and particular way whether or not they ever develop a serious medical condition. This is exactly the type of personal stake the Article III injury-in-fact requirement demands. Therefore, I conclude that the exposure-only plaintiffs have alleged Article III injury in fact.

2. Traceability

The second requirement of standing is that the plaintiff show that there is some causal connection between the injury and the conduct complained of, *i.e.*, the injury has to be fairly traceable to the challenged action of the defendants and not the result of the independent action of some third party. *Lujan*, 112 S. Ct. at 2136.

In their complaint, plaintiffs allege that their injuries are the proximate result of exposure to the CCR defendants' asbestos products. It is clear that they have been exposed to asbestos, and it is clear that the CCR defendants manufactured asbestos and asbestos-containing products.[12] Therefore, I conclude that plaintiffs have shown, for purposes of Article III standing, that their injuries are fairly traceable to the defendants' conduct.

3. Redressability

To satisfy the final requirement of standing, a federal plaintiff must show that his or her injury is likely to be redressed by a favorable decision. *Lujan*, 112 S. Ct. at 2136. Because of this requirement, "the form of relief sought is often critical in determining whether the plaintiff has standing." *Brown v. Fauver*, 819 F.2d 395, 400 (3d Cir. 1987).[13]

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[12] The objectors do not dispute that this requirement has been satisfied.

[13] The objectors offer no argument that the money damages sought in the complaint would not redress the injuries of the exposure-only plaintiffs.

The redressability requirement has been problematic only in cases requesting declaratory or injunctive relief. For example, in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), the plaintiff claimed that the Texas policy of not prosecuting the fathers of illegitimate children for failure to pay child support was unconstitutionally discriminatory. The plaintiff, an unwed mother, asked the district court to issue an injunction forcing state officials to prosecute the father of her child. The Supreme Court, however, held that the plaintiff did not have Article III standing to bring the suit. The Court reasoned that an injunction commanding state prosecutions would not ensure that the mother would receive any additional support money. The Court explained that if the plaintiff "were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosection will ... result in payment of support can, at best, be termed only speculative." *Id.* at 618. In other words, the plaintiff lacked standing because her injury was not likely to be redressed by the relief she requested.

Similarly, in *Warth v. Seldin*, 422 U.S. 490 (1975), several plaintiffs challenged the constitutionality of a suburb's exclusionary zoning practices. They claimed that the zoning practices prevented construction of multifamily dwellings and low-income housing and, therefore, effectively excluded them from the neighborhood. The Supreme Court held that these plaintiffs lacked standing because they could not demonstrate that appropriate housing would be constructed without the exclusionary zoning ordinances. The Court felt that overturning the zoning ordinances would not guarantee that builders would choose to construct new housing in the area, or that low-income residents would be able to afford to live there. *Id.* at 505-07; *see also Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 45-46 (1976).

In this case, it is self-evident that the very conventional remedy sought by the plaintiffs — money damages — would do much to redress their injuries. Unlike claims for injunctive or declaratory relief, as in the above-cited cases, "[a] damage claim, by definition, presents a means to redress an injury." *Cardenas v.*

Smith, 733 F.2d 909, 914 (D.C. Cir. 1984). Therefore, I conclude that the exposure-only plaintiffs have shown that their injuries are likely to be redressed by the relief requested in their complaint.

4. Conclusion

The exposure-only plaintiffs have satisfied the three requirements of Article III standing. Beyond that, a reexamination of the policies served by the standing requirement convinces me of the propriety of this finding. *See* Memorandum, *supra* at 5-6. First, this is not a case where the courts are being "called upon to decide abstract questions of wide public significance. . . " *Warth*, 422 U.S. at 500. Here, the plaintiffs have particular, concrete and individual claims of injury. That there are many victims of asbestos does not change the individual and personal stake each plaintiff has in the outcome of this litigation. Judicial intervention is, therefore, appropriate and necessary.

Second, this case provides the type of factual setting which is necessary for judicial review to be effective. Because the claims of the exposure-only plaintiffs are based on their personal experiences and involve particularized concrete injuries, there is no risk of ruling on an ill-defined or abstract controversy.

Finally, the exposure-only plaintiffs have been directly affected by the CCR defendants' conduct. They are not merely concerned bystanders. Therefore, this case serves the Article III policy of reserving the federal courts for parties whose lives will be directly affected by the outcome of specific litigation.

Having reviewed the applicable case law and the Article III policies which have guided the courts in their decisions, it is clear to me that the claims of the exposure-only plaintiffs are precisely the type which confer standing to sue in federal court. I conclude, therefore, that the exposure-only plaintiffs have Article III standing to bring this lawsuit.

B. Diversity Jurisdiction - Amount in Controversy

The plaintiff class seeks to invoke the subject matter jurisdiction of this Court based on the federal diversity statute, 28 U.S.C. § 1332. That statute authorizes federal courts to exercise subject matter jurisdiction over actions "between citizens of different States" so long as "the matter in controversy exceeds the

sum or value of $50,000, exclusive of interest and costs." 28 U.S.C. § 1332. In class actions, each class member must on his or her own meet the amount in controversy requirement. *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973).

For purposes of measuring the amount in controversy, "the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938). The case cannot be dismissed for failure to exceed the requisite amount in controversy unless it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount . . . " *St. Paul Mercury Indem. Co.*, 303 U.S. at 289; *accord In re School Asbestos Litig.*, 921 F.2d 1310, 1315 (3d Cir. 1990) ("the court is required only to dismiss those class members whose claims appear to a 'legal certainty' to be less than the jurisdictional amount"). Only such a showing can overcome the presumption that the plaintiff has, in good faith, properly alleged the requisite amount. *See Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 353 (1961); 1 J. Moore, Moore's Federal Practice ¶ 0.92[1], at 829 & n.9 (2d ed. 1992); 14A C. Wright, A Miller & E. Cooper, Federal Practice and Procedure § 3702, at 54-56 (2d ed. 1985). Thus, although the plaintiff has the burden of proving the requisite amount in controversy, in practice, this burden "is not a heavy one.... [T]he plaintiff need only present allegations or proof that it is *not* clear to a legal certainly that [s/he] will not recover less than the jurisdictional amount." Moore, *supra*, at 831 (citations omitted, emphasis in original).

The amount in controversy is judged as of the time of filing the complaint, and subsequent events will defeat jurisdiction only if they show that the plaintiff lacked a good faith basis for claiming over $50,000 at the time the complaint was filed. *Id.* at 288-90; *see also Nationwide Mutual Fire Ins. Co. v. T & D Cottage Auto Parts and Service, Inc.*, 705 F.2d 685, 687 (3d Cir. 1983). Thus, "[t]he inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his [or her] bad faith or oust the [court's] jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim." *St. Paul Mercury Indem. Co.*, 303 U.S. at 289 (citations omitted); *accord Apicella v. Valley Forge Military Academy and Junior College*, 630 F. Supp. 20, 24 (E.D. Pa. 1985). Likewise, a verdict or settlement

for less than the jurisdictional amount does not undermine the court's jurisdiction. Moore, *supra*, at 834 (events "such as dismissal or compromise of claims ... do not affect jurisdiction").

In determining the amount in controversy, claims for punitive damages generally must be included in the computation. *See, e.g., Bell v. Preferred Life Assur. Soc'y*, 320 U.S. 238, 240 (1943). A claim for punitive damages may be "stricken from the amount in controversy" only if it is "'patently frivolous and without foundation' because such damages are unavailable as a matter of law." *Packard v. Provident National Bank*, 994 F.2d 1039, 1046 (3d Cir. 1993) (citation omitted).

The plaintiffs allege that jurisdiction is based upon diversity of citizenship and an amount in controversy for each member of the plaintiff class which exceeds $100,000. The objectors, on the other hand, argue that the exposure-only plaintiffs cannot in good faith allege damages in excess of the jurisdictional minimum.[14]

Applying the legal principles discussed above, courts in class action personal injury cases seeking unliquidated damages have uniformly held that it cannot be said to a "legal certainty" that any class member's claim is for less than the jurisdictional amount. For example, in the class action brought on behalf of asbestos personal injury plaintiffs against the Manville Settlement Trust, both Judge Weinstein and the Second Circuit rejected the argument that some members of the class did not meet the amount in controversy requirement, even though the class included those who had not yet manifested an asbestos-related condition, and even though the settlement imposed a cap on some claimants below the $50,000 level. *In re Joint Asbestos Litig.*, 129 B.R. at 793-94, 982 F.2d at 734. The class in that case consisted of "all beneficiaries of the [Manville] Trust who now have *or in the future may have* (a) any unliquidated claims for death or injury resulting from exposure to Manville asbestos...." 982 F.2d at 729 (emphasis added).

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[14] There is no dispute as to the diversity of citizenship of the named parties. Also, the objectors concede, and I agree, that the claims of those members of the plaintiff class who already manifest an asbestos-related condition satisfy the jurisdictional minimum of 28 U.S.C. § 1332.

Nevertheless, Judge Weinstein, relying on his own experience and on cases from other courts, took "judicial notice of the fact that the value of every claim in the complaint can in good faith be said to exceed $50,000 for the purposes of pleading." 129 B.R. at 793-94. Also, under the proposed stipulation of settlement — which was filed simultaneously with the complaint — the maximum possible award to certain kinds of claimants was $30,000. 982 F.2d at 730. With respect to the settlement cap, Judge Weinstein noted that "[w]hile any plaintiff is free to settle a claim for less than the amount sought in the complaint, the amount that controls for jurisdictional purposes is what the claimant in good faith pleads." 129 B.R. at 793. On appeal, the Second Circuit summarily rejected the challenge to these rulings, specifically agreeing that the settlement cap below $50,000 did not affect the Court's jurisdiction. 982 F.2d at 734.

The same conclusions have been reached in other class action product liability cases. The Second Circuit twice rejected an amount in controversy challenge in the Agent Orange litigation, even though (1) the class included "future claimants," *i.e.*, those who did not yet manifest a disease as a result of exposure to Agent Orange, and (2) the settlement provided no payment to many members of the class. *Ivy*, 996 F.2d at 1434; *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 157-58, 163 (2d Cir. 1987). In the *Ivy* case, several class members who were classified as "future claimants" when the initial class action was settled in 1984 asserted that they had subsequently suffered injury as a result of their Agent Orange exposure and that they were not bound by the 1984 class action settlement. As with the standing issue, the *Ivy* plaintiffs argued that they could not be bound by the original settlement on the theory that their individual claims in 1984 (for not-yet manifested conditions) could not have satisfied the amount in controversy requirement. The Second Circuit disagreed, holding that it did not appear to a legal certainty that the claims of the plaintiff class, including the claims of the exposure-only plaintiffs, were really for less than the jurisdictional amount.

Likewise, in a case involving the drug DES, a district court certified a class of women who had been exposed to DES *in utero* but had not developed cancer. The court rejected a challenge to the jurisdictional amount requirement as follows:

> Plaintiffs' claimed damages are unliquidated and subject to a jury's evaluation of many subjective factors. I cannot now find to a legal certainty that the claim of any member of the plaintiff class is less than the jurisdictional amount.

Payton v. Abbott Labs, 83 F.R.D. 382, 395 (D. Mass. 1979), *vacated on other grounds*, 100 F.R.D. 336 (D. Mass 1983).

Similarly, in the Dalkon Shield litigation, the certified class included women "who had used the Dalkon Shield but had not yet manifested an injury" from that use.[15] *In re A.H. Robins Co.*, 88 B.R. 742, 745 (E.D. Va. 1988). Nevertheless, the Fourth Circuit rejected a challenge to the amount in controversy, noting that such personal injury claimants always sought an amount in excess of the jurisdictional amount and holding that it is "indisputable that it cannot be said to a legal 'certainty' that the jurisdictional amount herein was not satisfied." *In re A.H. Robins Co.*, 880 F.2d 709, 723-25 (4th Cir. 1989).

Finally, in the *Bowling* case discussed above, the court, in approving a class action settlement, rejected the argument that not all members of the plaintiff class met the $50,000 requirement, even though the heart valves implanted in several of the class members were, at the time of settlement, still functioning properly. The court stated that, "[a]though it is unlikely that the Plaintiffs would have made it to trial and then prevailed, had they done so, the Plaintiffs can assert in good faith that they would have received more than $50,000 each from a jury." *Bowling*, 143 F.R.D. at 167. This the court held even though, had the parties not settled, the claims of these plaintiffs would probably have been dismissed for failure to state a claim upon which relief could be granted.

The objectors argue that in spite of the holdings in the above-cited cases the exposure-only plaintiffs in this case have not met the amount in controversy requirement: (1) without a presently diagnosed asbestos-related condition, the exposure-only plaintiffs

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[15] Although this quotation directly referred to the bankruptcy claimants, the class in the class action was defined to include those claimants. *See In re A.H. Robins Co.*, 85 B.R. 373, 378 (E.D. Va. 1988); *see also In re A.H. Robins Co.*, 880 F.2d 709, 717 (4th Cir. 1989).

only have a cause of action for medical monitoring, if anything, and hence cannot recover more than $50,000, and (2) the proposed settlement itself shows that the amount in controversy does not exceed $50,000.[16]

I do not find it necessary to make a claim-by-claim analysis of the causes of action available to diversity plaintiffs in order to determine whether the plaintiffs have alleged the jurisdictional minimum. I conclude that it is enough that the kind of factual injuries alleged by the exposure-only plaintiffs — physical, monetary, and emotional injuries — plainly support a claim to more than $50,000. The *Manville Trust, Agent Orange, DES, Dalkon Shield*, and *Heart Valve* cases discussed above included persons who had been exposed to the hazardous substance or product but manifested no compensable disease or condition, and the courts nonetheless found that the plaintiffs all met the jurisdictional minimum. None of those courts found it necessary or appropriate to make a detailed examination of the causes of action available to such persons for purposes of the jurisdictional amount requirement.

Even those claims that would not be recognized under applicable law must still be counted for jurisdictional purposes. This is evident from the recent Third Circuit decision in *Angus v. Shiley, Inc.*, 989 F.2d 142 (3d Cir. 1993). In that case, the plaintiff alleged that she was suffering extreme anxiety and emotional distress as a result of learning that her implanted heart valve, which had been manufactured by the defendant, might fracture in a fashion that could cause death or serious injury. Her suit seeking compensatory damages for emotional distress and punitive damages was brought in Pennsylvania state court and removed by defendant to federal district court. The district judge

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[16] The objectors also attempt to distinguish many of the above-cited cases on the ground that, in those cases, "each of the *named plaintiffs* specifically alleged that they had sustained physical injury as a result of the defendant's conduct." Baron Brief at 37 (emphasis added). That argument fails because (1) the amount in controversy requirement applies to class members as well as to class representatives, *Zahn*, 414 U.S. at 301, and (2) in this case, the plaintiffs, including those with no manifested asbestos-related condition, do allege physical injury as a result of exposure to defendants' products — adverse cellular changes.

rejected plaintiff's motion to remand the case to state court and dismissed the case on the merits for failure to state a claim.[17]

On appeal, the plaintiff first contended that the district court had lacked diversity jurisdiction because her claims did not satisfy the amount in controversy requirement. The Third Circuit rejected this contention:

> Given that the complaint does not limit its request for damages to a precise monetary amount, the district court properly made an independent appraisal of the value of the claim,... and reasonably found that the actual amount in controversy exceeded $50,000 *for there can be no doubt that a reasonable jury likely could have valued Angus' losses at over $50,000.*

Id. at 146 (footnote omitted, emphasis added). Turning to the merits, the court upheld the dismissal of Angus' complaint for failure to state a claim, finding that Pennsylvania would not allow a cause of action for emotional distress under the circumstances. *Id.* at 147.

With its decision in *Angus*, the Third Circuit in essence held that claims for damages for emotional distress in product liability cases should be included in determining whether the jurisdictional amount is met, even when those claims ultimately must be dismissed for failure to state a valid claim.[18] *See also Bowling*, 143 F.R.D. at 167. The settling parties argue that the "lesson" from *Angus* was in fact required by the general rule that a court does not lose jurisdiction even when "the complaint discloses the

[17] The district judge termed its dismissal as a grant of summary judgment, but the Third Circuit ruled that its action was properly characterized as a dismissal. *Angus*, 989 F.2d at 146-47.

[18] *Angus* cannot be distinguished on the ground that it is a heart valve case and this is an asbestos case. The availability of damages for emotional distress obviously does not turn on the type of product involved. In fact, *Angus* expressly relied upon asbestos cases in deciding that the case should be dismissed.

existence of a valid defense to the claim." *St. Paul Mercury Indem. Co.*, 303 U.S. at 289.[19]

Alternatively, even if a claim-by-claim examination is necessary, the exposure-only plaintiffs have alleged a cognizable claim for medical monitoring and punitive damages. On this point most of the objectors concede, and I agree, that the claim for medical monitoring is not frivolous. Those objectors assert, however, that damages for medical monitoring cannot exceed approximately $500 per year, or approximately $10,000 per claimant.

But the plaintiffs also seek punitive damages. As noted above, claims for punitive damages must be counted in determining whether the jurisdictional amount has been satisfied unless they are "patently frivolous and without foundation." *Packard*, 994 F.2d at 1046. Conceding this, one of the objectors contends that punitive damages are not available at all when only medical monitoring damages can be sought, arguing that:

> there is *no* authority to suggest that the 'exposure only' plaintiffs' nominal claims for medical surveillance — without more — would support an award of punitive damages. Indeed, it appears that no court in any jurisdiction has ever upheld such an award. Accordingly, the punitive claims must be stricken from the amount in controversy.

Brief of the law firm of Baron & Budd ("Baron Brief") at 33 (emphasis in the original). The objectors suggest, in effect, that if no known or reported decision has upheld an award of punitive damages in such circumstances, I must conclude to a "legal certainty" that punitive damages could never be awarded. This, however, is not the law. The "legal certainty" test requires that such a claim be *unavailable* as a matter of law. *Packard*, 994 F.2d

[19] The claims in the present case are far stronger than the claims that were counted in computing the amount in controversy (but then dismissed) in *Angus*, given that the plaintiffs here allege that the asbestos products to which they were exposed were defective (Complaint at ¶ 46) and that they suffer physical injury from that exposure (Complaint at ¶ 41).

at 1046. In other words, controlling adverse precedent is required to show that a claim would certainly fail.

In any event, it is not uncommon for plaintiffs to join claims for punitive damages with claims for medical monitoring.[20] The potential substantiality of such claims is shown by *In re Fernald Litig.*, 1989 U.S. Dist. LEXIS 17764 (S.D. Ohio 1989). There the court approved a class action settlement of claims brought by owners of property adjacent to a nuclear facility and certain current and former employees of the facility. In evaluating the settlement, the court noted that, to facilitate settlement, it had conducted an advisory summary jury trial in which the non-binding verdict included "$1,000,000 for diminution of property values, $80,000,000 for a medical monitoring fund, and $55,000,000 for punitive damages." *Id.* at *4.

I distinguish *Linkous v. Medtronic, Inc.*, 1985 Westlaw 2602 (E.D. Pa. Sept. 4, 1985), upon which the objectors rely in support of their claim that the exposure-only plaintiffs cannot add punitive damage claims to medical monitoring claims in order to meet the jurisdictional minimum. In *Linkous*, the plaintiffs sought to certify a separate class for punitive damages claims. The court ruled that the class in that case failed to meet the requirements for certification. *Id.* at *8. In light of that ruling, the court also held that the amounts sought in punitive damages could not be used to establish that the plaintiffs in the remaining two classes met the jurisdictional amount requirement. *Id.* at *4, *7. Here, by contrast, the class itself includes plaintiffs' claims for both compensatory *and* punitive damages, which thus are both counted in deciding the jurisdictional amount issue.

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[20] *See, e.g., Day v. NLO, Inc.*, 814 F. Supp. 646 (S.D. Ohio 1993); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468 (D. Colo. 1991); *Catasauqua Area School Dist. v. Raymark Indus., Inc.*, 662 F. Supp. 64 (E.D. Pa. 1987). Punitive damages have also been awarded in connection with other "exposure-only" claims. *See, e.g., Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (lower court awarded $7.5 million in punitive damages along with substantial damages for fear of cancer).

The objectors also contend that punitive damages could not be awarded in a sufficient amount to exceed $50,000 when combined with the award for medical monitoring damages because "in Pennsylvania punitive damages must be reasonably related, and not disproportionate, to the amount of compensatory damages." Baron Brief at 31-32. The objector's argument mistakenly invokes the law of only one state, and also misstates that law. This is a nationwide class action in diversity jurisdiction, and the class members' claims are subject to the laws of the various states, not just Pennsylvania. In any event, this Court recently noted in applying Pennsylvania law that "punitive damages need not bear a reasonable relationship to compensatory damages." *Fine v. State Farm Fire & Cas. Co.*, 1993 U.S. Dist. LEXIS 7682, at *4 (E.D. Pa. June 11, 1993) (citing *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800 (Pa. 1989)). And, in light of the recent Supreme Court decision of *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), where a punitive award 526 times greater than the compensatory award was upheld, it cannot be argued with legal certainty that the Constitution imposes any requirement that punitive damages bear a reasonable relationship to compensatory damages. In short, there is no mathematically certain limit on the amount of punitive damages that might be awarded to the plaintiffs in this case.

In fact, there have been many large punitive damage awards in prior asbestos cases. Just recently, a majority of the Third Circuit, sitting en banc, approved a $1 million award of punitive damages on behalf of a single plaintiff against a former manufacturer of asbestos-containing insulation. *Dunn v. HOVIC*, 1993 U.S. App. LEXIS 19482 (3d Cir. July 27, 1993). In so doing, the court noted that:

> [a] multi-million dollar punitive damages award is not unique in products liability cases. See, e.g., *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) ($6.1 million in asbestos case); ... *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985) ($1.5 million in asbestos case) ....

Id. at *37.[21]

The objectors rely heavily on *Packard v. Provident Nat'l Bank*, 994 F.2d 1039 (3d Cir. 1993), for their argument that the exposure-only plaintiffs cannot satisfy the jurisdictional minimum with their claims for medical monitoring and punitive damages. In *Packard*, the plaintiffs sought recovery of quantifiable "sweep fees" that defendant trustee banks had charged to trusts. Those liquidated sums were far less than $50,000 per class member, with the named plaintiff seeking recovery of only about $4,000 in such fees. *Id.* at 1046. This case, however, is much different. The complaint here seeks unliquidated damages that would be subject to a jury's subjective evaluation. It cannot be said with legal certainty that a jury would not award the exposure-only plaintiffs unliquidated, compensatory damages and punitive damages for medical monitoring in excess of the jurisdictional amount. In other words, *Packard* dealt only with the counting of punitive damages where the compensatory damages were liquidated at a level far less than $50,000. The *Packard* holding does not apply to cases like this one where the plaintiffs seek unliquidated compensatory damages.

Furthermore, because the level of liquidated compensatory damages in *Packard* was so low, the plaintiffs were necessarily trying to satisfy the jurisdictional amount almost entirely through their punitive damages claim. The court stated that "when it appears that [a punitive damages] claim comprises the bulk of the amount in controversy and may have been colorably asserted solely or primarily for the purpose of conferring jurisdiction, that claim should be given particularly close scrutiny." *Id.* at 1046. The court then examined whether plaintiffs in *Packard* could possibly state a viable claim for punitive damages under Pennsylvania law and concluded that that law foreclosed the award of punitive damages

[21] As examples of other substantial awards of punitive damages in asbestos litigation, *see Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir.) ($2,300,000 in punitive damages), *cert. dismissed*, 497 U.S. 1057 (1990); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.) ($3,000,000 in punitive damages), *cert. denied*, 498 U.S. 920 (1990); *Eagle-Picher Indus., Inc. v. Balbos*, 604 A.2d 445 (Md. 1992) ($150,000 in punitive damages).

against a trustee.[22] *See Id.* at 1047-49. It accordingly determined that there was a legal certainty that the plaintiffs' claims in that case could not satisfy the jurisdictional amount and it ordered that the action be dismissed. *Id.* at 1050.

It cannot be said in this case that punitive damages are unavailable as a matter of law. Nor can it be said with legal certainty that there is a strict mathematical limit on the amount of such damages that might be awarded. *See, e.g., Fine*, 1993 U.S. Dist. LEXIS 7682, at *3 n.2 (without commenting on the ultimate merits of plaintiffs' claim for punitive damages, the court noted that, from the face of the complaint, it was not patently frivolous and thus could be considered in assessing the amount in controversy).

In light of the foregoing I find that, even if only the claims for medical monitoring and punitive damages are considered, the exposure-only plaintiffs' claims exceed the jurisdictional minimum. In other words, I cannot find to a legal certainty that a jury could not award the exposure-only plaintiffs more than $50,000 in compensatory and punitive damages on their medical monitoring claims.

The objectors' second contention is that the terms of the proposed settlement show that the exposure-only plaintiffs do not meet the jurisdictional amount because they will receive no immediate monetary payment. However, the "amount of settlement is often less than the amount the plaintiff expects to receive *if* he or she prevails at trial." *Bowling*, 143 F.R.D. at 167. For that reason, as noted above, it is clear that a settlement for less than the jurisdictional amount does not undermine the court's jurisdiction. I find that this rule applies as well where the proposed settlement is filed at the same time as the complaint — as occurred in the *Manville* case. It also applies even if the settlement provides some class members with *no* immediate monetary relief — as was true in the *Agent Orange* and *Manville* cases.

[22] *Packard* also differs from this case in that only Pennsylvania law applied to the plaintiffs' cause of action. In this case, as mentioned above, the laws of the various states apply.

It is widely known that asbestos personal injury claimants invariably seek — and often obtain — damages well in excess of $50,000. Therefore, there is no basis on which to conclude that the damage calculation was inflated here to create federal jurisdiction. Because the "[p]laintiffs' claimed damages are unliquidated and subject to a jury's evaluation of many subjective factors," *Payton*, 83 F.R.D. at 395, I conclude that it is impossible to establish "to a legal certainty" that the claims of the exposure-only plaintiffs are for less than the jurisdictional amount. Therefore, I necessarily conclude that the plaintiff class has satisfied the amount in controversy requirements of 28 U.S.C. § 1332.

C. Collusion

Because of the "case or controversy" requirement in Article III, "federal courts will not entertain friendly suits, or those which are feigned or collusive in nature." *Flast*, 392 U.S. at 100. The Constitution demands a "honest and actual antagonistic assertion of rights." *United States v. Johnson*, 319 U.S. 302, 305 (1943) (quoting *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). "[I]f two litigants commence a suit with the same goals in mind, no controversy exists to give the district court jurisdiction[.]" *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 290 (E.D. Pa. 1972).

The objectors argue that this class action is collusive, or "friendly," because (1) the complaint and the proposed settlement were filed simultaneously, and (2) a provision of the proposed settlement provides that the CCR defendants will pay class counsel's fees.

Throughout the years, allegations of collusion have defeated a district court's jurisdiction in cases very different from this personal injury action for damages. In *Johnson*, for example, a landlord sought to invalidate the rent controls in the Emergency Price Control Act of 1942 by requesting that his tenant bring an action against him under the Act seeking treble damages for excessive rent. Notwithstanding the tenant's presence as the nominal plaintiff, the landlord controlled the suit and paid the tenant's attorney's fees. Because of the lack of adverse parties and the collusive nature of the suit, the Supreme Court held that action must be dismissed. *Johnson*, 319 U.S. at 305; *see also Moore v.*

Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47 (1971) (both parties to the lawsuit jointly sought a judicial determination that an anti-busing statute was unconstitutional); *Wellman*, 143 U.S. at 344 (Court condemned "a friendly suit between the plaintiff and the defendant to test the constitutionality of [a particular piece of] legislation").

In *Teamsters Local 513 v. Wojcik*, 325 F. Supp. 989 (E.D. Pa. 1971), the district court dismissed for lack of subject matter jurisdiction a declaratory judgment action brought by a union against a union official who had been convicted of possessing narcotics. The purpose of the suit was to determine whether the official could still serve, despite a federal law disallowing anyone convicted of a violation of the narcotics laws from serving as an officer of a labor organization. Because both parties wished to preserve the official's position in the union unless the statute required otherwise, the court held that "there is no 'controversy' between them on that point because their interests are not adverse." *Id.* at 991.

The objectors argue that this suit is analogous to those cited above because the parties are no longer adverse as they settled their differences before filing the complaint. They argue that the simultaneous filing of the complaint and the proposed settlement leaves the Court with no choice but to find that this suit is "friendly." This is so, they argue, because to present a justiciable controversy, the parties must be genuinely adverse *when the suit is filed*.

On this point, the objectors cite to this Court's earlier decision in *Pennsylvania Ass'n for Retarded Children*, 343 F. Supp. at 290. In that case, an association of parents of retarded children brought a class action against the Commonwealth of Pennsylvania and thirteen individual school districts claiming that the exclusion of retarded children from the Pennsylvania public schools was unconstitutional. The plaintiffs added all other school districts in Pennsylvania as unnamed class defendants. The plaintiffs and representative defendants ultimately reached a settlement of the action and presented the proposal to the court for approval under Fed. R. Civ. P. 23. One unnamed school district objected, claiming that the court lacked jurisdiction over the class action because the

plaintiffs and the defendants were not sufficiently adversarial. Rejecting that argument, the court observed:

> Undoubtedly, if two litigants commence a suit with the same goals in mind, no controversy exists to give the district court jurisdiction as required by Article III, Sec. 2. But a different case arises when litigants *begin* a suit as adversaries and then at some later point decide to compromise the dispute. In such an instance, the court does not *ipso facto* lose jurisdiction over the matter for want of a controversy.

Id. at 290 (emphasis in original, citations omitted). In finding its jurisdiction intact, the court stated that "[t]he record in this case clearly shows that the Commonwealth did not collaborate with the plaintiffs in bringing or conducting this suit." *Id.* at 291.

The settling parties do not dispute that this class action was settled before the complaint was filed. They claim, however, that the CCR defendants, as asbestos manufacturers, and the plaintiffs, as asbestos victims, have diametrically opposed legal interests in this lawsuit just as they have throughout the twenty-year history of asbestos litigation. The settling parties claim, and the objectors do not dispute, that the negotiations leading to the proposed settlement were long, arduous, complex and arms-length. This type of controversy, the settling parties argue, is the opposite of the type banned from the federal courts for lack of a genuine dispute.

The recent decisions in *In re Joint Asbestos Litig.* support the argument that pre-filing negotiations do not evidence a "friendly" lawsuit. In that case, the complaint was filed on the same day as the proposed settlement. 982 F.2d at 728. Neither Judge Weinstein nor the Second Circuit saw any problem with the justiciability of the lawsuit resulting from that fact.[23] Also, other federal courts

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[23] At the August 23, 1993 hearing, the objectors attempted to distinguish *In re Joint Asbestos Litig.* by pointing out that Judge Weinstein was aware of the ongoing negotiations between the parties and that the simultaneous filing of the complaint and the settlement was done with his consent. However, a district judge cannot create subject matter jurisdiction if no case or controversy exists. If I can assume that Judge Weinstein "consented" to the filing of the complaint and the settlement, I can also assume he did so fully satisfied that the parties were not "friendly."

have held that the simultaneous filing of the complaint and the proposed settlement does not show a collusive suit or undermine the court's jurisdiction. *SEC v. Randolph*, 736 F.2d 525 (9th Cir. 1984); *Rodgers v. United States Steel Corp.*, 536 F.2d 1001 (3d Cir. 1976); *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826 (5th Cir. 1975); *United States v. TW Servs., Inc.*, 1993 U.S. Dist. LEXIS 7882 (N.D. Cal. Apr. 1, 1993); *Colorado Environmental Coalition v. Romer*, 796 F. Supp. 457, 458 (D. Colo. 1992); *West Virginia ex rel. Tompkins v. Coca-Cola Bottling Co.*, 1990 U.S. Dist. LEXIS 5304 (S.D. W. Va. Jan. 16, 1990); *United States v. Acton Corp.*, 131 F.R.D. 431 (D.N.J. 1990).[24]

In *SEC v. Randolph*, 564 F. Supp. 137 (N.D. Cal. 1983), *rev'd*, 736 F.2d 525 (9th Cir. 1984), the Securities and Exchange Commission ("SEC") filed a complaint against two alleged insider traders. Before actually filing the complaint in federal court, however, the SEC and the defendants had worked out a consent decree wherein the defendants, without conceding liability, agreed to disgorge the profits of their allegedly improper transactions. In accordance with the settlement agreement, on the same day the complaint was filed, proposed judgments incorporating the terms of the settlement agreement were also filed. The district court held that there existed no case or controversy because the parties had come to court only after they had agreed to a settlement and, thus,

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[24] The objectors attempt to distinguish these cases as involving the enforcement of public rights by a governmental agency (or a party standing in the shoes of a governmental agency) through proposal of a consent decree, and not the resolution of private claims for compensation through a settlement stipulation. The objectors point to language from two consent decree cases holding that the pre-filing settlements had not mooted the controversy because the settlements called for prospective relief in the form of injunctions. *Randolph*, 736 F.2d at 528 (citing *Swift & Co. v. United States*, 276 U.S. 311, 325-26 (1928) (dictum)). However, this case also calls for prospective relief in the form of a class action settlement. Such settlements require judicial approval, and once approved, take the form of consent judgments which, like injunctions, may be enforced by judicial proceedings. Therefore, I find these cases to be directly on point.

were no longer adverse at the time the complaint was filed. *Id.* at 144. The district court reasoned:

> Although cast in the form of a lawsuit, the proceedings in this case resemble a negotiated arrangement between private parties. The Court's first involvement with the case came when the parties presented it with a completed agreement and, in effect, asked the Court to rubber stamp it. The case was essentially over by the time the parties appeared in court. Under the circumstances, the Court questions whether there is a sufficient controversy here to justify invocation of the Court's jurisdiction under Article III of the Constitution. Even if there was once a controversy, it appears to have disappeared before the SEC filed its complaint. This is not a "collusive" lawsuit in the usual sense, because the parties' interests were certainly opposed when they began negotiating. But by the time they came to court, they were in agreement.

Id. The district court also stated that any settlement agreement between the SEC and the defendants could be enforced on normal contract principles and, thus, did not need court approval.

On appeal, the Ninth Circuit reversed the holding of the district court as to whether there existed an Article III case or controversy. *SEC v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984). The court held that because the consent decree called for prospective relief, the controversy was not mooted by the decree. The court also held that the district court "neglect[ed] the contingent nature of the proposed decree" when it held that the settlement agreement could stand alone. *Id.* Judicial approval of the consent decree was necessary to make it binding on the parties. *Id.* (citing *Carson v. American Brands, Inc.*, 450 U.S. 79, 87 (1981)). In support of its holding, the court stated that the use of the consent decree is efficacious because it "encourages informal resolution of disputes, thereby lessening the risks and costs of litigation." *Id.*

The facts in *Randolph* are similar to the facts of this case. The parties negotiated the settlement in that case before filing the complaint, but they needed court approval of the settlement for it to be binding as a judgment. Also, the consent decree called for prospective relief. The settlement agreement in this class action

also requires judicial approval pursuant to Fed. R. Civ. P. 23 to become binding on the parties, and it calls for both prospective relief, including ongoing adversary claims and relationships. Indeed, if not for the Rule 23 requirement, this case would have been mooted by the settlement agreement, and, as the objectors claim, there would be no case or controversy. However, a case does not become moot when, as in this case and *Randolph*, the parties reach a proposed settlement that is contingent on the approval of the court. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 371 n.10 (1982).

The objectors contend that there is no need to resort to the courts in this case to settle the claims of the named plaintiffs against the CCR defendants, *i.e.*, there is no need for judicial approval. They claim that the parties can do so by contract. Instead, the objectors argue, this suit was brought by cooperating interests for the sole purpose of affecting the rights of others. The objectors find collusion in the presentation of this lawsuit as a class action. The class action form, they claim, is used solely for the purpose of "rop[ing] millions of future asbestos claimants into [the] settlement[.]" Baron Brief at 42. The objectors argue that when class actions are settled prior to filing the complaint, they are necessarily brought solely to enforce a settlement on others.

The objectors [sic] argument on this point is without merit. As I see it, *all* class actions are brought to affect the rights of class members. "The purpose of a class action is to dispose of the claims of numerous parties in one proceeding." *King v. South Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524, 528 (6th Cir. 1986); *see also EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 173-74 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). It follows that class action settlements are reached for the same reason — regardless of their timing. This is precisely why Rule 23 requires judicial scrutiny of class action settlements to determine whether they are fair to the class members. Presentation of this lawsuit as a class action, therefore, is not evidence of collusion.[25]

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[25] Of course, this Court will not approve the proposed settlement in this case if it is not fair to those persons the objectors purportedly seek to protect from the settlement, *i.e.*, the absent class members.

Looking to the nature of the controversy, and not the timing of the settlement agreement, it is clear that the plaintiffs and the CCR defendants are true adversaries. The proposed settlement simply represents a compromise of a genuine dispute. *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 739 (2d Cir. 1992), *modified in other respects*, 993 F.2d 7 (2d Cir. 1993) (asbestos claimants and defendant companies cannot be put in same subclass because their interests are "profoundly adverse to each other."). This Court's reasoning in *Pennsylvania Ass'n for Retarded Children* does not require a contrary ruling. Just as the plaintiffs and the Commonwealth of Pennsylvania began as adversaries in that case, so did the parties to this dispute. And, the settlements in both cases were reached only after long negotiations.

I conclude that this case is one involving genuinely adverse interests, but, because of the settlement, it lacks a dispute as to the remedy. I conclude, therefore, that the simultaneous filing of the complaint and the proposed settlement does not require a conclusion that the case is collusive or lacks a genuine dispute. A contrary rule would unwisely discourage pre-litigation negotiations and, by encouraging parties to wait an "appropriate" period of time after filing suit to file a proposed settlement, elevate form over substance.

The objectors [sic] second collusion argument is that the CCR defendants' agreement in the settlement to pay class counsel's fees is evidence that this lawsuit is "friendly." A review of class action cases, however, quickly reveals that such agreements are standard practice. *Malchman v. Davis*, 761 F.2d 893, 904 (2d Cir. 1985), *cert. denied*, 475 U.S. 1143 (1986); *Brown v. Pro Football, Inc.*, 1991 U.S. Dist. LEXIS 11854, at *9 (D.D.C. 1991); *Seagoing Uniform Corp. v. Texaco, Inc.*, 1989 U.S. Dist. LEXIS 12579, at *1 (S.D.N.Y. Oct. 23, 1989); *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 825 (D. Mass. 1987); *Lurns v. Russell Corp.*, 604 F. Supp. 1335, 1345 (M.D. Ala. 1984); *Dekro v. Stern Bros. & Co.*, 571 F. Supp. 97, 101 (W.D. Mo. 1983). Such a provision was expressly approved by the court as "preferable and proper" in *In re A.H. Robins Co.*, 88 B.R. 755, 761 (E.D. Va. 1988), *aff'd*, 880 F.2d 709 (4th Cir. 1989). Because in those cases, as in this case, the *amount* of class

counsel's fees is to be fixed by the court, the fee agreements do not support an allegation of collusion.

In light of the foregoing, I conclude that this case is not a collusive or "friendly" suit.

D. Mootness

To satisfy the Article III case or controversy requirement, the parties must not only present a "honest and actual antagonistic assertion of rights," *Johnson*, 319 U.S. at 305, but the controversy must continue to exist at all stages of the federal proceedings. If events subsequent to the filing of the complaint resolve the dispute, the case should be dismissed as moot. *United States Parole Com. v. Geraghty*, 445 U.S. 388, 397 (1980). Generally, if the parties reach a settlement, the case is no longer justiciable as an Article III controversy. There is, however, an exception to this rule: a case does not become moot when the parties reach a *proposed* settlement that is contingent on the approval of the court. *Havens Realty Corp.*, 455 U.S. at 371 n.10; *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 465 n.3 (1978). And, as discussed above in the context of collusion, a class action settlement requires judicial approval pursuant to Rule 23 to be binding on the class members. Thus, the objectors' first argument, that the proposed settlement moots the case, is without merit.

The objectors also argue, however, that certain "side agreements" between class counsel and the CCR defendants effectively settle the claims of the named or representative plaintiffs. The objectors claim that because of these side agreements, the individual claims of the named plaintiffs and the entire class action are moot.

The objectors point to the existence of certain side agreements between the CCR defendants and various law firms who represent asbestos victims, including class counsel, as requiring a finding that this lawsuit is moot. *See* Plaintiffs' Proffer on Preliminary Evaluation of Fairness (example attached as part of Exhibit 3). The agreements are an attempt by the CCR defendants to provide an alternative dispute resolution ("ADR") procedure with respect to future asbestos claims in the event that the proposed settlement in this case fails to be approved and implemented. Under the terms of the side agreements, the signatory law firms will recommend to

their future asbestos clients that they defer filing suit against the CCR defendants until any asbestos-related disease is manifested. By deferring their claims, these clients would be accenting the criteria in the CCR defendants' ADR procedure which is virtually identical to the criteria in the proposed settlement. The clients are free to reject the recommendation of counsel, however, and sue the CCR defendants at any time. If the clients accept class counsel's recommendation, the statute of limitations is, by the terms of the agreement, tolled.

These side agreements superseded a prior agreement with one of the two law firms representing the plaintiff class. In the original agreement, if a future asbestos client did not wish to defer filing suit against the CCR defendants until an asbestos-related condition is manifested, the law firm could not represent him or her in a suit against the CCR defendants. However, in light of the recent opinion of the American Bar Association Standing Committee on Ethics and Professional Responsibility (Formal Opinion 93-371), the parties changed this agreement so as to avoid a possible violation of Model Rule of Professional Conduct 5.6(b) which prohibits restrictions on a lawyer's right to practice law.

The objectors claim that these side agreements require dismissal of this class action as moot under the recent Third Circuit case of *Lusardi v. Xerox Corp.*, 975 F.2d 964, 983 (3d Cir. 1992). In *Lusardi*, former employees brought an age discrimination class action case against their employer. After the case was filed and while no class certification motion was yet pending, the named plaintiffs fully and unconditionally settled their own claims against their employer. The claims of the rest of the putative class remained unsettled, and the named plaintiffs wished to reserve their right to act as class representatives. The Third Circuit held that because the named plaintiffs settled their claims before class certification, the class action was moot. *Id.* at 974. The court stated:

> In such a situation, "there is no plaintiff (either named or unnamed) who can assert a justiciable claim against any defendant and consequently there is no longer a 'case or controversy' within the meaning of Article III of the Constitution."

Id. (quoting *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1041 (5th Cir. 1981)).

The objectors claim that, as in *Lusardi*, the named plaintiffs in this case have, through the existence of the side agreements, effectively settled their claims against the CCR defendants whether or not the proposed settlement is approved. Baron Brief at 45. This statement is factually untrue. The side agreements do not settle any claims with any asbestos victims. The side agreements only bind the signatory law firms, not their individual clients. Thus, in the event that the proposed settlement is not approved, the claims of the named plaintiffs are not settled. They, and all future asbestos claimants, remain free to sue the CCR defendants, and the various signatory law firms can still represent them in their suit.[26] Therefore, *Lusardi* is inapplicable here because, unlike the named plaintiffs in that case, the named plaintiffs in this class action have not definitively settled their claims.

The objectors further claim that the obvious intent of the parties was to have class counsel agree, on behalf of all their clients (*i.e.*, the named plaintiffs), to process claims using the same criteria and procedures as those detailed in the proposed settlement in the event that the settlement is not approved. However, I find that if the claims of the named plaintiffs are not actually settled by the side agreements because these individual plaintiffs themselves are not bound by the side agreements, then the "true" intention of the parties is not important. *Cf. Parks v. Pavkovic*, 753 F.2d 1397, 1404 (7th Cir.), *cert. denied*, 473 U.S. 906 (1985) (case does not become moot because one of the parties, while continuing to take all the steps that a live adversary would take to assert his rights, has secretly concluded that come what may he will give his opponent everything the opponent seeks). In other words, whether or not the named plaintiffs have, as the objectors state, committed themselves to the *Carlough* criteria and procedures, is irrelevant if their current claims are not yet settled and thus are not moot.

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[26] Even under the original agreement which restricted class counsel's ability to sue the CCR defendants, the individual asbestos claimants were still free to retain other counsel to represent them against the CCR defendants.

I conclude, therefore, that this class action is not moot.

III. CONCLUSION

Federal courts are under a continuing duty to satisfy themselves of their jurisdiction before proceeding to the merits of any case. Having done so here, I find that this Court has subject matter jurisdiction over this case. For the reasons discussed above, I find that this class action is a non-collusive justiciable case or controversy in which plaintiffs have standing pursuant to Article III of the Constitution. I also find that it cannot be concluded to a legal certainty that the amount in controversy for each class member does not exceed $50,000 in accordance with 28 U.S.C. § 1332. Accordingly, the objections to this Court's subject matter jurisdiction are overruled.

/s/ LOWELL A. REED, JR., J.

NOTICE OF RULE 23(b)(3) CLASS CERTIFICATION FOR SETTLEMENT PURPOSES ONLY

UNITED STATES DISTRICT COURT

Eastern District of Pennsylvania
U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Potential Class Action Member.

You have been identified as a potential member of the class in the class action lawsuit, *Carlough* v. *Amchem Products, Inc. et al.*, C.A. No. 93-CV-0215 (E.D. Pa.). Enclosed is a complete individual notice packet regarding that class action and a proposed settlement of that lawsuit.

As a potential member of the class, you should read the entire packet thoroughly to ensure you know your rights with respect to the class action and proposed settlement.

In the complete individual notice packet, you will find:

- A Notice concerning the class action and an "Exclusion Request" form; and
- A Question and Answer sheet, which addresses basic questions about the class action and the proposed settlement.

Your rights in this class action include your right to exclude yourself from the class if you file an "Exclusion Request" with the Clerk of the Court, c/o P.O. Box 40745, Philadelphia, Pennsylvania 19107, postmarked no later than January 24, 1994. (An "Exclusion Request" form is attached to the complete "Notice of Rule 23(b)(3) Class Certification" included in the packet.) If you do not exclude yourself from the class, you will be bound by any judgment or settlement of the class action, and you may enter an appearance in the class action through your own counsel.

If you have questions, or need additional information regarding the class action lawsuit or proposed settlement, please do not hesitate to write or call the court-appointed counsel for the class at the addresses and phone numbers listed below:

Gene Locks, Esquire

Greitzer and Locks
22nd Floor
1500 Walnut Street
Philadelphia, PA 19102
(215) 893-0100
(215) 985-2960 (FAX)

Ronald L. Motley, Esquire

or

Joseph F. Rice, Esquire

Ness, Motley, Loadholt,
Richardson & Poole
151 Meeting Street, Suite 600
P.O. Box 1137
Charleston, South Carolina 29402
(800) 666-7503
(803) 571-7513 (FAX)

You may also obtain a complete copy of the settlement agreement in the *Carlough* class action by calling 1-800-847-2727.

Sincerely,

Michael E. Kunz
Clerk, United States District Court
Eastern District of Pennsylvania
U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NO. 93-CV-0215

EDWARD J. CARLOUGH, et al.,
Plaintiffs,

v.

AMCHEM PRODUCTS, INC., et al.,
Defendants.

NOTICE OF RULE 23(b)(3) CLASS CERTIFICATION FOR SETTLEMENT PURPOSES ONLY, OF PROPOSED SETTLEMENT, AND OF HEARING ON PROPOSED SETTLEMENT

ATTENTION:

ALL PERSONS WHO HAVE WORKED WITH OR AROUND ASBESTOS OR ASBESTOS-CONTAINING PRODUCTS (WHETHER OR NOT CURRENTLY SUFFERING FROM AN ASBESTOS-RELATED MEDICAL CONDITION)

THEIR SPOUSES, HOUSEHOLD AND FAMILY MEMBERS, AND LEGAL REPRESENTATIVES

THIS NOTICE ADDRESSES YOUR RIGHTS — PLEASE READ THIS ENTIRE NOTICE CAREFULLY.

THIS NOTICE IS DIRECTED TO:

(1) ALL PERSONS (OR THEIR LEGAL REPRESENTATIVES) WHO HAVE BEEN EXPOSED IN THE UNITED STATES OR ITS TERRITORIES (OR WHILE WORKING ABOARD U.S. MILITARY, MERCHANT, OR PASSENGER SHIPS), EITHER OCCUPATIONALLY OR THROUGH THE OCCUPATIONAL EXPOSURE OF A SPOUSE OR HOUSEHOLD MEMBER, TO ASBESTOS OR TO ASBESTOS-CONTAINING PRODUCTS FOR WHICH ONE OR MORE OF THE FOLLOWING COMPANIES MAY BEAR LEGAL LIABILITY AND WHO, AS OF JANUARY 15, 1993, RESIDED IN THE UNITED STATES OR ITS

TERRITORIES, AND WHO HAD NOT, AS OF JANUARY 15,1993, FILED A LAWSUIT FOR ASBESTOS-RELATED PERSONAL INJURY, OR DAMAGE, OR DEATH IN ANY STATE OR FEDERAL COURT AGAINST THE FOLLOWING COMPANIES (OR AGAINST ENTITIES FOR WHOSE ACTIONS OR OMISSIONS THOSE COMPANIES BEAR LEGAL LIABILITY):

AMCHEM PRODUCTS, INC.

A.P. GREEN INDUSTRIES, INC.

ARMSTRONG WORLD INDUSTRIES, INC.

CERTAINTEED CORP.

C.E. THURSTON AND SONS, INCORPORATED

DANA CORP.

FERODO AMERICA, INC.

FLEXITALLIC, INC.

GAF CORP.

I.U. NORTH AMERICA INC.

MAREMONT CORP.

ASBESTOS CLAIMS MANAGEMENT CORPORATION (formerly known as National Gypsum Company)

NATIONAL SERVICES INDUSTRIES, INC.

NOSROC CORP.

PFIZER INC.

QUIGLEY COMPANY, INC.

SHOOK & FLETCHER INSULATION CO.

T&N PLC

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC. (formerly known as Union Carbide Corporation)

UNITED STATES GYPSUM COMPANY

AND

2) ALL SPOUSES, PARENTS, CHILDREN, AND OTHER RELATIVES (OR THEIR LEGAL REPRESENTATIVES) OF PERSONS DESCRIBED IN (1) ABOVE AND WHO HAD NOT, AS OF JANUARY 15, 1993, FILED A LAWSUIT FOR THE

ASBESTOS-RELATED PERSONAL INJURY, OR DAMAGE, OR DEATH OF A PERSON DESCRIBED IN (1) ABOVE IN ANY STATE OR FEDERAL COURT AGAINST ANY OF THE COMPANIES LISTED IN (1) ABOVE (OR AGAINST ENTITIES FOR WHOSE ACTIONS OR OMISSIONS THOSE COMPANIES BEAR LEGAL LIABILITY).

YOUR RIGHTS MAY BE AFFECTED BY THE SETTLEMENT OF A CLASS ACTION LAWSUIT PENDING IN THIS COURT, CIVIL ACTION NO. 93-CV-0215. THEREFORE, YOU ARE HEREBY GIVEN NOTICE, pursuant to an October 27, 1993 Order of the United States District Court for the Eastern District of Pennsylvania, and Rule 23(c)(2) and (e) of the Federal Rules of Civil Procedure, that:

(1) Certain individuals have brought a class action lawsuit for personal injury damages as a result of occupational exposure to asbestos. The class action lawsuit was filed against the 20 companies listed on the front page of this Notice, who are referred to throughout this Notice as the CCR Defendants. These 20 companies are all members of the Center For Claims Resolution ("CCR"), an organization that helps resolve asbestos claims for personal injury against its member companies. The individual Plaintiffs bringing the lawsuit seek damages both for themselves and for a class of other similarly situated persons. Under Rule 23(b)(3) of the Federal Rules of Civil Procedure, the Court has conditionally certified the class **solely** for purposes of a possible settlement of the lawsuit.

(2) The class consists of all persons to whom this Notice is directed, who are described in categories (1) and (2) on the front page of the Notice. If you, or a spouse or household member, worked with or around asbestos or asbestos-containing products, you may be a class member, and your rights may be affected by this class action. Accordingly, you should read this Notice carefully.

(3) You are a member of the class if you were exposed occupationally (or through the occupational exposure of a spouse or household member) to asbestos or asbestos-

containing products manufactured or supplied by one or more of the CCR Defendants (or for which one or more of the CCR Defendants may otherwise bear legal liability), and you had not filed a personal injury lawsuit based on that exposure as of January 15, 1993.

You are also a class member if you are a family member or a legal representative of such an occupationally exposed person and you have not filed a personal injury lawsuit based on that person's exposure to asbestos as of January 15, 1993.

"Occupational exposure" to asbestos generally means that an individual's job responsibility involved working with or around asbestos or asbestos-containing products. These exposures usually occurred in industrial settings or during construction activities. "Occupational exposure" to asbestos does not include "environmental exposure," such as that potentially experienced by office workers in buildings where asbestos products were present.

If you meet the requirements for class membership, you are a class member whether or not you are presently suffering from an asbestos-related medical condition.

(4) A proposed settlement has been agreed upon by the individual Plaintiffs (who have been designated by the Court as Class Representatives) and by the 20 CCR Defendants. The settlement sets up a system to compensate class members who meet certain asbestos exposure requirements if and when they develop certain asbestos-related medical conditions. Compensation will also be available in death cases. A hearing will be held by the Court in Courtroom 11A, United States Courthouse, Philadelphia, Pennsylvania, on February 22, 1994, to determine whether the proposed Settlement should be approved by the Court as fair, reasonable, and adequate. The hearing may also continue at other times and places to be announced.

(5) If you are a class member, **you will receive the benefits of, and be bound by, a settlement of this lawsuit,**

unless you act to exclude yourself from the class. Part II of this Notice explains how you may exclude yourself from the class. If you remain in the class, you have the right to enter an appearance in the class action through your own attorney.

This Notice is divided into parts. In Part I (pp. 5-13), the Notice explains certain facts about the class action lawsuit, such as the parties and the class and the claims asserted in the lawsuit; the certification of a settlement class by the Court; the appointment of Class Counsel and the right of class members to individual counsel; and the effect of the proposed settlement on the rights of class members. Part II (pp. 13-15) explains the right of each class member to exclude himself or herself from the class, how a class member may exclude himself or herself from the class, and the consequences of remaining a class member or choosing to exclude oneself from the class. (A form for a class member to use to exclude himself or herself from the class is included at the end of the Notice.) Part III (pp. 15-23) includes a brief summary of the basic provisions of the proposed settlement, while a more detailed summary of the settlement is attached to this Notice as an Appendix. Part IV (pp. 23-25) discusses the hearing scheduled by the Court on the proposed settlement, and how class members may participate in that hearing. Part V (pp. 25-26) tells how to obtain additional information or to inspect documents pertaining to the class action. Finally, Part VI (p. 26) is a final reminder to class members concerning important time limits relevant to the class action and proposed settlement.

If you believe that you may be a class member, you should read this Notice carefully.

I. THE CLASS ACTION LAWSUIT, THE CERTIFICATION OF A SETTLEMENT CLASS, COUNSEL FOR CLASS MEMBERS, AND THE PROPOSED SETTLEMENT

A. The Class Action Lawsuit

1. The Parties and the Class

The individual Plaintiffs who brought the lawsuit are Edward J. Carlough; Pavlos Kekrides and Nafssica Kekrides, his wife; Laverne Winbun, Executrix of the Estate of Joseph E. Winbun;

Ambrose Vogt, Jr. and Joanne Vogt, his wife; Carlos Raver and Dorothy M. Raver, his wife; John A. Baumgartner and Anna Marie Baumgartner, his wife; Timothy Murphy and Gay Murphy, his wife; Ty T. Annas; and Fred Angus Sylvester.

These individual Plaintiffs are all members of, and have been appointed by the Court as Class Representatives to represent, a class that has been conditionally certified for settlement purposes only. This class consists of the following persons:

(a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant, or passenger ships), either occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the Defendants may bear legal liability and who, as of January 15, 1993, resided in the United States or its territories, and who had not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or death in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability).

(b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph (a) above who had not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) above in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability).

The 20 CCR Defendants are the following companies:

Amchem Products, Inc.
A.P. Green Industries, Inc.
Armstrong World Industries, Inc.
CertainTeed Corp.
C.E. Thurston and Sons, Incorporated
Dana Corp.
Ferodo America, Inc.
Flexitallic, Inc.
GAF Corp.
I.U. North America, Inc.
Maremont Corp.

Asbestos Claims Management Corporation (formerly known as National Gypsum Company)

National Services Industries, Inc.
Nosroc Corp.
Pfizer Inc.
Quigley Company, Inc.
Shook & Fletcher Insulation Co.
T&N plc
Union Carbide Chemicals and Plastics Company Inc. (formerly known as Union Carbide Corporation)
United States Gypsum Company

Examples of the types of products which the 20 CCR Defendants manufactured or supplied (or for which they may otherwise bear legal liability), and which, at various times, contained (or may have contained) asbestos, include, **but are not limited to**, the following types of products:

- acoustical products, including spray and tile
- adhesives and cements
- asbestos blankets
- asbestos cloth or textiles
- asbestos fiber or pellets (raw or processed)
- asbestos linings
- asbestos paint
- asbestos paper
- asbestos protective clothing
- asbestos rope, braided tubing and wick
- asbestos-containing sprays
- asbestos tape or thread
- asphalt products, including tile and sundries
- automotive, truck, off-highway vehicular, and marine products (brake linings, pads and shoes, brake blocks, clutch materials, transmission components, gasket materials, shock absorbers)
- ceiling panels, tiles, and related sundries
- cement products (cement or mortar, board, flooring, panels, pipe, flat and corrugated sheet, siding, shingles, stucco)

- ceramic or paint fillers
- commercial and industrial machines or components (brake linings, clutch facings, thermal insulation, transmission components, gaskets)
- detacktifying/demolding agents
- drywall joint treatment products (joint compound, joint cement, joint treatment, joint sealant, caulking compounds)
- fireproofing products
- gaskets, sheet packing, and molded products
- mastics, and coating and sealing-products
- millboard, rollboard, and mineral wool board
- phenolic or plastic resins
- plaster and plaster products
- plumbing joint sealant
- refractory products, such as clays, cements, shapes and block (used to build, insulate, or seal structures subjected to high heat such as boilers, furnaces and kilns)
- resilient floor covering products (tile, sheet, backing, and sundries)
- roofing products (cements, coatings, felts, deckings, flashings, paints, shingles)
- spackling compound
- thermal insulation products (pipe insulation, pipe wrap, block insulation, cement, spray, and sundries)

Examples of occupations in which workers, at various times, potentially worked with or around the asbestos or asbestos-containing products listed above include, **but are not limited to,** the following occupations:

- asbestos mine or mill worker
- asbestos products plantworker
- automotive, truck, off-highway vehicular, marine and industrial component worker (parts manufacturing and fabrication, mechanic, [illegible]installer)
- boilermaker
- chemical, atomic, paint, or ceramic products worker
- construction worker (including bricklayer, carpenter, drywall installer or taper, flooring installer,

electrician, laborer, painter, plasterer, plumber, roofer)
- construction demolition and waste worker
- firefighter
- HVAC (heating, ventilation, air conditioning) worker
- insulator
- iron, steel, or metal worker
- longshoreman, seaman, or deck hand
- machinist
- maintenance, custodial, or janitorial worker
- oil field worker
- pipefitter
- pipe layer
- powerhouse worker
- railroad worker
- refinery worker
- roofer
- rubber or tire worker
- sheetmetal worker
- shipyard worker (all trades)
- smelter or foundry worker
- steamfitter
- warehouse worker

THESE LISTS PROVIDE EXAMPLES ONLY, AND MAY NOT LIST EVERY TYPE OF ASBESTOS-CONTAINING PRODUCT OR OCCUPATION INVOLVING POTENTIAL EXPOSURE TO ASBESTOS OR ASBESTOS-CONTAINING PRODUCTS MANUFACTURED OR SUPPLIED BY ONE OR MORE OF THE 20 CCR DEFENDANTS (OR FOR WHICH ONE OR MORE OF THE CCR DEFENDANTS MAY OTHERWISE BEAR LEGAL LIABILITY).

MOST EXPOSURES TO ASBESTOS, HOWEVER, OCCURRED MANY YEARS AGO.

2. The Claims

In the lawsuit, the individual Plaintiffs seek for themselves, and for the class of persons in similar situations, compensatory and punitive damages from the 20 CCR Defendants based on exposure to asbestos or asbestos-containing products manufactured or

supplied by one or more of the CCR Defendants (or for which one or more of the CCR Defendants may otherwise bear legal liability). In general, the legal theories upon which the individual Plaintiffs claim that one or more of the CCR Defendants are liable include negligence, strict products liability, breach of warranty, negligent infliction of emotional distress, enhanced risk of injury, medical monitoring to determine the existence of injury, and conspiracy. Each of the CCR Defendants deny any wrongdoing or liability, and also assert several defenses. The Court has not ruled on the merits of any of these claims or defenses.

B. The Certification of a Settlement Class

On January 29, 1993, the Court conditionally certified the class **solely** for purposes of a possible settlement of this lawsuit. The CCR Defendants agreed to that conditional certification. The Court has not decided whether the lawsuit could go forward as a class action for any other purpose. If no settlement is approved by the Court, and the Court later decides that the class action cannot go forward as a class action for any other purpose, then the claims of the individual class members will not be resolved in this particular lawsuit, but may be pursued in other lawsuits.

C. Class Counsel and the Right to Individual Counsel

The Court has appointed the following Class Counsel to represent the class:

Gene Locks, Esquire

Greitzer and Locks
1500 Walnut Street
22nd Floor
Philadelphia, PA 19102
(215) 893-0100
(215) 985-2960 (FAX)

Ronald L. Motley, Esquire
or
Joseph F. Rice, Esquire

Ness, Motley, Loadholt,
Richardson & Poole
151 Meeting Street
Suite 600
P.O. Box 1137
Charleston, SC 29402
(800) 666-7503
(803) 577-7513 (FAX)

As a class member, you will be represented, at no cost to you, by these Class Counsel, who are acting on behalf of the class in this action. You may contact them at any time (at the addresses

and phone numbers listed above) with any questions you may have. If you wish to be represented by your own attorney, you may do so at your own expense. If you do not exclude yourself from the class in the manner described below in Part II of this Notice, that additional attorney may enter an appearance in this class action lawsuit by mailing a notice of appearance to the Clerk of Court at the address for the Clerk set forth below in Part IV of this Notice.

D. The Proposed Settlement

The Class Representatives, with the advice of the Class Counsel, have entered into a Settlement with the 20 CCR Defendants. The Settlement is a compromise of disputed claims and does not mean that the CCR Defendants engaged in the conduct alleged by the individual Plaintiffs. The terms of the Settlement are summarized briefly in Part III below, and in detail in the attached Appendix to this Notice. Copies of the full Settlement document (whose formal title is the "Stipulation of Settlement") may also be obtained by 1) calling the following toll-free phone number: 1-800-847-2727; or 2) contacting Class Counsel at the telephone numbers and addresses listed above.

The Class Representatives and the Class Counsel have concluded that this Settlement is in the best interests of the class members. In reaching this conclusion, the Class Representatives and Class Counsel have taken many factors into account, including (i) their belief that the procedures set forth in the Settlement provide a fair, flexible, speedy, cost-effective and assured method of compensating class members who have or who in the future will contract an asbestos-related medical condition (as defined in the Settlement); and (ii) the possibility that this class action would not be certified by the Court as a class action for any purpose other than settlement, which would mean that class members would have to bring individual lawsuits to recover from the CCR Defendants. They also considered that, under the current procedures for resolving asbestos claims in the tort system, (i) the large number of asbestos personal injury lawsuits has made it difficult for some courts to process the suits in a prompt, efficient, and fair manner; (ii) compensation to asbestos plaintiffs has in some instances been unfairly distributed, dependent more upon the trial docket and court procedures than upon the plaintiff's individual circumstances; (iii) plaintiffs and defendants continue to spend substantial amounts of

time and money on court proceedings; and iv) several major defendants have filed for bankruptcy, increasing costs and delays significantly, and creating financial pressures on the remaining defendants.

If the Settlement is approved by the Court, it will settle all claims for asbestos-related personal injury against the 20 CCR Defendants by all members of the class who do not exclude themselves from the class. Such claims will include, without limitation, any and all claims against these 20 CCR Defendants for 1) personal injury, damage, or death and all forms of mental or emotional harm; 2) loss of support, services, consortium, companionship, society, and other valuable services made by spouses, parents, children, or other relatives, whatever such claims are called, including, without limitation, wrongful death or survival actions; and 3) punitive, aggravated, or exemplary damages of any sort. Claims based on premises ownership and for vicarious liability (the liability of one corporation for another) are specifically included as claims resolved by the Settlement. **The Settlement expressly provides, however, that it is not intended to, and shall not affect, add to, or diminish the right of any class member to recover for asbestos-related personal injury pursuant to any workers' compensation or similar statutory provisions (such as the Longshore and Harbor Workers' Compensation Act or the Federal Employers' Liability Act (FELA)) for compensation by an employee against an employer. The rights of class members to bring suit against companies not involved in the Settlement are also not affected.**

Payments to class members under the Settlement during the first ten (10) years will likely be in excess of one billion dollars ($1,000,000,000), to as many as one hundred thousand (100,000) class members.

II. ELECTION BY CLASS MEMBERS

If you are a member of the class and wish to remain a class member, you need do nothing further at this time. If you elect to be excluded from the class, however, you must take action. The following two paragraphs explain the basic consequences of remaining in the class or excluding yourself, but you should also read the remainder of this Notice to understand fully the choices

and their consequences. If you desire, you may obtain a copy of the full Settlement document (the "Stipulation of Settlement") to read (see p. 11).

If you filed a lawsuit asserting an asbestos-related personal injury claim against one or more of the 20 CCR Defendants before January 15, 1993, you are not a member of the class. However, if you filed such a lawsuit after January 15, 1993, you are a member of the class. The filing of a lawsuit by you or on your behalf since January 15, 1993, is not considered a request for exclusion from the class. Accordingly, if you wish to exclude yourself from the class, you must follow the procedures specified below for exclusion from the class. If you do not follow those procedures, you will remain a class member, and the procedures set forth below will apply.

A. Consequences of Remaining in the Class

If you remain in the class and a Settlement is approved by the Court, you will get the benefit of that Settlement. For example, if the proposed Settlement is approved, you will be able to receive compensation, in accordance with the procedures of the Settlement, if you can demonstrate the occupational exposure to asbestos or asbestos-containing products required under the Settlement, and if you now have, or in the future contract an asbestos-related medical condition that is compensable under the Settlement. By remaining in the class, you will have accepted these procedures as the only means of resolving claims against one or more of the 20 CCR Defendants (and against entities for whose actions or omissions a CCR Defendant bears legal liability) for any asbestos-related personal injury or damage, and you will not be able to present those claims against these Defendants, and will be barred and forbidden by order of the Court from presenting them, in any other lawsuit.

If you want to remain in the class, you are not required to do anything at this time. Accordingly, you should **NOT** file the "Exclusion Request" discussed in the following paragraph and attached to the end of this Notice.

The Exclusion Request at the end of this Notice is only for those who wish to exclude themselves from the Class and the Settlement.

B. Consequences of Excluding Yourself from the Class and Method of Doing So

If you exclude yourself from the class, you will not receive the benefit of the proposed Settlement, and you will not be able to bring claims seeking compensation under the procedures of that Settlement. You may, however, pursue any such claims by filing your own lawsuit at your own expense through the usual court procedures. **IF YOU WANT TO BE EXCLUDED FROM THE CLASS, YOU MUST FILL OUT THE FORM CALLED "EXCLUSION REQUEST" ATTACHED AT THE END OF THIS NOTICE AND SEND IT TO THE ADDRESS GIVEN IN THAT FORM BY MAIL POSTMARKED NO LATER THAN JANUARY 24, 1994.** A separate request for exclusion must be completed and timely mailed for each person electing to be excluded from the class.

III. BRIEF DESCRIPTION OF THE SETTLEMENT

This is a brief summary of the basic provisions of the proposed Settlement. A more detailed summary of the Settlement is attached to this Notice as an Appendix. You should read that detailed summary and the full Settlement document itself (see p. 11) for a more complete description of the Settlement.

1. The Settlement provides that compensation will be paid to class members who worked with or around asbestos or asbestos-containing products manufactured or supplied by one or more of the 20 CCR Defendants (or by entities for whose actions or omissions a Defendant bears legal liability), and who satisfy the specific requirements in one of four medical categories. Compensation will also be available in death cases. The four medical categories, which each include certain particular requirements, are — 1) Mesothelioma; 2) Lung Cancer; 3) Other Cancer, *i.e.*, primary colon-rectal, laryngeal, esophageal, or stomach cancer; 4) Non-Malignant Conditions, *i.e.*, asbestosis or significant bilateral pleural thickening with a decrease in pulmonary (breathing) function. See pp. A-2 — A-3 below. In addition, as explained below, some class members may meet the medical requirements for compensation through identification as an "exceptional" medical claim by an independent medical panel.

Class members who do not meet these asbestos exposure and medical requirements will not receive compensation. For example, class members who have only chest x-ray changes associated with asbestos exposure but who do not meet the pulmonary function (breathing) test requirements of the Non-Malignant Conditions medical category will **not** be compensated, unless and until they meet those pulmonary function (breathing) test requirements or other medical requirements under the Settlement.

Similarly, class members whose claims were barred by the applicable statute of limitations as of January 15, 1993 (so that they could not recover damages in a lawsuit at that time), will also **not** receive compensation. (The CCR Defendants have agreed to toll (suspend) any other statute of limitations or similar timeliness rules for claims submitted for compensation under the Settlement.)

2. All claims must be submitted for processing to the Center For Claims Resolution (CCR), an organization designated to handle such claims. The 20 defendant companies are all members of the CCR. The claim form submitted to the CCR will require information about the exposed person's asbestos exposure history and medical condition. A class member may, at his or her own expense, employ his or her own, separately chosen attorney to assist in the filing of a claim. **(Class Counsel will represent an individual class member in filing a claim for compensation only if that class member separately retains them to do so.)** The Settlement limits in most circumstances the fees the attorney may charge to a certain percentage of the compensation ultimately paid to the class member.

3. The CCR will evaluate whether each claim meets the requirements for compensation. Disputes over whether a claim meets the asbestos exposure or medical requirements for compensation will be resolved by independent, neutral arbitrators or medical experts. In addition, class members who do not meet the particular requirements of a medical category, but who demonstrate through "comparably reliable" evidence that they have an asbestos-related medical condition that is "substantially comparable" to that of a class member who does meet the particular requirements of a compensable medical category, will qualify for compensation if their claim is identified as "exceptional" by an "Exceptional Medical Panel" composed of independent,

neutral medical experts. There are limits on how many "exceptional" claims the independent medical panel may select each year, and there is no appeal from the decision of the "Exceptional Medical Panel."

4. The Settlement sets a maximum number of claims in each medical category that may be compensated in each year; claims that qualify for compensation in a given year but which exceed these maximum numbers will have priority for payment in the next year. Accordingly, these maximum case flow numbers regulate only the timing of when claims will be paid, and do not limit the total number of claims that may qualify for payment. The maximum numbers may be adjusted upward, within limits, one time during the first ten years of the Settlement, and new maximum case flow numbers will be negotiated after the first ten years. In the first ten years that the Settlement is effective, the Settlement provides that approximately 100,000 claims will potentially be paid.

5. For each medical category, the Settlement sets a minimum and a maximum compensation value and a middle range of average compensation values. These compensation values range from $2,500 to $200,000. See pp. A-4 — A-5 below. Over the next ten years, it is anticipated that payments to class members will exceed $1 billion ($1,000,000,000).

6. Each class member whose claim qualifies for compensation will receive from the CCR a good faith offer to resolve his or her claim against the CCR Defendants, in most cases within several months after submitting the claim to the CCR. This offer will be based on the traditional factors taken into account in settling a case in court, and will fall between the minimum and maximum compensation values for the relevant medical category. The CCR will be legally bound to give offers to claimants in a given medical category that average an amount within the middle range of compensation values for that medical category. This means that some offers to class members by the CCR will equal or exceed this middle range of compensation values for each medical category, while some offers will be below this middle range. Alternatively, a class member may receive payment even more quickly (within 30 days after determination that the claim qualifies for compensation) by electing to receive the minimum compensation value for the relevant medical category. Finally, a

class member who has an unusually high claim for damages against one or more of the 20 CCR Defendants may apply for compensation to an independent, neutral "Extraordinary Claims Panel." There is no fixed limit on the amount of compensation that may be paid by that panel to an individual class member, although there are overall limits on the compensation that may be paid to class members by that panel. There are also limits on how many "extraordinary" claims the panel may select each year.

7. A class member with a claim that qualifies for compensation and who is dissatisfied with the settlement offer received from the CCR may also choose, following a mandatory settlement conference, to have the compensation amount resolved by binding arbitration or by a jury trial in court. Although the number of class members who may have their compensation determined in this manner in each year is limited, those class members who are unable to have their compensation determined in this manner in one year will have priority the next year. The issues to be determined in binding arbitration or a jury trial are limited. In particular, no compensation for increased risk of cancer or for punitive damages may be obtained, and numerous defenses may not be asserted. The Settlement places no limit, however, on the amount of any jury verdict or arbitration award in these proceedings. A class member who elects to follow these alternative procedures, and who receives a verdict or award in his or her favor, will receive up to 150% of the CCR's last settlement offer soon after the award or jury verdict is final, and the balance, if any, over five years.

8. Unlike many traditional settlements in asbestos cases — where a settling plaintiff with a non-malignant condition waives and releases all claims for any future malignant (cancer) condition — a class member who receives payment for a non-malignant condition may submit a new claim for any later developed malignant condition. Compensation already paid to a class member for a non-malignant condition will be taken into account, however, in determining settlement amounts for a malignant condition, and compensation is available for only one non-malignant and only one malignant condition.

9. By remaining in the class, class members have agreed to follow the procedures in the Settlement as the only means of

resolving claims for asbestos-related personal injury or damage against the 20 CCR Defendants (and against entities for whose actions or omissions the 20 Defendants bear legal liability). In addition, class members who receive compensation must sign what is called a "release," which is an individual settlement agreement releasing claims against the 20 CCR Defendants (and against entities for whose actions or omissions the 20 Defendants bear legal liability). In some circumstances, the Settlement itself or the individual release may result in the reduction of any jury verdict awarded to a class member from other companies that are not part of this Settlement.

10. The Settlement expressly provides that it is not intended to, and shall not affect, add to, or diminish the right of any class member to recover for asbestos-related injury under any workers' compensation or similar statutory provision for compensation by an employee against an employer.

11. Each of the 20 CCR Defendants must pay a fixed share of the compensation payments under the Settlement, and each Defendant is responsible only for its own share of these payments. If a Defendant does not pay its share, class members who have not yet received compensation may sue that Defendant either to enforce its obligations under the Settlement or under ordinary principles of tort law (as though the Settlement had never taken place). Similarly, class members who have received compensation for Non-malignant Conditions only would have these same options, but only with regard to subsequent claims for malignant conditions. The CCR Defendant would also have to give notice of its failure to pay its share to class members.

12. Any CCR Defendant may withdraw from the Settlement after ten years. The withdrawing Defendant would have to give notice of that withdrawal to class members. If a Defendant chooses to withdraw, the compensation values under the Settlement would be reduced by that Defendant's share. Class members who have not yet received either compensation or settlement offers could sue the withdrawing Defendant under ordinary principles of tort law (as though the Settlement had never taken place). In addition, class members who have received either compensation or settlement offers for Non-malignant Conditions only could sue the withdrawing Defendant under ordinary principles of tort law with

regard to later claims for malignant conditions. The Compensation Schedule under the Settlement will also be renegotiated, within certain limits, after ten years.

13. Class Counsel and a representative of the AFL-CIO will review the disposition of claims under the Settlement each year. As part of this review, Class Counsel and the AFL-CIO representative will be able to examine all books and records of the CCR related to the processing of claims under the Settlement.

14. The CCR Defendants will pay the costs of virtually all the procedures under the Settlement, such as the costs of the independent medical panels. These payments will not diminish the funds available to pay claimants under the Settlement.

15. Class Counsel will be entitled to reasonable attorneys' fees for their work on the Settlement. These fees will be determined by the Court and paid by the 20 CCR Defendants, and will not diminish the funds available for class members under the Settlement. As explained above, however, Class Counsel will only receive attorneys' fees for representing an individual class member who files a claim for compensation under the Settlement if Class Counsel are individually hired to represent that class member. In that circumstance, attorneys' fees must be paid by the claimant, although the Settlement limits, in most circumstances, the fees that may be charged.

16. The CCR Defendants will have 45 days after the end of the period for class members to exclude themselves from the class to withdraw from the Settlement because too many class members have excluded themselves from the class.

17. The CCR will begin processing and paying claims under the Settlement at the end of the period for class members to exclude themselves from the class. Operations under the Settlement will end, however, if the CCR Defendants withdraw from the Settlement because there are too many class members who exclude themselves from the class (see Paragraph 16 above), the Settlement is not approved by the Court, if certain insurance conditions are not satisfied, or if the Court's decision approving the Settlement is overturned by another court on appeal.

IV. COURT HEARING ON THE PROPOSED SETTLEMENT

1. The Scheduled Hearing

The Court will hold a hearing on the proposed Settlement in Courtroom 11A, United States Courthouse, Philadelphia, Pennsylvania, on February 22, 1994, to determine whether, as recommended by both the Class Representatives and Class Counsel, it should approve the Settlement as fair, reasonable, and adequate. That hearing may also continue at other times or places to be announced.

If the Court decides that the proposed Settlement is fair, reasonable and adequate, the Court will issue a Final Judgment and Order binding class members who have not excluded themselves from the class and the 20 CCR Defendants to the Settlement and the Court's Final Judgment and Order.

2. Objections to the Settlement

If you support the proposed Settlement, you do not need to appear at the hearing or take any other action. Class Counsel will appear at the hearing on behalf of the class.

If you object to the proposed Settlement, you may send those objections to the Court. Written objections must be filed with the Clerk of the Court by first class mail postmarked no later than February 8, 1994. The Clerk of the Court's address is as follows:

Michael E. Kunz,
Clerk, U.S. District Court
Eastern District of Pennsylvania
U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

If you also wish to object to the Settlement orally at the hearing (either on your own or through your own separately-hired counsel), you must send a letter stating your intention to appear at the hearing, along with your written objections to the Settlement, to the Clerk of the Court postmarked no later than February 8, 1994. It is, however, not necessary for you to make your objections orally for your objections to be considered by the Court.

V. ADDITIONAL INFORMATION

1. Questions

Any questions you have about the matters contained in this Notice should not be directed to the Court but should instead be directed to the Class Counsel or your own counsel (if any). You should be sure to call or write Class Counsel or your own counsel with any questions. You may also call the following toll-free number for a copy of the full settlement document: 1-800-847-2727. The names, addresses, telephone numbers, and telefax numbers of Class Counsel are as follows:

Gene Locks, Esquire

Greitzer and Locks
22nd Floor
1500 Walnut Street
Philadelphia, PA 19102
(215) 893-0100
(215) 985-2960 (fax)

Ronald L. Motley, Esquire
or
Joseph F. Rice, Esquire

Ness, Motley, Loadholt, Richardson & Poole
151 Meeting Street, Suite 600
P.O. Box 1137
Charleston, SC 29402
1-800-666-7503
(803) 577-7513 (fax)

2. Inspection of Documents

You (or your own attorney) may review additional materials filed in this lawsuit at the Clerk's Office, U.S. Courthouse, 601 Market Street, Philadelphia, PA 19106, during reasonable business hours.

VI. REMINDER AS TO TIME LIMITS

IF YOU WISH TO EXCLUDE YOURSELF FROM THE CLASS, YOU MUST COMPLETE THE EXCLUSION REQUEST ON THE FOLLOWING PAGE AND MAIL IT TO THE CLERK OF THE COURT, c/o P.O. Box 40745,

PHILADELPHIA, PA 19107, *BY FIRST CLASS MAIL POSTMARKED NO LATER THAN* January 24, 1994. You will remain a member of the class and be bound by a Settlement, if approved, unless you request in writing to be excluded.

If you wish to object to the proposed Settlement, you MUST send your written objections to the Clerk of the Court, U.S. District Court for the Eastern District of Pennsylvania, U.S. Courthouse, 601 Market Street, Philadelphia, Pennsylvania 19106, by first class mail postmarked no later than February 8, 1994. If you wish to make your objections orally at the hearing, you should also include your request to be heard orally at the hearing with your written objections. It is, however, not necessary for you to make your objections orally for your objections to be considered by the Court.

AGAIN, YOU NEED NOT TAKE ANY ACTION IF YOU WISH TO REMAIN IN THE CLASS AND RECEIVE THE BENEFITS OF THE PROPOSED SETTLEMENT.

Michael E. Kunz
Clerk, U.S. District Court
Eastern District of Pennsylvania
U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

DATED: October 27, 1993

* * * *

EXCLUSION REQUEST

READ THE ATTACHED LEGAL NOTICE CAREFULLY BEFORE FILLING OUT THIS FORM

***If you want to exclude yourself from the Class*, you must fill in and return this form by first-class mail postmarked no later than January 24, 1994, to:**

Clerk of the Court
c/o P.O. Box 40745
Philadelphia, PA 19107

A separate request for exclusion should be completed and timely mailed for each person electing to be excluded from the class.

***IF YOU WISH TO REMAIN A MEMBER OF THE CLASS*, DO *NOT* FILL OUT AND MAIL THIS FORM.**

The undersigned ***does not*** want to remain a member of the class certified in the case of ***Carlough et al.*** v. ***Amchem Products, Inc., et al.***, No. 93-CV-0215, pending in the United States District Court for the Eastern District of Pennsylvania.

_____

(Signature)

_____

(Print name of person signing)

_____

_____

_____

(Print address of person signing)

_____

Date of Birth

_____

Social Security Number

Brief description of basis for class membership (that is, facts concerning class member's occupational exposure to asbestos):

_____

_____

_____

_____

* * * *

APPENDIX

1. General Description

In general, the Settlement provides that compensation will be paid to class members who have contracted or may in the future contract an asbestos-related medical condition and who worked with or around asbestos or asbestos-containing products manufactured or supplied by one or more of the 20 CCR Defendants (or by entities for whose actions or omissions one or more of the CCR Defendants bear legal liability). Compensation will also be available in death cases. All claims for compensation will be processed by the Center For Claims Resolution (CCR), an organization that has been designated to handle such claims. The 20 Defendants are members of the CCR.

2. The Basic Requirements for Compensation

To qualify for compensation, class members (or their attorneys) will have to submit (i) evidence that the class member had sufficient occupational exposure to asbestos or asbestos-containing products manufactured or supplied by one or more of the CCR Defendants (or by entities for whose actions or omissions one or more of the CCR Defendants bear legal liability); and (ii) medical evidence that the class member meets the requirements of a "compensable medical category," as defined in the Settlement. Stipulation, Part III, at p. 12. These requirements are described in more detail below.

In addition, class members whose claims were barred by the applicable statute of limitations or similar legal doctrines concerning the timeliness of claims as of January 15, 1993 (so that they could not recover damages in a lawsuit at that time) will be ineligible for compensation. (The CCR Defendants have waived any other statutes of limitations or similar timeliness rules for claims submitted for compensation under the Settlement.) Stipulation, Part VI, at p. 49.

NOT ALL MEMBERS OF THE CLASS WILL QUALIFY FOR COMPENSATION UNDER THE SETTLEMENT. THE OCCUPATIONAL ASBESTOS EXPOSURE AND MEDICAL REQUIREMENTS MUST BE MET FOR CLASS MEMBERS TO RECEIVE COMPENSATION. FOR EXAMPLE, CLASS MEMBERS WHO HAVE ONLY CHEST X-RAY CHANGES

THAT INDICATE PRIOR ASBESTOS EXPOSURE WILL NOT QUALIFY FOR COMPENSATION, UNLESS AND UNTIL THEY MEET PULMONARY FUNCTION (BREATHING) REQUIREMENTS OR OTHER MEDICAL REQUIREMENTS. SIMILARLY, PERSONS WITH LUNG CANCER WILL ONLY QUALIFY IF THEY ALSO MEET CERTAIN OTHER REQUIREMENTS, WHICH ARE SUMMARIZED BELOW.

3. The Evidence of Occupational Exposure Required

To meet the occupational asbestos exposure requirement, a class member must show exposure to asbestos or asbestos--containing products manufactured or supplied by one or more of the 20 CCR Defendants (or by entities for whose actions or omissions one or more of the CCR Defendants bear legal liability). The exposure must have occurred on a regular basis over some extended period of time in proximity to where the class member (or the occupationally exposed person upon whom the class member's claim is based) actually worked (or an equivalent exposure if exposure secondary to occupational exposure is claimed.) This is generally called the "frequency, regularity, and proximity" standard. If, however, a class member is able to show that a different standard would apply to a lawsuit by that class member for asbestos-related injury, then that different standard will govern. Stipulation, Part IV, at p. 19.

4. "Compensable Medical Categories" and the Requirements of Those Categories

There are four "compensable medical categories": (1) Mesothelioma, (2) Lung Cancer, (3) Other Cancer, and (4) Non-Malignant Conditions.

For Mesothelioma, there must be a diagnosis on the basis of a pathological examination of tissue of this rare tumor in the chest or abdominal cavity, and evidence of exposure to a Defendant's asbestos or asbestos-containing products at least ten (10) years prior to the manifestation of the tumor. Stipulation, Part V, at pp. 25-26.

For Lung Cancer, there must be a diagnosis of a cancer whose primary site is in the lung, evidence of exposure to a Defendant's asbestos or asbestos-containing products at least twelve (12) years prior to the manifestation of the tumor, and evidence of either 1)

asbestosis, as shown by tissue analysis or chest x-ray changes and pulmonary function (breathing) tests; 2) significant bilateral pleural thickening accompanied by diminished pulmonary (breathing) capacity; or 3) a combination of certain chest x-ray changes and a certain number of years (ranging from approximately 4 to 15 years) of working directly with or around asbestos or asbestos-containing products. Stipulation, Part V, at pp. 26-28.

For Other Cancer, there must be a diagnosis of a tumor whose primary site is in colon-rectum, larynx, esophagus, or stomach, evidence of exposure to a Defendant's asbestos or asbestos-containing products at least twelve (12) years prior to the manifestation of the tumor, and evidence of either 1) asbestosis, as shown by tissue analysis or chest x-ray changes and pulmonary function (breathing) tests; or 2) significant bilateral pleural thickening accompanied by diminished pulmonary (breathing) capacity. Stipulation, Part V, at p. 29.

For Non-Malignant Conditions, there must be either 1) a diagnosis of asbestosis, based on tissue analysis or chest x-ray changes and pulmonary function (breathing) tests; or 2) significant bilateral pleural thickening accompanied by diminished pulmonary (breathing) capacity; and, with either 1) or 2) evidence of exposure to asbestos or asbestos-containing products at least twelve (12) years prior to manifestation of the asbestosis or pleural thickening. Stipulation, Part V, at pp. 29-33.

5. "Exceptional" Medical Claims

Some class members may not be able to meet the particular requirements of a "compensable medical category" by providing the types of medical evidence specified in the Settlement, but may be able to present other "comparably reliable" evidence of an asbestos-related condition that is "substantially comparable" to that of a claimant satisfying the requirements of one of the four medical categories. These claimants may apply to an independent medical panel called the "Exceptional Medical Panel" to have the claim identified as an "exceptional" medical claim. If so identified, the claim will be deemed to have met the medical requirements for compensation under the Settlement. Stipulation, Part V, at pp. 43-47.

The "Exceptional Medical Panel" will identify "exceptional" medical claims at six month intervals. The number of "exceptional" medical claims that the panel may identify in each medical category in each six month period may not exceed the following percentages of the total number of claims paid under the Settlement in each category during the previous six months:

Mesothelioma	5%
Lung Cancer	20%
Other Cancer	20%
Non-Malignant Conditions	6%

Stipulation, Part V, at p. 47.

6. Procedures For Determining Whether Claims Qualify For Compensation

When a class member submits information to the CCR to establish that he or she meets the occupational asbestos exposure and medical requirements of the Settlement, the CCR will review that information, and as soon as possible (no longer than 90 days), will respond in one of three ways: (1) by agreeing that the claim qualifies for compensation; (2) by disagreeing that the claim qualifies for compensation; or (3) by advising that the information submitted is materially incomplete, and that no determination can reasonably be made without further information. If the CCR reasonably believes that it cannot determine whether a claim meets the requirements of a "compensable medical category," the CCR may, at its option and expense, require further reasonable, non-invasive and non-excessive medical examination or testing. Stipulation, Part III, at pp. 15-16.

Any dispute concerning whether a class member meets the occupational exposure requirements will be resolved in binding arbitration before by a single neutral arbitrator. Stipulation, Part IV, at p. 20.

Any dispute concerning whether a class member meets the medical requirements of a "compensable medical category" will be decided initially by a single member of an independent medical panel, with the option for further review by two additional medical panel members.

The decision of the majority of the three medical panel members shall finally determine the issue. Stipulation, Part V, at pp. 33-42.

7. Compensation Schedule

The Settlement establishes for each "compensable medical category" a minimum and a maximum value, and a "negotiated average value" range within that broader range, as follows (Stipulation, Exhibit B):

Compensable Medical Category	Minimum	Negotiated Average Value Range	Maximum
Mesothelioma	$20,000	$37,000-60,000	$200,000
Lung Cancer	10,000	19,000-30,000	86,000
Other Cancer	5,000	9,500-12,500	32,000
Non-Malignant Conditions	2,500	5,800-7,500	30,000

After each ten (10) year period that the Settlement operates, Class Counsel and the Defendants will negotiate any appropriate adjustment in this Compensation Schedule. Any upward adjustment to these values at that time may not exceed twenty percent (20%). Stipulation, Part VII, at pp. 51-52.

As explained below, this Compensation Schedule does not apply to "extraordinary" claims (which have no fixed maximum payment) or claims for which compensation is determined in court or by binding arbitration (for which the amount of compensation to be paid is not limited by the Settlement). Moreover, this Compensation Schedule reflects only payments that will be made to claimants by the 20 CCR Defendants.

8. Claims Payment Procedures

A. Case Flow

The Settlement establishes case flow maximums for each "compensable medical category" for each of the first ten years of the Settlement. These case flow maximums (which are set forth in

Exhibits A and A* to the Settlement) essentially provide for settlement of approximately 100,000 claims over the ten year period. The CCR will pay qualifying claims each year up to the case flow maximums. If the number of qualifying claims in any category in any year exceeds these case flow maximums, then such excess claims will have priority for payment in the next year. Stipulation, Part VIII, at p. 53.

If the total number of qualifying claims in a medical category in any successive five (5) year period exceeds the case flow maximum for that period for that medical category by more than ten percent (10%), the future case flow maximums for that medical category will be increased by ten percent (10%). Stipulation, Part VIII, at pp. 53-54.

After the first ten (10) years that the Settlement operates, Class Counsel and the CCR Defendants will negotiate case flow maximums for the next period. Stipulation, Part VIII, at pp. 54-55.

B. Compensation Payments

Each class member whose claim has been determined to qualify for compensation may elect (1) a simplified payment procedure, (2) an individualized payment procedure, or (3) submission of the claim for treatment as an "extraordinary" claim.

(1) Simplified Payment Proceed

Class members with qualifying claims may elect to receive prompt payment of the minimum amount of compensation payable for the "compensable medical category" in which the class member qualifies. Such payments will be made as soon as practicable, and, subject to the case flow maximums, within thirty (30) days after a decision that the claim qualifies for compensation and receipt of appropriate settlement papers by the CCR. Stipulation, Part VIII, at pp. 55-56.

(2) Individualized Payment Procedure

Class members with qualifying claims may alternatively elect the individualized payment procedure, under which the CCR will evaluate the claim based on factors that are traditionally taken into account in settling a case, such as the extent of the injury, the claimant's age, dependents, and similar factors. The CCR will make a good faith offer to the class member within the range of minimum and maximum values for the class member's "compensable medical category" set forth in the Compensation Schedule. Stipulation, Part VIII, at pp. 56-58.

If the offer is accepted, payment will be made as soon as practicable, and, subject to the case flow maximums, within thirty (30) days after receipt of appropriate settlement papers by the CCR. The average amount of money offered to class members in each "compensable medical category" in each six month period must fall within the negotiated average value range for that category. This means that the total amount of settlement dollars offered to class members electing individualized payment procedures in each "compensable medical category" in any six-month period must equal the amount that would result by multiplying the total number of such class members by a number within the negotiated average value range for that medical category. For example, the average offer to class members in the Mesothelioma category electing individualized payment procedures in any six month period must fall between $37,000 and $60,000. (See ¶ 7 above). This means that some offers by the CCR to class members will equal or exceed this middle (average) range of compensation values for each medical category, while some offers will be below this middle range. Stipulation, Part VIII, at pp. 58-59.

Claims will generally be paid in the order in which they were submitted to the CCR. If, however, the case flow maximums are exceeded in any given year, the order in which claims are paid may be altered to ensure that a disproportionate number of class members paid in that year are not represented by one plaintiffs' counsel or firm. Stipulation, Part VIII, at p. 59.

(3) "Extraordinary" Claim Procedure

A class member with a qualifying claim may also propose to have the claim treated as an "extraordinary" claim for which higher compensation may be paid. Proposals will be submitted to an independent three-person panel known as the "Extraordinary Claims Panel." The criteria for selection as an "extraordinary" claim, and for determination of the amount of compensation, will be a combination of age, number and age of dependents, relevant economic factors, an unusually high percentage of exposure to the products of one or more of the 20 CCR Defendants (or of entities for whose actions or omissions these Defendants bear legal liability), and other similar factors that would demonstrate a truly extraordinary claim for compensatory damages against one or more of the 20 CCR Defendants if the claim were litigated in court. Stipulation, Part IX, at pp. 61-63.

Each year, the "Extraordinary Claims Panel" will select these "extraordinary" claims; provided, however, that the maximum number of such claims in each medical category may not exceed the following percentages of the total number of claims paid by the CCR Defendants to that date in each category (minus the total number of claims previously selected as "extraordinary" claims):

Mesothelioma	3%
Lung Cancer	3%
Other Cancer	3%
Non-Malignant	1%

The panel will make offers for any amount they deem fit with no fixed maximum value for each claim; but the sum of such settlement offers for the "extraordinary" claims in all medical categories for each year may not exceed an amount equal to the maximum number of "extraordinary" claims that may be selected to that date in each category multiplied by the following average values for extraordinary claims in each medical category (minus any amounts previously paid to claimants with "extraordinary" claims):

Compensable Medical Category	Negotiated Average Value
Mesothelioma	300,000
Lung Cancer	125,000
Other Cancer	50,000
Non-Malignant Conditions	50,000

Stipulation, Part IX, at pp. 63-65 and Exhibit B.

If the class member accepts the offer, payment will be made as soon as practicable, and within thirty (30) days after receipt of appropriate settlement papers by the CCR. In addition, in certain cases of extreme hardship or other exigent circumstances, advance payments may be made with respect to claims proposed (but not yet selected) for "extraordinary" claim treatment. Stipulation, Part IX, at pp. 65-66.

"Extraordinary" claims will count against the case flow maximums in the relevant "compensable medical category." Stipulation, Part IX, at p. 64.

Claims not selected as "extraordinary" claims in one year may be resubmitted in a subsequent year. The class member may also, at any time, decide to follow either the simplified or individualized payment procedures. Stipulation, Part IX, at p. 65.

9. Payment of Additional Claims

If the total amount of settlement dollars paid to class members with qualifying claims in a given "compensable medical category" in a year is less than an amount equal to the maximum number of claims payable under the case flow maximums for that category multiplied by the maximum number in the average value range for that category, the difference shall be used, in any subsequent year or years, to pay claims that qualify for compensation in "compensable medical category" that exceed the case flow maximums. Additional mesothelioma claims shall be the first paid under this procedure. Stipulation, Part VIII, at p. 60.

10. Determination of Compensation in the Court System or Through Binding Arbitration

If a class member with a qualifying claim does not accept an offer made to him, the class member may have the dispute

concerning compensation resolved either in the court system or through binding arbitration. The class member must first participate in a mandatory settlement conference. The maximum number of claims in each medical category that may use these procedures in any given year may not exceed the following percentages of the total number of claims that qualified for payment and could be paid in that category during the previous year:

Compensable Medical Category	Percentage
Mesothelioma	2%
Lung Cancer	2%
Other Cancer	1%
Non-Malignant Conditions	0.5%

Class members who wish to use these procedures but who exceed this case flow maximum will be given priority to use the procedures the next year. Stipulation, Part X, at pp. 67-69; Amendment to the Stipulation of Settlement, at pp. 6-7.

Although class members shall generally proceed to the court system or to binding arbitration in the order in which they elect to do so, the Court may, upon application from Class Counsel, CCR Counsel, or a representative of the AFL-CIO, alter this principle of FIFO order to prevent a disproportionate number of class members in a medical category represented by one attorney or firm from proceeding to court or to binding arbitration in that year. Amendment, at pp. 6-7.

If the class member elects the court system, the class member may bring a lawsuit in any appropriate court. If the class member elects binding arbitration, a single, neutral arbitrator will decide the dispute. Stipulation, Part X, at p. 69.

The only issues to be resolved in any court or binding arbitration proceeding will be i) whether an asbestos-related disease or condition is present; ii) whether one or more of the CCR Defendants' products were a substantial contributing factor to those injuries; iii) the amount of compensatory damages, if any, to be awarded; and iv) where relevant, the CCR Defendants' share of compensatory damages. No compensation for risk of cancer and

no punitive damages may be obtained, and numerous defenses may not be asserted. Stipulation, Part X, at pp. 69-72.

The Settlement places no limit, however, on the amount of any jury verdict or arbitration award in these proceedings.

If the class member prevails and the verdict or award warrants, the class member will receive up to one-hundred and fifty percent (150%) of the CCR's last settlement offer soon after the jury verdict or arbitration award is final, and the remainder in equal installments over five years. Stipulation, Part X, at pp. 72-73.

11. Expedition of Claims in Special Circumstances

Where special circumstances exist (such as extreme financial hardship or imminent death), the CCR will make every reasonable effort to expedite processing of the claim. Stipulation, Part XI, at p. 74.

12. Right to Make Additional Claims or to Resubmit Claims

A class member who previously submitted a claim for a non-malignant condition may submit a new claim for a subsequently - diagnosed malignant condition at any time, regardless of whether the class member previously received compensation for the non-malignant condition. Any amount previously paid for a non-malignant condition will be taken into account in determining the settlement amount for the malignant condition. Compensation is available for only one non-malignant condition and only one malignant condition. Stipulation, Part XIV, at pp. 83-84.

Claims that are denied may also be resubmitted at any time if the class member dies, has new tissue or biopsy samples (pathological evidence), or receives a diagnosis of a malignant condition. Otherwise, claims that are denied may be resubmitted only if there is new evidence (other than new pathological evidence), and only after two years have expired. Stipulation, Part XIV, at p. 83.

13. Releases and Provisions Concerning Contribution and Indemnity

By remaining in the class, class members have agreed to follow the procedures in the Settlement as the exclusive means of resolving claims for asbestos-related personal injury or damage against one or more of the 20 CCR Defendants (and against entities

for whose actions or omissions a CCR Defendant bears legal liability). In addition, class members who receive compensation will be required to execute an appropriate written release of all claims against the 20 CCR Defendants (and against entities for whose actions or omissions the 20 Defendants bear legal liability). This release will not affect the class members' rights to bring suit against other companies not involved in the Settlement. Stipulation, Part II, at pp. 10-11, and Part XII, at pp. 75-80.

If a class member brings a lawsuit for asbestos-related injury against other companies and has not provided the 20 CCR Defendants with a release that fully protects the Defendants against claims for contribution or indemnity by the other companies, the class member must take certain steps designed to protect the CCR Defendants from such claims. These steps may include reducing any jury verdict that the class member receives against the other companies. Stipulation, Part XIII, at pp. 81-82.

14. No Joint and Several Liability

Compensation to class members will be funded in accordance with the terms of the Defendants' Sharing Agreement (which is attached to the Settlement as Exhibit C). Each Defendant will be liable only for its own share of the Defendants' obligations, and recourse for that payment will be limited to that Defendant. If any Defendant should fail to meet its financial obligations under the Settlement and the Sharing Agreement, class members who have not yet received compensation would have the option of 1) enforcing the Defendant's obligations under the Settlement; or 2) asserting full rights in the tort system against that Defendant. Similarly, class members who have received compensation for Non-malignant Conditions only would have these same options, but only with regard to subsequent claims for malignant conditions. The defaulting Defendant would also have to give notice of the default to class members. Stipulation, Part XVI, at pp. 86-87.

15. No Effect on Workers' Compensation or Similar Statutory Rights Against Employers

The Settlement is not intended to affect, add to, or diminish the rights of class members to recover for asbestos-related injury under state or federal workers' compensation or similar statutory provisions for compensation by an employee against an employer,

such as the Longshore and Harbor Workers' Compensation Act, and the Federal Employers' Liability Act (FELA). Accordingly, the Settlement will not affect any otherwise applicable provision of a workers' compensation or similar statutory provision that bars a class member from filing a tort suit against one or more of these 20 CCR Defendants. Stipulation, Part XV, at p. 85.

16. Attorneys' Fees

Class Counsel will be entitled to reasonable attorneys' fees to be determined and approved by the Court and paid by the 20 CCR Defendants. Funds for compensating class members under the Settlement will not be reduced by the amount of these fees. Stipulation, Part XIX, at p. 92.

Class members may engage their own attorneys at their own cost to advise them regarding the possibility of making a claim, to represent them in making a claim, or to resolve a dispute over a claim. (Class Counsel will not represent class members in making individual claims unless they are retained by individual class members to do so.) Class members may enter into such fee agreements with these attorneys as they consider appropriate, but the attorney will not be allowed to receive in legal fees more than twenty-five percent (25%) of the compensation paid to that claimant (and no more than twenty percent (20%) of any compensation paid to the claimant above the maximum values for non-extraordinary claims). These limitations do not apply, however, to representation to determine compensation in a court proceeding or in binding arbitration. Stipulation, Part XX, at p. 93.

17. Payment of Costs of Procedures Under the Stipulation

The costs of administering most procedures under the Settlement, including the resolution of disputes concerning qualification for compensation through medical panels or arbitration, will be paid by the 20 Defendants. If the compensation amount is determined in court or binding arbitration, however, each party (the class member and the CCR Defendants) will bear its own costs. Stipulation, Part XVIII, at p. 91.

18. Annual Audits by Class Counsel

Each year, the Class Counsel and a representative of the AFL-CIO will audit the disposition of claims. In each such annual audit,

the Class Counsel will have the right to examine all books and records maintained by the CCR relating to the processing of claims under the Settlement. The AFL-CIO representative will have the right to participate equally with Class Counsel in raising with the Court any issues arising out of the audit. Stipulation, Part XXIII, at p. 97; Amendment, at p. 8.

19. Right of Defendants to Withdraw if Excessive Opt-outs

The 20 CCR Defendants will have the unlimited right to withdraw jointly from the Settlement if an excessive number of class members, as determined in the sole discretion of the Board of Directors of the CCR, exclude themselves from the class. If the 20 CCR Defendants decide to exercise this withdrawal right, they must do so within forty-five (45) days after the close of the period during which class members can exclude themselves from the class. Stipulation, Part XXI, at p. 94.

20. Withdrawal Right of any Defendant After Ten Years

Each of the 20 CCR Defendants will have the right to withdraw from the Settlement after ten (10) years, and after giving notification of such withdrawal to class members. If any Defendant withdraws, the amounts in the Compensation Schedule would be reduced by that Defendant's share. A withdrawing Defendant would have no right to a refund of any amounts previously paid or offered to class members under the Settlement. Class members who have not received either compensation or settlement offers under the Settlement would then be able to assert full rights in the tort system against that Defendant. In addition, class members who have received either compensation or settlement offers for Non-malignant Conditions only could sue the withdrawing defendant under ordinary principles of tort law with regard to subsequent claims for malignant conditions. Stipulation, Part XXII, at pp. 95-96.

21. Operational Date

The CCR will begin processing and paying claims under the Settlement at the expiration of the period for class members to exclude themselves from the class. The CCR Defendants will stop processing and paying claims, however, if the CCR Defendants decide to withdraw from the Settlement due to excessive opt-outs, the Settlement is not approved by the Court, if certain insurance

conditions are not satisfied, or if the Court's decision approving the Settlement is overturned by another court on appeal. Stipulation, Part XXVII, at pp. 102-03.

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QUESTIONS AND ANSWERS ON THE CLASS ACTION LAWSUIT AND PROPOSED SETTLEMENT

NOTE: THESE QUESTIONS AND ANSWERS SHOULD BE READ ONLY IN CONNECTION WITH THE COMPLETE "NOTICE OF RULE 23(b)(3) CLASS CERTIFICATION FOR SETTLEMENT PURPOSES ONLY"

I. THE CLASS ACTION LAWSUIT AND CLASS MEMBERSHIP

- **WHAT IS A CLASS ACTION LAWSUIT?**

A class action lawsuit is a lawsuit brought by one or more people on behalf of a larger group that share common interests.

- **WHAT IS THIS CLASS ACTION LAWSUIT ABOUT?**

A class action lawsuit was filed against 20 companies who are all members of the Center For Claims Resolution, or CCR, an organization that helps resolve asbestos claims for personal injury against its members. The lawsuit was brought on behalf of individuals who worked with or around asbestos or asbestos-containing products manufactured or supplied by one or more of the 20 CCR companies (or for which one or more of the 20 CCR companies may otherwise bear legal liability), but who had not, as of January 15, 1993, filed a lawsuit for asbestos-related injuries against one or more of those companies. The precise requirements for class membership are discussed in more detail below.

- **WHAT IS THE STATUS OF THE LAWSUIT?**

The class action lawsuit is pending in the federal district court for the Eastern District of Pennsylvania, which is located in Philadelphia. The Court has conditionally certified the class solely for purposes of a possible settlement. The individual plaintiffs, who have been designated as class representatives, their counsel, who have been designated as Class Counsel, and the defendants, who are the 20 CCR companies, have agreed to a proposed settlement of the class action lawsuit. The Court will hold a

hearing in Courtroom 11A, United States Courthouse, Philadelphia, Pennsylvania, on February 22, 1994, to evaluate whether to approve the proposed settlement as fair, reasonable, and adequate.

- **WHO ARE THE 20 DEFENDANT COMPANIES?**

The 20 companies are:

Amchem Products, Inc.
A.P. Green Industries, Inc.
Armstrong World Industries, Inc.
Certain Teed Corp.
C.E. Thurston and Sons, Incorporated
Dana Corp.
Ferodo America, Inc.
Flexitallic, Inc.
GAF Corp.
I.U. North America, Inc.
Maremont Corp.
Asbestos Claims Management Corporation (formerly known as National Gypsum Company)
National Services Industries, Inc.
Nosroc Corp.
Pfizer Inc.
Quigley Company, Inc.
Shook & Fletcher Insulation Co.
T&N plc
Union Carbide Chemicals and Plastics Company Inc. (formerly known as Union Carbide Corporation)
United States Gypsum Company

- **WHO IS CONSIDERED A MEMBER OF THE CLASS?**

Members of the class fall into the following two categories:

A. All persons (or their legal representatives) who have been exposed occupationally, or through the occupational exposure of a spouse or a household member, to asbestos or asbestos-containing products for which one or more of the 20 defendant companies may bear legal liability, but who had not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injuries against one or more of those companies. The occupational exposure to the asbestos or asbestos-containing products must have taken place while the

exposed worker was working in the United States or its territories, or while working on U.S. military, merchant or passenger ships. Class members must also have resided in the U.S. or its territories as of January 15, 1993.

B. Spouses, parents, children or other relatives (or their legal representatives) of an exposed person, who had not, as of January 15, 1993, filed a personal injury lawsuit based on the exposed person's asbestos exposure, are also class members.

If you meet these requirements, you are a class member, *whether or not you are presently suffering from an asbestos-related medical condition.* You will be included in the class unless you exclude yourself from the class. The procedures for excluding yourself from the class are discussed below.

- **WHAT IS MEANT BY "EXPOSED OCCUPATIONALLY, OR THROUGH THE OCCUPATIONAL EXPOSURE OF A SPOUSE OR HOUSEHOLD MEMBER, TO ASBESTOS OR ASBESTOS-CONTAINING PRODUCTS"?**

This means that your job responsibility involved working with or around asbestos or asbestos-containing products, or that you had similar exposure through the occupational exposure to asbestos or asbestos-containing products of a spouse or household member. These exposures generally occurred in industrial settings or during construction activities. "Occupational exposure" to asbestos does not include "environmental exposure," such as that potentially experienced by office workers in buildings where asbestos products were present. Included in the complete "Notice of Rule 23(b) (3) Class Certification" (at pp. 6-8), which is included in the individual notice packet for class members, is a list of asbestos or asbestos-containing products and the occupations in which exposure to these products potentially occurred. The individual notice packet may be obtained by calling 1-800-847-2727.

- **AM I A CLASS MEMBER IF I FILED A LAWSUIT AGAINST ONE OR MORE OF THE 20 CCR COMPANIES BEFORE JANUARY 15, 1993?**

No. Only individuals who meet the other requirements for class membership, and who had not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury against one or more

of the 20 companies involved in the class action lawsuit are class members.

- **WHAT IF I FILED A LAWSUIT AGAINST ONE OR MORE OF THE 20 CCR COMPANIES AFTER JANUARY 15, 1993?**

If you meet the requirements for class membership, you are a class member. The filing of a lawsuit after January 15, 1993, will not be considered a request for exclusion from the class. Accordingly, if you wish to exclude yourself from the class you must file an "Exclusion Request" with the federal court no later than January 24, 1994. An "Exclusion Request" form may be obtained by calling 1-800-847-2727. An "Exclusion Request" form is also attached to the complete "Notice of Rule 23(b)(3) Class Certification" that is included in the individual notice packet for class members.

- **WHAT DO I HAVE TO DO TO BE CONSIDERED PART OF THE CLASS?**

Absolutely nothing. As long as you meet the class definition outlined above, you are automatically considered part of the class.

- **IF I REMAIN IN THE CLASS, CAN I ALSO FILE A SEPARATE LAWSUIT AGAINST ONE OR MORE OF THE 20 CCR COMPANIES THAT ARE INVOLVED IN THE CLASS ACTION LAWSUIT?**

No. By remaining in the class, you will have accepted this class action as the only means of resolving claims against one or more of the 20 CCR companies based on asbestos-related personal injury, and you will not be able to present these claims in any other lawsuit. The proposed settlement provides, however, that each year a limited number of class members with claims that qualify for compensation may have the amount of their compensation determined in a jury trial. This class action also does not affect your right to file a lawsuit for asbestos-related injury against companies not involved in this class action lawsuit.

- **CAN I DECIDE NOT TO BE PART OF THE CLASS?**

Yes. If you elect to be excluded from the class, you must file an "Exclusion Request" with the federal court no later than January

24, 1994. An exclusion request form may be obtained by calling 1-800-847-2727. An exclusion request form is also attached to the complete "Notice of Rule 23(b)(3) Class Certification" that is included in the individual notice packet for class members.

- **IF I DECIDE NOT TO PARTICIPATE IN THE CLASS, CAN I FILE A SEPARATE LAWSUIT AGAINST ANY OF THE 20 CCR COMPANIES INVOLVED IN THE CLASS ACTION LAWSUIT?**

Yes. If you exclude yourself from the class, you may pursue an individual lawsuit against any of these companies. However, if you exclude yourself, you will not get the benefits of a settlement of this class action.

- **WHO IS REPRESENTING THE CLASS?**

The plaintiffs are represented by three attorneys who have been appointed by the court to represent the class. They are:

Gene Locks, Esquire
Greitzer and Locks
1500 Walnut Street, 22nd Floor
Philadelphia, Pennsylvania 19102
(215) 893-0100
(215) 985-2960 (FAX)

Ronald L. Motley, Esquire
or
Joseph F. Rice, Esquire
Ness, Motley, Loadholt, Richardson & Poole
151 Meeting Street, Suite 600
P.O. Box 1137
Charleston, South Carolina 29402
(800) 666-7503
(803) 577-7513 (FAX)

- **WILL I BE CHARGED A FEE TO PARTICIPATE IN THE CLASS?**

No. As a class member, you will be represented by the Class Counsel, who are acting on behalf of the class at no expense to class members. Class Counsel will apply to the Court for reasonable attorneys' fees for their work on this class action and settlement. The Court will determine these fees. The fees will be

paid by the 20 CCR companies, and will not diminish the funds available for class members under the settlement.

- **CAN I HAVE MY OWN ATTORNEY FOR PURPOSES OF THE CLASS ACTION LAWSUIT?**

Yes. If you wish to be represented by your own attorney in the class action lawsuit, you may do so *at your own expense*. If you do not exclude yourself from the class, your attorney may enter an appearance in this class action lawsuit by mailing a notice of appearance to the Clerk of Court at:

Michael E. Kunz
Clerk, U.S. District Court
Eastern District of Pennsylvania
U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

As explained below, you may also be represented by your own attorney for purposes of filing a claim for compensation under the settlement.

II. THE PROPOSED SETTLEMENT

A. GENERAL INFORMATION

- **WHAT IS THE PROPOSED SETTLEMENT OF THE CLASS ACTION LAWSUIT?**

In general, the settlement proposal provides for compensation to be paid to class members who have contracted, or in the future contract, an asbestos-related medical condition and who worked with or around asbestos or asbestos-containing products manufactured or supplied by one or more of the 20 CCR defendant companies (or by entities for whose actions or omissions a CCR defendant bears legal liability). To qualify for compensation, class members must meet certain asbestos exposure and medical requirements. These requirements are described in Part II.B below of these questions and answers. Compensation is also available in death cases. The Center For Claims Resolution (CCR) will process the claims under the terms of the settlement.

A copy of the full settlement agreement may be obtained by calling 1-800-847-2727.

- **WHAT IS THE CENTER FOR CLAIMS RESOLUTION?**

The Center For Claims Resolution (CCR) is an organization that helps resolve personal injury asbestos claims against its member companies. The 20 defendant companies are all members of the Center For Claims Resolution. The CCR has also been designated to process claims for compensation under the settlement.

- **WHEN WILL THE SETTLEMENT BECOME EFFECTIVE?**

The settlement will not become effective until the U.S. District Court in Pennsylvania determines that the settlement is fair, reasonable, and adequate. The Court has scheduled a hearing on this issue in Courtroom 11A, United States Courthouse, Philadelphia, Pennsylvania, on February 22, 1994. The CCR will, however, begin processing claims for compensation under the terms of the settlement at the end of the time period for class members to exclude themselves from the class action.

- **WHAT WILL HAPPEN IF THE COURT DOES NOT APPROVE THE SETTLEMENT PROPOSAL?**

If no settlement is approved by the Court, and the Court later decides that the class action cannot go forward for any other purpose, then the claims of the individual class members will not be resolved in this class action lawsuit, but may be pursued in other lawsuits.

- **MAY I PARTICIPATE IN THE HEARING ON THE PROPOSED SETTLEMENT?**

Yes. If you support the settlement, you do not need to appear at the hearing or take any other action. Class counsel will appear at the hearing on behalf of the class. If, however, you wish to object to the settlement, you may voice your objections to the Court. Written objections must be filed with the Clerk of the Court at the address listed on page 3 postmarked no later than February 8, 1994. If you wish to object to the settlement orally at the hearing (either on your own or through your own separately-hired counsel), you must send a letter stating your intention to appear at the hearing, along with your written objections to the settlement, to the Clerk of the Court postmarked no later than February 8, 1994.

B. QUALIFICATIONS FOR COMPENSATION UNDER THE PROPOSED SETTLEMENT

- **IF THE PROPOSED SETTLEMENT IS APPROVED, HOW CAN I FILE A CLAIM FOR COMPENSATION?**

All claims must be submitted for processing to the CCR. Each claimant must fill out a form that provides information about the asbestos exposure history and medical condition upon which the claim is based. Claim forms may be obtained by contacting the CCR, 116-300 Village Boulevard, Princeton, New Jersey 08543-5319.

- **MAY I HAVE AN ATTORNEY HELP ME FILE A CLAIM?**

Yes. You may employ your own, separately retained, attorney to assist you. Class counsel will represent you in filing a claim only if you retain them to do so. In most circumstances, the amount that an attorney may charge for representing you in filing a claim is limited to between 20-25% of the amount of compensation that you receive.

- **WILL CLASS COUNSEL BE ABLE TO REPRESENT ME FOR PURPOSES OF FILING A CLAIM FOR COMPENSATION UNDER THE SETTLEMENT?**

Yes. Class Counsel will be able to represent an individual class member for purposes of filing a claim for compensation under the settlement if the class member contacts any of the Class Counsel and retains him for that separate representation.

- **DOES MEMBERSHIP IN THE CLASS AUTOMATICALLY QUALIFY ME FOR COMPENSATION?**

No. To receive compensation, class members must first satisfy 1) an asbestos exposure requirement; and 2) medical requirements in one of the four medical categories — mesothelioma, lung cancer, certain other cancers, and certain non-malignant conditions. (There is also a provision for selection of certain "exceptional" medical claims by an independent medical panel, as explained below.) The class member's claim for asbestos-

related personal injury must also not have been barred by the applicable statute of limitations as of January 15, 1993, the date that the class action was filed (so that the class member could not have received damages in a lawsuit as of that date). Compensation is also available in death cases.

- **HOW CAN I DETERMINE IF I MEET THE ASBESTOS EXPOSURE REQUIREMENTS?**

You must be able to show that you worked with or around asbestos or asbestos-containing products manufactured or supplied by at least one of the 20 CCR defendant companies (or by entities for whose actions or omissions a defendant company bears legal liability), and that that exposure occurred on a regular basis over some extended period of time. This is the same asbestos exposure requirement that most claimants would have to meet in a lawsuit against one of these defendant companies. In fact, if you can show that a different asbestos exposure requirement would apply in a lawsuit by you against one of these 20 companies, then that different requirement will apply under the settlement.

- **WHAT HAPPENS IF THE CCR DETERMINES THAT MY CLAIM DOES NOT MEET THE ASBESTOS EXPOSURE REQUIREMENTS FOR COMPENSATION?**

If the CCR decides that your claim does not satisfy the exposure requirements for compensation, you may challenge that decision. Any dispute concerning whether a claimant meets, the asbestos exposure requirements will be decided by a neutral arbitrator.

- **HOW CAN I DETERMINE IF I MEET THE MEDICAL REQUIREMENTS?**

You must meet the requirements in the settlement for one of four medical categories: (1) mesothelioma; (2) lung cancer; (3) other cancers (which includes colon-rectal, laryngeal, esophageal, or stomach cancer); or (4) non-malignant conditions (which includes asbestosis, or pleural thickening under certain circumstances). There are various medical requirements within each category. These include various pathological (tissue) analyses, chest x-rays readings, and/or specified pulmonary function

(breathing) test results. You will need to consult a doctor or review your medical records to see if you qualify.

- **WHAT HAPPENS IF THE CCR DETERMINES THAT MY CLAIM DOES NOT MEET THE MEDICAL REQUIREMENTS FOR COMPENSATION?**

If the CCR decides that your claim does not meet the medical requirements for compensation, you may challenge that decision. Any dispute concerning whether a claimant meets the medical requirements will be decided first by a single member of an independent medical panel, with the option for further review by two additional medical panel members. The decision of the majority of the panel will finally determine the issue.

- **IF I DO NOT SATISFY THE MEDICAL REQUIREMENTS, MAY I STILL RECEIVE COMPENSATION?**

Maybe. The settlement provides for identification of "exceptional" medical claims. Accordingly, some class members may not be able to meet the particular requirements of the medical categories described above by providing the types of medical evidence specified in the settlement, but may be able to present other "comparably reliable" evidence of a medical condition "substantially comparable" to one of the medical categories. These claimants may apply to an independent medical panel to have the claim identified as "exceptional." There are limits on how many "exceptional" claims the independent medical panel may select each year. Any claim that the panel identifies as an "exceptional" medical claim shall be considered to meet the medical requirements for compensation under the settlement. There is no appeal from a decision of this panel, although a claimant may reapply to the panel in certain circumstances.

- **WHAT IF I DO NOT MEET ANY OF THE MEDICAL REQUIREMENTS?**

Unless the independent medical panel considers your case "exceptional," you will not receive compensation unless and until you meet the particular requirements of one of the compensable medical categories. For example, if you have chest x-ray changes associated with asbestos exposure but do not meet the pulmonary

function (breathing) test requirements of the non-malignant conditions category, you will not receive compensation unless and until you meet those requirements or other medical requirements under the settlement.

- **WHEN CAN I SUBMIT MY CLAIM?**

You may submit a claim at any time because there are no filing limits or deadlines. The CCR will begin to process claims at the close of the period for class members to exclude themselves from the class. But you cannot qualify for compensation until you meet the asbestos exposure and medical requirements.

- **ARE THERE ANY TIME DEADLINES THAT APPLY TO FILING A CLAIM UNDER THE SETTLEMENT?**

There is only one time deadline that applies to filing a claim: no payment will be made for claims under the settlement that were barred by the applicable statute of limitations as of January 15, 1993, the date the class action was filed. This is because claimants whose claims were time-barred as of January 15, 1993, could not recover damages in a lawsuit as of that time. The 20 CCR companies have agreed to toll (suspend) any other statute of limitations or similar timeliness rules for claims submitted for compensation under the settlement. You may therefore submit your claim at any time.

- **WHAT HAPPENS IF THE CCR DETERMINES THAT MY CLAIM DOES NOT MEET THE REQUIREMENTS FOR COMPENSATION BECAUSE IT WAS BARRED BY THE STATUTE OF LIMITATIONS AS OF JANUARY 15, 1993?**

If the CCR determines that your claim does not meet the requirements for compensation because it was barred by the applicable statute of limitations as of January 15, 1993, you may challenge that decision. Any dispute over this issue will be decided by a neutral arbitrator.

- **IF I RECEIVE PAYMENT FOR A NON-MALIGNANT CONDITION, MAY I SUBMIT A NEW CLAIM FOR A MALIGNANT CONDITION THAT LATER DEVELOPS?**

Yes. Each class member, however, may receive compensation for only one non-malignant and one malignant condition, and compensation already paid to a class member for a non-malignant condition will be taken into account in determining the settlement amount for a malignant condition.

C. COMPENSATION PAYMENTS UNDER THE PROPOSED SETTLEMENT

- **HOW MUCH MONEY CAN I EXPECT TO RECEIVE IF I QUALIFY FOR COMPENSATION?**

While no single monetary figure has been set for compensation, the settlement has established a minimum and maximum value and an average range for the four categories of asbestos-related medical conditions that are compensable under the settlement. See pp. A-4 — A-7 of the complete "Notice of Rule 23(b)(3) Class Certification for Settlement Purposes Only" (which accompanies these Questions and Answers). These values reflect payments that the 20 CCR companies involved in this class action have made to similar claimants whose cases have been settled in the last four years. The amount that you or other individuals will receive will depend on a number of factors similar to the ones that would be taken into account in a settlement of an individual lawsuit — such as, for example, the nature and extent of your injury, your age, your employment, and the number and age of your dependents. All in all, the settlement provides that, in the next ten years, over $1 billion will potentially be paid in compensation to approximately 100,000 class members.

- **AM I ENTITLED TO GREATER COMPENSATION IF EXTRAORDINARY CIRCUMSTANCES WARRANT IT?**

A class member who has an unusually high claim for damages against one or more of the 20 CCR companies may apply for compensation to an independent, neutral "extraordinary claims panel." There is no fixed limit on the amount of compensation this panel may reward to an individual class member, although there are

overall limits on the amount of compensation that may be paid to class members by this panel. There are also limits on how many "extraordinary" claims the panel may select each year. The criteria for selection as an "extraordinary" claim is a combination of age, number and age of dependents, relevant economic factors, an unusually high percentage of asbestos exposure to the products of one or more of the 20 CCR companies, and other similar factors that demonstrate a truly extraordinary claim for damages against one or more of the 20 CCR companies.

- **WHAT IF I AM DISSATISFIED WITH THE COMPENSATION I AM OFFERED BY THE CCR OR BY THE "EXTRAORDINARY CLAIMS PANEL"?**

You may choose, following a mandatory settlement conference, to have the compensation amount resolved by binding arbitration or by a jury trial in court. Although the number of class members who may have their compensation amount decided in this way in a given year is limited, those who are unable to have their compensation amount resolved in arbitration or court in one year will have priority the next year.

- **WILL THE PROCEEDING IN COURT DIFFER FROM A NORMAL LAWSUIT?**

Yes. Because the amount of compensatory damages is the only matter to be determined in court or the arbitration proceeding, the issues are very limited. The primary issues to be determined by the jury in court or in binding arbitration will be only whether the class member has an asbestos-related medical condition caused by one or more of the 20 CCR companies, and the appropriate amount of compensatory damages. The companies may not assert many of the defenses they would assert in a lawsuit outside of this settlement, and the individual class member may not seek damages for increased risk of cancer or for punitive damages.

- **ARE THERE LIMITS ON THE AMOUNT OF DAMAGES I MAY RECEIVE IN COURT OR IN BINDING ARBITRATION?**

No. There are no limits on the amount of damages that may be awarded in court or in binding arbitration. Depending on the

amount awarded, however, some of the damages award may be paid to you over a five-year period.

- **HOW MANY CLAIMS WILL BE COMPENSATED EACH YEAR?**

The settlement sets a maximum number of claims in each medical category that may be compensated in each year. These case flow maximums will provide for the settlement of approximately 100,000 claims over the first ten (10) years of the settlement. After the first ten (10) years that the settlement operates, new case flow maximums will be negotiated.

- **WHAT IF THE NUMBER OF CLAIMS THAT QUALIFY FOR COMPENSATION IN ONE YEAR EXCEEDS THE MAXIMUM THAT MAY BE PAID IN THAT YEAR?**

These claims will be given priority for payment in the next year.

- **HOW FAST WILL I BE COMPENSATED IF I QUALIFY FOR COMPENSATION?**

The CCR can take up to 90 days after a claim is sent to it to decide if the claim qualifies for compensation. If your claim qualifies for compensation, and you choose to take the minimum compensation amount for your medical category, you may receive that amount very quickly, often within 30 days after submitting the necessary settlement documents to the CCR. The CCR will evaluate and make offers to all other claimants in six month periods. If you accept the CCR's offer of compensation, you will be paid within 30 days after you have signed and submitted the necessary settlement documents to the CCR.

D. OTHER ISSUES CONCERNING THE PROPOSED SETTLEMENT

- **DOES THE PROPOSED AGREEMENT SETTLE ALL CLAIMS FOR ASBESTOS-RELATED PERSONAL INJURY BY CLASS MEMBERS AGAINST THESE 20 DEFENDANT COMPANIES?**

Yes. If approved by the Court, the proposal will settle all claims for asbestos-related personal injury against all 20 CCR

companies by class members who do not exclude themselves from the class.

- **WILL I GIVE UP MY WORKERS' COMPENSATION IF I PARTICIPATE?**

No. The settlement expressly states that it is not intended to, and shall not affect, add to, or diminish the right of class members to recover compensation benefits for asbestos-related personal injury or damages through workers' compensation or other similar statutory provisions for compensation by an employee against an employer, such as the Federal Employers' Liability Act or the Longshore and Harbor Workers' Compensation Act.

- **CAN I BRING SUIT AGAINST COMPANIES NOT INVOLVED IN THIS SETTLEMENT.**

Yes. The proposed settlement does not affect your right to bring suit against other companies who are not part of this settlement. In some circumstances, however, a class member may have to take certain actions in a suit against other companies if those other companies sue any of the 20 CCR companies seeking to force one or more of the 20 CCR companies to contribute to, or to pay entirely, the judgment obtained by the class member. The actions that a class member may have to take may include reducing any jury verdict that the class member receives against the other companies.

- **HOW DO THE 20 DEFENDANT COMPANIES DIVIDE UP THE PAYMENTS THEY MUST MAKE UNDER THE SETTLEMENT?**

Each of the 20 CCR companies has agreed to pay a fixed share of the compensation payments under the settlement, and each company is responsible only for its share. If a company does not pay its share, class members who have not received compensation may sue the company for its obligations either under the settlement or under ordinary principles of tort law (as though the settlement had never taken place). Similarly, class members who have received compensation for Non-malignant Conditions only would have those same options, but only with respect to later claims for malignant conditions. The company that did not pay its share would also have to give notice of that fact to class members.

- **WILL ANYONE MAKE SURE THAT THE SETTLEMENT IS PROPERLY ADMINISTERED?**

Yes. Each year, Class Counsel and a representative of the AFL-CIO will review the processing of claims by the CCR to make sure that the settlement terms have been properly carried out. During each review, Class Counsel and the AFL-CIO representative will have the right to examine all books and records maintained by the CCR related to the processing of claims under the settlement. Moreover, the Court will maintain jurisdiction to ensure that the settlement is properly administered.

- **DO THE 20 CCR COMPANIES HAVE ANY RIGHTS TO WITHDRAW FROM THE SETTLEMENT?**

Yes, under two conditions. As a group, they can withdraw from the settlement if an excessive number of class members exclude themselves from the class, and do not participate in the class action. This decision is in the sole discretion of the CCR Board of Directors, and the Board of Directors must make this decision to withdraw no later than 45 days after the close of the period for class members to exclude themselves from the class. Secondly, individual defendant companies can withdraw from the settlement after 10 years.

- **WHAT HAPPENS IF A COMPANY WITHDRAWS FROM THE SETTLEMENT AFTER 10 YEARS?**

If any company withdraws, the compensation values for each medical category will be reduced by that company's share. A withdrawing company, however, would have no right to a refund of any amounts previously paid or offered to class members under the settlement, and would have to give notice of the withdrawal to all class members. After withdrawal, class members who have not received either compensation or settlement offers could then file suit against the withdrawing company in the tort system (as though the settlement had never taken place). Similarly, class members who have received either compensation or settlement offers for Non-malignant Conditions only could sue the withdrawing defendant in the tort system, but only with respect to subsequent claims for malignant conditions. The Compensation Schedule under the settlement will also be renegotiated, within certain limits, after ten years.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

MEMORANDUM

Reed, J. **October 27, 1993**

This is a class action for asbestos-related personal injuries. Currently before me is the joint motion of the settling parties for approval of notice to the class (Document No. 445).

I. BACKGROUND[1]

On January 15, 1993, counsel for the plaintiff class filed the complaint in this action along with motions for class certification and for approval of a proposed settlement agreement ("proposed settlement" or "settlement") between the plaintiff class and the members of the Center for Claims Resolution ("the CCR defendants"). On the same day as the complaint was filed, the CCR defendants answered the complaint and joined in plaintiffs' request that the class be certified and the settlement agreement be approved. The complaint describes the plaintiff class as including all persons who were exposed occupationally, or through the occupational exposure of a spouse or household member, to asbestos or asbestos-containing products for which one or more of the CCR defendants may bear legal liability, and who had not filed a personal injury lawsuit based on that exposure as of January 15, 1993. The occupational exposure must have occurred in the United States or its territories, or while working aboard U.S. military, merchant, or passenger ships, and the occupationally exposed persons must have resided in the U.S. or its territories as of

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[1] For more background information, see *Carlough* v. *Amchem Prods., Inc.*, 1993 U.S. App. LEXIS 24930 (3d Cir. Sept. 29, 1993); *Carlough* v. *Amchem Prods., Inc.*, 1993 U.S. Dist. LEXIS 14402 (E.D. Pa. Oct. 6, 1993).

January 15, 1993. Legal representatives of such occupationally exposed persons who had not, as of January 15, 1993, filed a lawsuit based on that exposure, are also included in the class.

On January 29, 1993, the Honorable Charles R. Weiner of this Court granted conditional certification of an opt-out plaintiff class pursuant to Fed. R. Civ. P. 23(b)(3), and assigned to me the scheduling and review of settlement procedures and the resolution of objections to the settlement itself. Because of the number of objections to the subject matter jurisdiction of this Court, the fairness of the proposed settlement, and the constitutionality of notice to absent class members, I issued a Scheduling Order on June 2, 1993, setting dates for briefing and argument on these issues. Various objectors filed memoranda of law explaining legal bases for their objections, to which the named plaintiffs and the CCR defendants (hereinafter the "settling parties") responded. Hearings were held on August 23,1993 and October 5, 1993, at which time the objectors and the settling parties were heard.

On October 6, 1993, I found that this lawsuit is a justiciable case or controversy pursuant to Article III of the Constitution and that this Court has subject matter jurisdiction over this lawsuit pursuant to the diversity statute, 28 U.S.C. § 1332. *Carlough* v. *Amchem Prods., Inc.*, 1993 U.S. Dist. LEXIS 14402 (E.D. Pa. Oct. 6, 1993). This memorandum addresses (1) whether the proposed settlement is fair for the preliminary purpose of sending notice to the class, and (2) whether the plan for dissemination of notice and the contents of the notice satisfy the requirements of Fed. R. Civ. P. 23 ("Rule 23") and the due process clause of the Constitution.

II. DISCUSSION

A. Fairness of the Proposed Settlement

Before deciding whether the settling parties plan for dissemination of the notice and the contents of the notice should be approved, I must make a preliminary determination of whether the proposed settlement is fair. See Manual for Complex Litigation § 30.44, at 241 (2d ed. 1985).

After hearing extensive argument at the hearing on August 23, 1993, and having reviewed the proffers of the settling parties and the legal memoranda filed by the objectors, I find that the proposed

settlement is fair for the preliminary purpose of deciding whether to send notice to the class in that it appears to be the product of serious, informed, non-collusive negotiations,[2] it has no obvious deficiencies, it does not improperly grant preferential treatment to class representatives or segments of the class, and it clearly falls within the range of possible approval.[3] See *Id*. Although I accept as reliable the proffers of the settling parties as to the fairness of the proposed settlement and find based on the information before me that the terms of the proposed settlement are fair to all members of the class, I will undertake a more detailed examination and analysis of the additional data in support of the proposed settlement during the final fairness hearing process.

B. Adequacy of Notice to the Class

1. Dissemination of Notice

a. Description of the Plan for Dissemination of Notice

The settling parties' proposed plan for dissemination of notice (the "notice plan") has several features:[4] (1) individual notice, by first class mail, to the 9,000-plus plaintiffs who have filed suit against one or more of the CCR defendants since this class action was filed on January 15, 1993, (2) efforts to identify other absent class members and individual notice provided to those persons

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[2] See *Carlough* v. *Amchem Prods., Inc.*, 1993 U.S. Dist. LEXIS 14402 (E.D. Pa. Oct. 6, 1993) (finding that this case is a non-collusive case or controversy under Article III of the Constitution).

[3] In reviewing the fairness of the proposed settlement, I have carefully considered all of the arguments made by the various objectors. I find these arguments unpersuasive, and thus have not addressed them in this memorandum.

[4] The description of the notice plan is derived from the Declaration of Katherine Kinsella, Senior Vice-President and Senior Consultant to the Kamber Group, which is attached to the Joint Motion of the Settling Parties for Approval of Notice to the Class. Class counsel and the CCR defendants retained Ms. Kinsella and the Kamber Group to design the notice plan.

identified, and (3) notice to all others by publication and through various persons and organizations.

The settling parties contend that the only class members whose identities are currently known are the 9,000-plus plaintiffs who have filed suit against one or more of the CCR defendants since this class action was filed on January 15, 1993. The notice plan provides for individual notice to be sent by first class mail to counsel for each of these plaintiffs.[5]

Given the potential size of the plaintiff class, the number of currently identifiable class members is relatively small. Because of this, the notice plan also includes substantial measures to find the names and addresses of other class members and includes individual notice provided directly to those identified by these measures. These efforts will be made through contacts with national and local labor unions and plaintiffs' lawyers, and through paid and unpaid advertising.

With respect to the unions, the settling parties have drawn up a list of 56 national or international unions that may have current or retired members in the plaintiff class.[6] Because the unions do not typically make their member lists available to the public, the settling parties will send a letter to each of the 56 unions to ask for names and addresses of any current or retired member who worked

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[5] The notice materials will be sent directly to any plaintiff who is not represented by counsel. This list of plaintiffs will be continually updated throughout the proposed notification period, with complete individual notice packets sent to new entrants on the list up until two weeks prior to the close of the notification period.

[6] The AFL-CIO, a federation of eighty-six unions purportedly with 13.3 million members, has expressed its support of the proposed settlement in this case. The AFL-CIO stated in its amicus brief that it has had a "long standing interest in asbestos compensation and litigation issues," because "[a] substantial percentage of the workers exposed to asbestos through their jobs in the United States have been union members." Amicus Brief of AFL-CIO at 1 (filed September 24, 1993). The AFL-CIO also stated that it "intends to take an active part . . . in assisting the settling parties in disseminating the court approved notice to union members." *Id*. at 4.

with or around asbestos or asbestos-containing products. Complete individual notice packets will be mailed to all names and addresses generated through these efforts. Alternatively, if such names and addresses cannot be furnished, the settling parties will propose some alternative means, such as a mailing by the union at the CCR defendants' expense, through which notice of this class action and proposed settlement may be sent to current and retired union members.[7] If any national or international union declines to help identify or mail notices to its members, letters will be sent to affiliated local unions containing the same request for help.[8]

With respect to efforts to identify individual class members through contacts with plaintiffs' attorneys, complete information packets will be mailed under the notice plan to the 1000-plus attorneys who have filed claim against one or more of the CCR defendants. Each attorney will be asked to give the settling parties the names and addresses of any potential class members known to the attorney, and complete notice packets will be mailed to those persons identified.

Finally, the notice plan provides for a campaign of paid and unpaid advertising which is designed to result in further individual notice. The campaign will encourage potential class members to call a toll-free telephone number or to contact class counsel, and a complete notice packet will be sent to those who call.

The paid advertising component of the publication campaign consists of two rounds of advertisements in newspapers and in Parade magazine and a 30-second television advertisement. Before

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[7] If any union is willing only to enclose a one-page notice concerning this case with some other union mailing, such as pension checks, the union will be given copies of the shorter print advertisement, described below, for insertion in the mailing. The CCR defendants will pay the mailing's costs.

[8] The local unions will be those in areas in the United States where large numbers of claims have been filed against the CCR defendants. And, as with the national or international unions, if certain local unions are willing only to enclose a one-page notice with another union mailing, the short print ad will be used, and the CCR defendants will pay the costs of the mailing.

deciding where to advertise, the settling parties determined that, based on various factors, the primary target group for the notice plan would likely be males age 45 or older. Thus the paid advertising plan is weighted towards this group, although it also targets males and females ages 35 or older.[9]

The first round of print advertising will consist of a one-half page ad[10] in 292 newspapers covering 136 media markets.[11] The ad will generally be run in the Sunday edition of those newspapers, as it typically has the largest circulation of any day of the week. To the extent possible, the ad will be placed in the sports section. The approximate circulation of the 292 selected newspapers is 46 million.

A second round of print advertising will run two weeks after the first and will use the same ad. This round will be run in 59 media markets which were chosen by the settling parties because they have historically generated large concentrations of asbestos claims against the CCR defendants. These markets include 114 newspapers. During this period, the same ad will also be placed in a full page of *Parade* magazine. *Parade* is the largest general circulation magazine in the United States and is included in 351 local newspapers. *Parade* has a circulation of over 36 million and will cover 11.8 million households that are outside the media markets where the newspaper ads will be purchased.

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[9] For a discussion of how the settling parties chose the newspapers and media markets in which to advertise, see *Memorandum in Support of Joint Motion of the Settling Parties for Approval of Notice to the Class* at 14.

[10] The ad will be one full-page in tabloid-style newspapers.

[11] As discussed below, the ad will describe, *inter alia*, the class, the proposed settlement, the consequences of not opting out, the right to appear and object to the proposed settlement, and the procedures for exclusion from the class. *See* Exhibit C to the Joint Motion. The ad will also urge those who believe they are members of the class to call the toll-free telephone number so that a complete notice packet can be mailed to them.

The final element of the paid advertising campaign is a commercial spot television notice. In deciding where to air the television notice, the settling parties selected eighty media markets based partly on information concerning historic case fillings against the CCR defendants. Those eighty markets include 64 million television households, which is 69% of all television households in the United States. The 30-second television notice, weighted toward the likely class members, will appear multiple times in each market, at different times of day. All in all, the settling parties contend that the television notice should be seen cumulatively over 250 million times by adults ages 35 and older.[12]

Under the notice plan, the television notice will be aired throughout the week before the first round of paid newspaper advertising. The ad will have both a visual and an audio component and review of the proposed "copy" shows that it will encourage potential class members to look for the print ad in the newspapers (where a more extensive explanation of the class action and the proposed settlement will be found). The "copy" reveals as well that the television ad, just as the print ad, will urge all those who believe they may be a class member to call a toll-free telephone number to receive a complete individual notice packet.

In addition to paid advertising, the notice plan also calls for unpaid advertising, that is efforts to have public service announcements concerning the case and the proposed settlement both broadcast and published. A press release or newscast script will be sent to all national wire services and radio stations, and to all major print, radio, and television outlets in major media markets. A cover letter will ask that these media outlets assist in publicizing the class action and proposed settlement by airing public service announcements.

The efforts described above to obtain the names and addresses of absent class members through contacts with national and local labor unions and plaintiffs' attorneys, and through paid and unpaid

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[12] In 56 of the 80 media markets, the ad will reach 86.4% of the television households, with a frequency of 4.6 times. In the remaining 24 markets, the ad will reach 73.7% of the television households, with a frequency of 2.7 times.

advertising are only partly designed to result in further individual notice. These same efforts, especially the advertising campaign, are also designed to, on their own, provide Rule 23 notice to those class members who do not respond and whose names and addresses cannot otherwise be ascertained through reasonable effort. *See* Manual Complex Litigation § 30.211, at 221 (In class actions, notice by publication "may be the principal means for informing [certain class members] of their Rule 23 rights.").

For example, with respect to the contacts with unions, in addition to the efforts to identify individual class members, the notice plan provides that notification packets be sent to key officials at each of the 56 unions identified by the settling parties. These mailings are intended to further urge the unions to use all reasonable means to notify current members and retirees about the class action and settlement. Camera-ready materials will be provided for immediate use in any publications distributed by the unions to their members and retirees. In addition, identical packets will be sent to officials of other labor bodies that are comprised of various combinations of the 56 unions listed, and officials at the approximately 10,000 to 15,000 local labor unions affiliated with these 56 unions. The affiliated local unions have been chosen because they are in areas where there have been large numbers of claims filed against the CCR defendants. Again, these mailings are intended to encourage union officials to use the materials provided by the settling parties to notify their members of the class action and proposed settlement.

Along this same line, a notification packet will be mailed to the more than 1,000 attorneys who have represented plaintiffs in lawsuits against one or more of the CCR defendants. Thus, in addition to asking each attorney for the names and addresses of potential class members, the cover letter will also ask each attorney to use the notification materials to help notify potential class members of the class action and proposed settlement.

To supplement these efforts to provide Rule 23 notice by publication to those whose names and addresses cannot otherwise be obtained, the notice plan provides for contacts with other

organizations whose members may be in the class, trade, industrial, and legal publications, and various state and federal courts.[13]

The settling parties have drawn up a list of 40 trade or other organizations whose members may be in the class. The total membership of these organizations is in excess of 38.7 million. Just as with the unions and the plaintiffs' attorneys, a packet will be sent to these organizations, and they will be urged to use all reasonable means to notify their members or other potential class members about the class action and proposed settlement. Again, camera-ready materials will be available for immediate use in any publications distributed by the organization to its members.

The settling parties also prepared a list of 41 trade, industrial and legal publications whose readers include individuals who may have worked with or around asbestos or asbestos-containing products, or attorneys who routinely represent plaintiffs in asbestos personal injury litigation. The total circulation of these publications is approximately 4.5 million. Under the notice plan, a packet, including the camera-ready materials, will be sent to each publication. A cover letter will urge each publication to use these materials to publicize the class action and proposed settlement to its readers.

Finally, the notice plan provides for a complete set of notice materials and an appropriate cover letter to be sent to several hundred state and federal courts where claims have been filed against one or more of the CCR defendants. The cover letter will explain that these materials are being provided to the courts as a courtesy, and will ask the courts to help in the notification effort in any way that they can.

b. Timing of the Notice Plan and the Opt-Out Period

The settling parties propose that the dissemination of notice be completed in eight weeks. Under the notice plan, mailings of individual notice packets to those persons who have filed claims since January 15, 1993, and to those whose names and addresses

[13] According to the settling parties, these efforts will also result in some additional individual notice in that those persons contacted may call the toll-free or class counsel and provide their name and address.

are ascertained from unions or plaintiffs' attorneys, will be completed (to the extent possible) within three to four weeks. Mailings of notification materials to unions, mass media outlets, trade or other organizations, trade, industrial and legal publications, and various state and federal courts will be completed in this same time period. The paid television advertising will run in weeks four and five, with the first round of paid print advertising appearing on the Sunday at the beginning of week five or six. The second round of paid print advertising will appear on the Sunday at the beginning of week seven or eight. The advertisement in *Parade* will also run in this same time period.

The mailing of individual notice packets to potential class members who call the toll-free telephone number, or to plaintiffs who file claims against the CCR defendants after July 31, 1993, will continue throughout the notification period. Given that the settling parties believe the dissemination plan will be completed within eight weeks, they propose an opt-out period of twelve weeks. This would allow class members *at least* four weeks after receipt of notice to decide whether or not to exclude themselves from the class.[14] The majority of class members, *i.e.*, those who receive notice in the beginning of the notice period, will obviously have more than four weeks to decide whether or not to opt out.

The settling parties will obtain a post office box in the name of the Clerk of the Court for receiving "Exclusion Requests" from class members. The box will be checked on a daily basis, and the parties will maintain a list and copies of all Exclusion Requests received. The settling parties also propose that, within a reasonable time after the close of the opt-out period, they file a sealed or unsealed report to the Court concerning implementation of the dissemination plan outlined above. They propose that the report contain a list of the names and addresses of all potential class members to whom individual notice packets were mailed.

c. Whether the Notice Plan Satisfies Rule 23

As stated above, this class action was conditionally certified under Federal Rule of Civil Procedure 23(b)(3). Because the

[14] The Exclusion Requests will be considered timely if they are postmarked before the expiration of the opt-out period.

judgment in a class action maintained under this subdivision binds all members of the class unless they expressly opt out, Rule 23(c)(2) requires that the class members be informed of the existence of the action. In addition, when the named parties to a class action reach a proposed settlement, Rule 23(e) requires that the class members be notified of the terms of the proposed settlement. These requirements were designed to protect absent class members' due process rights. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). As the Supreme Court as noted, the "right to be heard has little reality of worth unless one is informed that the matter is pending and can choose for [him/herself] whether to appear or default, acquiesce or contest." *Id.* at 314.

Because the named parties in this class action filed the proposed settlement at the same time as the complaint, the notice materials proposed by the settling parties are designed to simultaneously inform class members of both the existence of the class action, pursuant to Rule 23(c)(2), and the substance of the proposed settlement, pursuant to Rule 23(e). Although such combined notices have been approved by the Third Circuit, *Greenfield* v. *Villager Industries, Inc.*, 483 F.2d 824 (3d Cir. 1973), they must satisfy the requirements of both Rules 23(c)(2) and 23(e). *See* 5 H. Newberg & A. Conte, Newberg on Class Actions § 8.21, at 8-67 (3d ed. 1992) (hereinafter "Newberg on Class Actions"). The requirements of Rule 23(c)(2) are stricter than the requirements of Rule 23(e) and arguably stricter than the due process clause. *See* 5 Newberg on Class Actions § 8.04, at 8-16; *Zimmer Paper Products, Inc.* v. *Berger & Montague, P.C.*, 758 F.2d 86, 90 (3d Cir.), *cert. denied*, 474 US. 902 (1985). Thus, it is enough that the plan for dissemination of notice satisfies Rule 23(c)(2). Accordingly, this memorandum need only discuss the requirements of Rule 23(c)(2).

Rule 23(c)(2) requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). However, "[t]he type of notice to which a member of a class is entitled depends upon the information available to the parties about that person" and the possible methods of identification. *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1098 (5th Cir. 1977), explaining *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); see also *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 534, 539 (N.D. Ga. 1992). Where a potential class member's address is known or is available through reasonable efforts, individual or actual notice is required; constructive notice by publication in that circumstance would not satisfy the requirements of Rule 23(c)(2). *Eisen* v. *Carlisle & Jacguelin*, 417 U.S. 156 (1974); *In re Nissan*, 552 F.2d at 1099. In determining the reasonableness of the effort required, the court must look to the "anticipated results, costs, and amount involved." *In re Nissan*, 552 F.2d at 1099. For example, "[a] burdensome search through records that may prove not to contain any of the information sought" is not required. *Id.* Rule 23 does not require the parties to exhaust every *conceivable* method of identifying the individual class members. *See. e.g.*, *Burns* v. *Elrod*, 757 F.2d 151, 154 (7th Cir. 1985). For those whose names and addresses cannot be determined by reasonable efforts, notice by publication will suffice under Rule 23(c)(2) and under the due process clause. *Mullane*, 339 U.S. at 317-18. These class members will be bound by the final judgment in a class action despite the lack of individual notice.

After reviewing the case law, I find that the efforts in this case to identify absent class members are adequate to meet the individual notice requirements of Rule 23(c)(2). As the Manual for Complex Litigation recognizes, a reasonable notice plan is a function of anticipated results:

> Receipt of actual notice by all class members is required neither by Rule 23 nor the Constitution .... What efforts are reasonable under the circumstances of the case rests initially in the sound discretion of the judge before whom the case is pending .... [T]he fact that notice to some class members must be given by publication is not necessarily fatal. In all cases the Court should strike an appropriate balance between protecting class members and making Rule 23 workable.

Manual for Complex Litigation § 30.211, at 223; *see also In re "Agent Orange" Product Liability Litig.*, 818 F.2d 145, 168 (2d Cir. 1987), *cert. denied*, 484 US. 1004 (1988) ("Rule 23, of course accords considerable discretion to a district court in fashioning notice to a class."); *Berland* v. *Mack*, 48 F.R.D. 121, 129 (S.D.N.Y. 1969) ("Rule 23 contemplates cooperative ingenuity on

the part of counsel and the court in determining the most suitable notice in each case.").

In this case, although the list of known class members is relatively short, the notice plan provides for very substantial efforts to determine the names and addresses of additional class members. As described in more detail above, these efforts include contacts with national and local labor unions and plaintiffs' lawyers, and an extensive campaign of paid and unpaid advertising. A long list of national and local unions and over 1,000 plaintiffs' attorneys will be contacted and asked to provide names and addresses of potential class members. If the unions prefer instead to mail notice on their own to their members, the CCR defendants will pay for such mailings. In addition, every element of the publication campaign — the mailings to unions, other organizations and publications, plaintiffs' attorneys, courts, and the extensive paid and unpaid media advertising — has been designed to not only provide notice by itself but also to result in further individual notice. All persons identified through these efforts will be mailed a complete notice packet.

A comparison of the individual notice campaign proposed here with those approved in other similar class actions, *i.e.*, class actions involving claimants with no presently manifested disease ("future claimants"), shows that the efforts here are more than adequate to meet the requirements of Rule 23(c)(2).

In the *Johns-Manville* bankruptcy proceedings *no* efforts to give the future claimants individual notice were made at all. *In re Johns-Manville Corp.*, 68 B.R. 618, 626 (Bankr. S.D.N.Y. 1986) (outlining notice campaign), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. Kane* v. *Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988). Nonetheless, the court concluded that the notification campaign was fully adequate. *In re Johns-Manville*, 68 B.R. at 626.

In the *Manville Trust* limited fund class action, which followed the bankruptcy reorganization, very limited individual mail notice was directed at future claimants without manifested conditions. Instead, mail notice was sent only to known claimants or their counsel, co-defendants counsel, courts in which the Trust was involved as a party, judges who participated in asbestos

coordinating committees, parties and co-defendant counsel in the Brooklyn Navy yard litigation, persons on Manville's service list from the underlying bankruptcy proceeding, the Property Damage Trust, certain court-appointed experts, and counsel for certain unions. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 774-75 (E. & S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified on rehearing*, 993 F.2d 7 (2d Cir. 1993). Thus, only minimal efforts were made to obtain the names and addresses of persons who had been exposed to Manville asbestos but who had not yet manifested any asbestos-related condition. Still, the notice was found "adequate to apprise potential class members, including ... possible future claimants, to the extent reasonably possible, of the pendency of the action." *Id.* at 801.

Also, in the *Agent Orange* litigation, the Rule 23(b)(3) opt-out class included all persons exposed to Agent Orange in Vietnam, regardless of whether they had manifested any physical injury related to that exposure. *In re "Agent Orange"*, 818 F.2d at 154; *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1429-30, 1433-35 (2d Cir. 1993). The individual notice efforts in the *Agent Orange* litigation involved mailing written notice to persons who had already filed lawsuits in federal court (or whose state court actions were removed to federal court) and whose cases had been transferred to the Honorable Jack B. Weinstein, persons who had intervened or sought to do so, class members who had not yet filed suit or sought to intervene but were represented by counsel associated with the plaintiff's management committee, and all persons listed on the Veterans' Administration's "Agent Orange Registry." 818 F.2d at 155; *see also In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 729 (E.D.N.Y. 1983). In addition, notice was sent to state governors for referral to any state agencies that might be able to provide the court with names and addresses of class members. 100 F.R.D. at 730-31. Lastly, media announcements included a toll-free telephone number to be called for further information. *Id.* at 730, 734, 735.

Thus, the efforts to identify unknown future claimants in the *Agent Orange* litigation were more limited than the efforts proposed here. Individual notice was given only to those persons already known to the plaintiffs' counsel in the case, those listed on the "Agent Orange Registry," any persons whose names were

furnished by the state governors, and those who called the toll-free telephone number. No efforts, for example, were made to solicit veterans' groups to obtain further names and addresses. Nonetheless, the Second Circuit upheld the notice campaign, praising it as "a creative approach appropriate to this unique case." 818 F.2d at 167. This same notice was again upheld by the Second Circuit against a collateral attack. *Ivy*, 996 F.2d at 1435.

The individual notice campaign proposed in this case goes beyond that provided in those cases cited above. The notice plan proposed by the settling parties will make substantial efforts to obtain the names and addresses of additional class members by contacting numerous unions and plaintiffs' lawyers, and by sending individual notice packets to all potential class members who call the publicized toll-free telephone number.

Contrary to the contention of the objectors, the Supreme Court's holding in *Eisen* does not mandate a different finding in this case. In *Eisen*, the plaintiff class consisted of over six million buyers and sellers of odd-lot securities. Some 2,225,000 of the class members could be identified by name and address from the computer records of various brokerage firms. The named plaintiff argued that Rule 23(c)(2) did not require individual notice to each identifiable class member, pointing out that the cost of such notice was prohibitively high and to require such notice would effectively end the case as a class action. The Supreme Court held that the mandate of Rule 23(c)(2) requiring individual notice to those persons who can be identified through reasonable effort is "unmistakable." *Id.* at 173. The Court observed that "[t]here is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs," *Id.* at 176, and stressed that "individual notice is not a discretionary consideration to be waived in a particular case." *Id.*

Relying on *Eisen*, several objectors argue that the settling parties must, at the very least, obtain lists of the names and addresses of (1) present and former employees of the CCR defendants and of their predecessors whose job it was to install, or to work around asbestos, (2) present and former employees of naval and commercial shipyards, and (3) present and former employees of major purchasers of asbestos or asbestos-containing products from the CCR defendants. Brief of the law firm of Baron & Budd

("Baron Brief") at 7-11. The objectors claim that the majority of the persons on these lists are members of the plaintiff class.[15] They also contend that the lists are obtainable through reasonable effort, and thus, regardless of the cost, individual notice packets must be mailed to those persons.

After reading the memoranda of law and hearing extensive argument on exactly what lists are available and what such lists might contain, I conclude that the efforts suggested by the objectors would be unduly time-consuming and expensive, and not necessarily fruitful. First, to the extent that these lists are in the control of third parties, it is unlikely that the third parties would cooperate. Unlike unions — who because of their relationship with potential class members have an incentive to cooperate in the notification effort — former customers of the CCR defendants, former subsidiaries of the CCR defendants, and shipyards are unlikely to want to help notify their former employees of this class action because they may fear that such notice will increase the number of asbestos-related workers' compensation claims against them. Second, assuming such lists exist or could be generated, none of the lists would be current. The settling parties claim and the objectors do not dispute that such lists would contain pre-1980 addresses.

Third, the lists would be substantially overinclusive. Far fewer of those persons whose names would be generated are indeed members of the class. And, there would be no easy method of knowing which persons on these lists were likely to have been exposed to asbestos and which persons were not. *See In re Domestic Air*, 141 F.R.D. at 546 (court held that it was not necessary to send individual notice to all those on an overinclusive list when there were no data which would enable the parties to determine who on the list was a class member). In striking the balance between protecting the rights of absent class members and making Rule 23 workable, courts have held that it is not necessary to send individual notices to an overinclusive group of people simply because that group contains some additional class members

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[15] The objectors cite nothing to suggest that their claim is based on anything other than pure conjecture.

whose identifies are unknown. *See, e.g., In re "Agent Orange" Product Liab. Litig.*, 818 F.2d at 169 (rejecting argument that individual mail notice should have been provided to all 2.4 million Vietnam Veterans, because there were "far fewer than that number exposed to Agent Orange" and thus notice would have been "considerably overbroad"); *In re Domestic Air*, 141 F.R.D. at 539-46 (sending notice to larger group "would most likely confuse the recipients and encourage [responses] by non-class members"); *Skelton* v. *General Motors Corp.*, 1987 U.S. Dist. LEXIS 795, at *8 & n.3 (N.D. Ill. Feb. 3, 1987) (rejecting overinclusive list because it "could mislead many thousands of ineligible [persons] into thinking they qualify to recover in this action" and would "generate considerable confusion and additional expense in administering the settlement.") Further, courts have refused to order identification efforts that would require "impractical and extended searches" or would be unduly time-consuming or expensive. See *Helfand* v. *New America Fund, Inc.*, 64 F.R.D. 86, 92-93 (E.D. Pa. 1974) (quoting *Mullane*, 339 U.S. at 317), vacated on other grounds sub nom., *Girsh* v. *Jepson*, 521 F.2d 153 (3d Cir. 1975).

Thus, this case is different than *Eisen*. In *Eisen*, the 2,225,000 persons on the computer lists were known to be members of the plaintiff class. See *In re Domestic Air*, 141 F.R.D. at 546 (*Eisen* represents "classic case" for individual notice where "records kept by defendants indisputably contained the names and addresses of the universe of class members."). Although providing each person on the computer list with individual notice would have been expensive for the named plaintiff in *Eisen*, and therefore extremely burdensome, actually identifying those persons as class members was clearly possible through reasonable effort. As the court noted in *In re Nissan*, the word "reasonable" in the "reasonable effort" requirement of Rule 23(c)(2) could not be ignored. *In re Nissan*, 552 F.2d at 547. "In every case, reasonableness is a function of anticipated results, costs, and amount involved." *Id.* (citation omitted).

In this case, the methods suggested by the objectors would, after burdensome and expensive efforts, produce at best a list of names and outdated addresses that would represent only a fraction of the class, and that would include many names of non-class

members. It would not be reasonable to mail individual notice packets to these persons, especially in light of the extensive, and probably more effective, notice plan proposed by the parties and described above.

The objectors also argue that the notice plan fails to provide a sufficient time in which notice to the class can be accomplished and in which class members can exercise their option to exclude themselves. The Supreme Court has held that both due process and Rule 23(c)(2) require that notice of a judicial proceeding affecting the rights of an absent party "afford a reasonable time for those interested to make their appearance." *Mullane*, 339 U.S. at 314. In this case, the settling parties have proposed that the dissemination of notice be completed in eight weeks with the opt-out period extending an extra four weeks beyond that. This would allow class members who last receive notice at least four weeks after receipt of notice to decide whether or not to exclude themselves from the class.

The objectors claim that the eight-week notice period is inadequate, and that the paid newspaper and television advertisements should continue for at least six months. The objectors give no real reasons in support of their argument, except to say that six months is better than two months. Again, notice need not be the best that it can be. It is enough that it satisfies Rule 23(c)(2) and the due process clause. I conclude that the eight-week notice period, given that it includes extensive efforts to both identify individual class members, provide individual notice, and provide notice by publication, is sufficient.

The objectors also claim that the opt-out period is too short. The objectors cite to *Greenfield* v. *Villager Industries, Inc.*, 483 F.2d 824, 833-34 (3d Cir. 1973), in support of their claim. In *Greenfield*, the class included holders of certain shares of stock, and the notice consisted of two small newspaper ads. After the appearance of the ads, the class members had only 30 days either to exclude themselves from the class or file a claim for compensation. *Id.* at 830, 833. Class members who took neither step lost all rights to compensation. *Id.* at 828. In these circumstances, the Third Circuit found that the entire notice plan was inadequate, including the 30-day opt-out period, since brokerage firms would need longer than 30 days after seeing the

newspaper ads to search their records and notify potential class members concerning their rights. *Id.* at 834.

The objectors argue that the unions will have to do what was expected of the brokerage firms in *Greenfield*, and, as in that case, the one-month opt-out period is too short. In this case, however, the total opt-out period is twelve weeks. The extra four-weeks at the end of the latest dissemination of notice is to ensure that all those notified will have *at least* one month to decide whether to exclude themselves from the class. Also, the publication campaign in this case is much more extensive than the inadequate notice given in *Greenfield*.

I find that *Greenfield* does not hold that all one-month opt-out periods are inadequate as a matter of law. And, after reading the memoranda of law and hearing argument on the timing of the notice plan and the period for opting out, I find that the eight-week notification plan and the twelve-week opt-out period are adequate in this case.

C. Conclusion

As stated above, I conclude that the settling parties' plan for the dissemination of notice, including the timing, satisfies the requirements of Rule 23(c)(2), and therefore, the requirements of the due process clause. It is clear to me that the individual notice campaign and the notice by publication campaign together are designed to reach the maximum number of class members. However, because the class in this case is potentially very large, and the objectors numerous, I will order that the settling parties, at the end of the first four-week period, file a report with the Court which contains the following information: (1) the number of individuals actually notified, (2) the categories of individuals notified, and (3) a description of precisely what efforts the various "volunteer" organizations and persons[16] have made to notify potential class members. The Court, upon reviewing the mid-term report, may amend the notice plan if necessary to satisfy the requirements of Rule 23(c)(2).

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[16] The "volunteer" organizations include unions, plaintiffs' attorneys, other organizations whose members may be in the class, and trade, industrial, and legal publications.

As mentioned above, the settling parties also propose that, within a reasonable time after the close of the opt-out period, they file a report to the Court containing a list of the names and addresses of all potential class members to whom individual notice packets were mailed.[17] The requirement of a mid-term report does not relieve the settling parties of this responsibility. Moreover, I will order the settling parties to include in their final report the information requested above in the mid-term report.

2. Contents of the Notice

a. Description of Notification Materials

The notification materials include the following items: (1) the full, Rule 23 notice (the "Notice"), (2) a document entitled "Questions and Answers on the Class Action Lawsuit and Proposed Settlement," (3) the print advertisement, (4) the "copy" for the television advertisement, (5) the camera-ready materials, (6) the lists of CCR defendants, asbestos-containing products and occupations of those potentially exposed to asbestos, (7) the press release and newscast script, (8) the script for the toll-free telephone number operator, (9) and the cover letters to various persons and organizations.

The most detailed notification document is the full Notice, which is a 27-page document.[18] This Notice is a combination notice under Rule 23(c) and Rule 23(e), which means that it gives class members notice of both the class action and the proposed settlement. Pursuant to Rule 23(c), the Notice notifies class members of the existence of the class action and explains the procedures for opting out of the class and the consequences of remaining in the class, and informs each class member who does not opt out of his or her right to enter an appearance in the class action through counsel. The Notice has a heading in bold letters which reads: "ATTENTION: ALL PERSONS WHO HAVE WORKED WITH OR AROUND ASBESTOS OR ASBESTOS-CONTAINING PRODUCTS, THEIR SPOUSES OR

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[17] Because the final report will contain the names and addresses of potential class members, I will order that it be *sealed*.

[18] Exhibit A to the Joint Motion.

HOUSEHOLD MEMBERS, AND THE FAMILY MEMBERS OR LEGAL REPRESENTATIVES OF SUCH INDIVIDUALS."

The Notice also includes an "Exclusion Request Form" which class members who wish to opt out must complete and return to the Court. Pursuant to Rule 23(e), the Notice also summarizes the terms of the proposed settlement (both briefly in the body of the Notice and in greater detail in a 14-page Appendix), tells class members how to obtain a full copy of the settlement agreement, and explains how class members may review additional materials relevant to the class action and proposed settlement.

Along with the full Notice, those class members who can be identified through the efforts described above will also be mailed a document entitled "Questions and Answers on the Class Action Lawsuit and Proposed Settlement."[19] This document is essentially an explanation of the main points of the Notice in a question-and-answer format. It takes important blocks of information concerning the class action and settlement and breaks them down into smaller units that can be more easily understood.

The print advertisement will run as a one-half page ad in most newspapers and a one full-page ad in tabloid-style newspapers and in *Parade* magazine.[20] The ad gives basic information about the class action, the proposed settlement, the procedures for opting out and the consequences of remaining in the class, and the right to enter an appearance through counsel. The ad has a headline, directed in bold letters to "ALL PERSONS WHO HAVE WORKED WITH OR AROUND ASBESTOS OR ASBESTOS-CONTAINING PRODUCTS, THEIR SPOUSES, HOUSEHOLD AND FAMILY MEMBERS AND LEGAL REPRESENTATIVES."[21] A list of asbestos-containing products and occupations where exposure to these products potentially

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[19] Exhibit B to the Joint Motion.

[20] Exhibit C to the Joint Motion.

[21] Due to the size of *Parade* magazine, the headline of the advertisement will be slightly smaller than shown in Exhibit C to the Joint Motion, but the text of the ad in *Parade* will be the same.

occurred is also included in the ad. The ad urges any potential class members with questions to call the special toll-free telephone number or to contact class counsel to obtain a complete individual notice packet.

The 30-second television notice is designed to catch the attention of potential class members, to alert them to the existence of the class action, to encourage them to look in their newspapers for the more thorough print advertisement and call the toll-free telephone number if they wish to receive a complete individual notice packet.[22] The ad will have both spoken text and a rolling text on the screen, and will read as follows:

> Attention
>
> A class action lawsuit involving individuals occupationally exposed to asbestos is pending in federal court.
>
> If you're a class member, your rights may be affected by this lawsuit and a proposed settlement.
>
> Class members are:
>
> * all persons exposed occupationally to asbestos;
>
> * individuals exposed through the occupational exposure of a spouse or household member;
>
> * family or legal representative of those exposed
>
> For information, see your Sunday paper, or call 1-800-xxx-xxxx (repeat number).

The camera-ready materials are small announcements which are designed to be used in publications such as those distributed by many state and local unions and labor bodies that will not accept paid advertising.[23] As with the television notice, the camera-ready materials encourage the readers to look in their newspapers for the more detailed print advertisement and call the toll-free telephone

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[22] Exhibit C to the Joint Motion.

[23] Exhibit E to the Joint Motion.

number if they wish to receive a complete individual notice packet.[24]

The lists of the CCR defendants, the asbestos-containing products and the occupations of those persons who were potentially exposed to asbestos or asbestos-containing products will be included in the notification materials sent to unions and similar trade or other organizations.[25] These lists will also be included in the full Notice and the print advertisement to further clarify the scope of the class.

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[24] The camera-ready announcements read as follows:

ATTENTION
ALL PERSONS WHO HAVE WORKED WITH OR AROUND ASBESTOS OR ASBESTOS-CONTAINING PRODUCTS

A proposed class action settlement involving individuals who were exposed occupationally, or through the occupational exposure of a spouse or household member, to asbestos or asbestos-containing products is now pending in the United States District Court in Philadelphia. Family members or legal representatives of exposed persons are also class members.

If you, or a spouse or household member worked with or around asbestos or asbestos-containing products, you may be a class member, and your rights may be affected by this class action and proposed settlement.

If you are a class member, you may exclude yourself from the class. If you are a class member and you do not exclude yourself from the class, you have the right to participate in the class action through counsel, and you will be bound by the results of the class action and settlement.

For further information about the class action and proposed settlement, and the procedures for exclusion from the class, see your local Sunday newspaper or weekly, or call

1-800-xxx-xxxx or Class Counsel 1-800-666-7503

[25] Exhibit F to the Joint Motion.

The press release and newscast script give basic information concerning the class action and settlement.[26] They are designed to be distributed as public service information to newspapers, wire services, and television and radio outlets in numerous media markets.

The notification materials also include a script to be followed by the telephone operator when answering calls placed to the toll-free number which all the notification materials urge potential class members to call to obtain a complete individual notice packet.[27] The script is designed to ensure that erroneous information concerning the class action and settlement will not be disseminated by the toll-free operators. Pre-stuffed individual notice packets will be labeled so that the correct materials (the Notice or the Stipulation of Settlement itself or both) are mailed to potential class members who call the toll-free telephone number.

Finally, the notification materials include cover letters to be sent to potential class members, plaintiffs' attorneys, unions and labor bodies, trade and other organizations, trade, industrial, and legal publications, media outlets, and state and federal courts.[28] These letters inform the reader of the existence of the class action, including a description of the class, and urge them to help in the notification efforts.

b. Whether the Notice Materials Satisfy Rule 23(c)(2) and Rule 23(e)

The requirements for the contents of the notice to be provided to absent class members to inform them of the lawsuit and the proposed settlement are set forth in Rules 23(c)(2) and (e). Again, because the named parties in this class action filed the proposed settlement at the same time as the complaint, the notice materials are designed to simultaneously inform class members of both the existence of the class action, pursuant to Rule 23(c)(2), and the substance of the proposed settlement, pursuant to Rule 23(e).

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[26] Exhibit G to the Joint Motion.

[27] Exhibit H to the Joint Motion.

[28] Exhibits I, J, K, L, M, N and P to the Joint Motion.

However, as stated above, the notice must satisfy the content requirements of both rules.

Rule 23(c)(2) requires that the notice "advise each member that (a) the court will exclude the member from the class if the member so requires by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if the member desires, enter an appearance through counsel." Courts have also held that "the notice required by subdivision (c)(2) must contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment." *In re Nissan*, 552 F.2d at 1105.

Rule 23(e) simply states that "notice of the proposed ... compromise shall be given to all members of the class in such manner as the court directs." Thus, the Third Circuit has observed that Rule 23(e) "commits the form of the notice to the court's discretion." *Zimmer Paper Prods.*, 758 F.2d at 90. The court should, however, ensure that the notice "apprise[] prospective [class] members of the terms of the Proposed Settlement, the identity of persons entitled to participate in it[,] and the options that are open to the [class] members in connection with the proceedings." *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910, 924 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 285 (2d Cir. 1992). In other words, the notice should contain enough information about the settlement to enable class members to make an informed choice. *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 223 (5th Cir. 1981). Also, the description of the proposed settlement must be "neutral," *In re Nissan*, 552 F.2d at 1105, and amenable to "lay comprehension." *Kyriazi* v. *Western Electric Co.*, 647 F.2d 388, 395 (3d Cir. 1981).

Items to be considered for inclusion in the Rule 23(e) notice are (1) a description of the class, (2) a statement of the purpose, time, and place for the settlement hearing, (3) a description of the case, including the contentions of the complaint and a summary of the proceedings before settlement, (4) a description of the proposed settlement, (5) an explanation that attorneys' fees will be sought by class counsel, and (6) a description of the procedure for filing objections to the settlement, for obtaining documents, and for

making a claim against the settlement fund. 2 Newberg on Class Actions § 8.32, at 8-105. There is no requirement that the entire proposed settlement be sent to the class members.

The full Notice and the Questions and Answers satisfy the express requirements of Rule 23(c)(2). Each explains (1) that every class member has the right to exclude her/himself from the class if s/he files an exclusion request by a certain date, (2) that any judgement or settlement of the class action will bind class members who do not request exclusion, and (3) that any class member who does not request exclusion may, if s/he desires, enter an appearance in the class action through counsel. In addition, a simple, one-page "Exclusion Request Form" is attached to the full Notice. Any class member who wishes to exclude her/himself from the class may do so simply by returning this form to the Post Office Box to be maintained by the settling parties in the name of the Court Clerk.

With respect to the notice of the proposed settlement under Rule 23(e), the full Notice contains both a short summary of the proposed settlement in the body of the Notice and a more extensive summary in an Appendix to the Notice. The primary features of the settlement are also summarized in the Questions and Answers document. In addition, both the full Notice and the Questions and Answers inform class members that they may obtain a complete copy of the entire Stipulation of Settlement by telephoning the toll-free number. Thus, any class member may review the entire settlement agreement in detail. The full Notice also contains all six items suggested by Professor Newberg in the passage cited above. Thus I find that the individual notification documents "contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class," and thus meet the requirements of Rule 23(c)(2) and (e). *In re Nissan*, 552 F.2d at 1105.

The abbreviated versions of the notice for use in written publications and in the broadcast media are likewise adequate for their purposes. Each written advertisement (the newspaper advertisement, the camera-ready materials, and the press release) contains the three items, noted above, that are required by Rule 23(c). In addition, each written ad contains both a short summary of the proposed settlement and the toll-free number that class members may call to obtain the full notice packet.

The broadcast advertisements (the television ad and the newscast script) are similarly adequate. Neither contains the amount of information contained in the print advertising; however, each serves its goal of alerting potential class members concerning the class action and settlement, and urges class members to call the toll-free number to obtain the complete individual notice materials.

A comparison with notices approved in other cases shows that the contents of the notification materials proposed here are properly designed. The full Notice is comparable to those reprinted in the Manual for Complex Litigation § 41.41-43, at 393-97, 400-05, 408-12, and in the Appendix to 5 Newberg on Class Actions. The full Notice is also comparable to the Rule 23(c) and (2) notices used in the *Agent Orange* litigation. *In re "Agent Orange"*, 100 F.R.D. at 731-34 (Rule 23(c) notice), *aff'd*, 818 F.2d 145 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 867-74 (E.D.N.Y. 1984) (Rule 23(e) notice). The abbreviated notices for print and broadcast are comparable to those reprinted in the Manual for Complex Litigation § 41.41, at 398, in the Appendix to 5 Newberg on Class Actions, and to those used in the *Agent Orange* litigation, 100 F.R.D. at 734-35, 597 F. Supp. at 874-75.

In sum, I have reviewed the contents of the entire set of notification materials described above, and I believe that these materials satisfy the requirements of Rules 23(c)(2) and (e) and the due process clause of the Constitution. However, taking into consideration the comments and suggestions of the objectors and the *amicus curiae*, I also believe that some of the notice materials can more clearly alert the reader that they may be a member of the class whether or not they are currently suffering from an asbestos-related condition. This class action, although not the first of its kind, is somewhat unusual in that it involves an asbestos personal injury class that includes as members persons who have not yet been diagnosed with an asbestos-related injury. Because I believe that it is extremely important that these persons be alerted to their potential membership in the class, I will order that some clarifying language be added or made more prominent in some of the notice materials.

The notice materials define the scope of the class in some detail. They specifically explain that the class does not include

"environmental exposure," such as any possible exposure by office workers in buildings where asbestos products were present. To make this still clearer, the full Notice and the print advertisement contain a list of asbestos-containing products and a list of occupations where exposure potentially occurred. Some of the notice materials also notify readers that they may be members of the class "whether or not [they] are presently suffering from an asbestos-related medical condition." This information appears on page three of the full Notice. Again, this information is important to alert those who might not otherwise believe that they are members of the class. Thus, I will order that this information be mentioned in the "ATTENTION" line on page one of the full Notice. For the same reason, I will order that this information be mentioned in the larger print sections of the print advertisement attached as Exhibit C to the Joint Motion. Finally, I will order that this information be added to the camera-ready materials and the 30-second television ad.[29]

In sum, I find that the contents of the notice satisfy the requirements of Rules 23(c)(2) and (e) and the due process clause of the Constitution, and that, after the minor changes discussed above, all of the proposed notice materials may be used to provide Rule 23 notice to the class.[30]

3. General Objections to the Plan and Contents

In opposing the notice plan and the contents of the notice materials broadly, the objectors contend that, regardless of the content of the plan, it cannot satisfy the requirements of Rule 23(c)(2) or due process. The objectors raise essentially three arguments. First, they contend that the preliminary certification

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[29] Due to the limitations of these media, the information can be presented in a much more abbreviated form.

[30] In reviewing the adequacy of the notice materials, I have not addressed all of the arguments made by the various objectors. I am aware that the settling parties have agreed with several of the suggestions offered by the objectors and have amended the notice materials accordingly. After having heard extensive oral argument on this issue, as I have on all others in this case, I find that the remaining objections to the notice materials are unpersuasive.

order provides inadequate information to class members as to whether they are in the class and that this deficiency cannot be cured by the notice without amending the class definition. In addition, objectors suggest that even with the additional occupational information provided in the notice, persons who worked in those occupations may be unaware or may have forgotten their asbestos exposure and consequently will not know that they are in the class. Second, objectors contend that the case law provides that "future claimants, who do not yet manifest physical injury, cannot as a matter of due process be provided adequate notice. Finally, objectors argue that even if absent class members are able to determine whether they are class members, notice is inadequate because class members are compelled to decide whether to remain in the class or opt out at a time when they do not yet know the extent of their injuries.

The objectors first argument has two parts. Initially, the objectors contend that the description of the class in the notice differs from the class definition in the preliminary certification order of January 29, 1993. The objectors contend that the notice is therefore inadequate unless the certification order is amended. The objectors are incorrect in asserting, however, that the additional information included in the notice, identifying specific asbestos-containing products, further describing what constitutes "occupational exposure," and listing relevant occupations, is inconsistent with the definition of the class as preliminarily certified. The objectors themselves have not identified any inconsistencies.

In any event, it is the certification order, and not the notice, that determines the res judicata effect of the judgment that will be entered in this case. Thus, any modifications in the class definition that may be called for can be made at the time the final certification order is entered, that is, after and if the settlement is approved. It is appropriate to modify the class definition at that time if, during the course of the proceedings, the scope of the class has changed. *See, e.g.*, *Montelongo* v. *Meese*, 803 F.2d 1341, 1352 (5th Cir. 1986) (approving post-trial modification of class definition pursuant to court's "broad authority to redefine the class 'as appropriate in response to the progression of the case . . . ") (quoting *Richardson*

v. *Byrd*, 709 F.2d 1016, 1019 (5th Cir. 1983)), *cert. denied*, 481 US. 1048 (1987).

As a second prong of this argument, the objectors suggest that even if the notice and certification order were congruent, the notice inadequately advises potential class members of their rights because people may not be aware of asbestos exposure in their jobs, or "may have forgotten" their exposure. Baron Brief at 18. I am satisfied, however, that after more than 20 years of extensive litigation, over 15 bankruptcies (many with extensive notice), and massive publicity about asbestos, persons who have had occupational exposure to asbestos are aware of that exposure. There is no reason to believe, as objectors assert without support, that the notice does not provide a sufficient explanation of the scope of the class such that persons who may be in the class would be unable to determine their status.

In short, the notice provides an adequate definition of the class, and that definition is consistent with the preliminary certification order. Any modifications in the class definition, if warranted, can potentially be made at the conclusion of the proceedings. And, given this adequate description of the class in the notice, potential class members will be able to ascertain whether they are in the class.

The objectors argue that persons who have been exposed to asbestos, but who have no presently manifested asbestos-related condition, cannot be provided with effective notice. The objectors contend that such persons "could not reasonably believe that they have any 'rights' to give up," and that they will simply treat the notice as "junk mail." Baron Brief at 19. In essence, the objectors argue that adequate notice can never be given to persons without manifested injuries, citing *Schweitzer* v. *Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 US. 864 (1985).

Schweitzer, however, does not so hold. The issue in *Schweitzer* was whether plaintiffs' asbestos personal injury claims were discharged in bankruptcy where the plaintiffs had no manifest injury at the time of the bankruptcy. The court held that these claims were not discharged as a matter of statutory bankruptcy law since these persons had no cause of action under the Federal Employer's Liability Act at that time. *Id.* at 942-43. While the

court expressed certain reservations about due process, were it to have concluded that the claims were discharged, those concerns do not apply here. First, unlike the notice proposed here, the notice given in *Schweitzer* was not directed to "future" asbestos claimants and, even if received, did not include any information notifying such claimants that their rights were affected by the proceeding. Second, the Conrail reorganization plan at issue in *Schweitzer* made no provision for the compensation of such claimants. Accordingly, had the court held the claims discharged, all of the personal injury claimants would have been denied compensation entirely, with no prior notice.

Thus, while the court in *Schweitzer* stated that plaintiffs there could not reasonably have been expected to file claims against Conrail before their injuries became manifested, it did so in the context of those facts. Such facts are not comparable to the situation here, where notice will be specifically directed to "future" claimants and will inform them that they are included in the class, and where the settlement at issue will provide compensation for qualifying claimants who develop asbestos-related conditions in the future.

While *Schweitzer* is inapposite, other cases support the constitutionality of the proposed notice plan.[31] These cases have approved notice to classes including persons with unmanifested injuries. The objectors argue that these cases are not persuasive authority because all but one — the *Agent Orange* case — arose out of bankruptcies, or because they involved exposures to products that were less likely to be unknown or forgotten by the exposed persons. Such attempts to distinguish this line of cases, however, must fail.

The cases cited, except for *Agent Orange*, did arise in the bankruptcy context. Nevertheless, in all of these cases, the rights of "future" claimants were being adjudicated, and due process

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[31] See *In re "Agent Orange"*, 100 F.R.D. at 728-29, aff'd, 818 F.2d at 167-69; *In re "Agent Orange"*, 996 F.2d at 1435; *In re Johns-Manville Corp.*, 78 B.R. at 408-09; *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 834-37; *Unarco Bloomington Factory Workers* v. *UNR Industries, Inc.*, 124 B.R. 268, 271-72, 283 (N.D. Ill. 1990).

therefore required that notice be given to advise the "future" claimants of their rights to appear and participate in proceedings. Since these bankruptcy proceedings would significantly impact the remedies of "future" claimants against the debtor companies, notice in these cases is just as important — if not more important — than the notice in an opt-out class such as this one, where all claimants, whether they opt out or not, will be provided with a significant remedy against the CCR defendants.

The objectors further argue that even the Agent Orange decisions, *In re "Agent Orange"*, 100 F.R.D. at 718, *aff'd*, 818 F.2d 145 (2d Cir. 1987); 996 F.2d at 1425, which concededly involved a non-bankruptcy Rule 23(b)(3) class action, should be disregarded as precedent. According to the objectors, the Second Circuit in the *Ivy* decision misinterpreted the requirements of the due process clause by holding that, given able representation of absent class members, adequate notice to such class members is unnecessary. 996 F.2d at 1435. Such a reading of the case is wrong. The Second Circuit in *Ivy* referred to its earlier holding that the notice plan was adequate and stated that "[its] view ha[d] not changed." *Id.* Noting that due process "is a flexible concept," the Second Circuit concluded that, upon balancing the relevant factors, including "society's interest in the efficient and fair resolution of large-scale litigation," the fairness of the settlement, and the adequacy of class counsel, all due process requirements were satisfied. *Id.*

Thus, the Second Circuit in *Ivy* did not dispense with notice requirements, as it could not have done. Rather, it simply held that other factors may enter into the due process calculus, and that, given the circumstances present there, the notice given was adequate. This holding is consistent with Supreme Court precedent. See *Mullane*, 339 U.S. at 314-15 (due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections .... [I]f with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.").

In sum, there is ample support for the constitutionality of the proposed notice plan in this case. These cases all approved notice

campaigns directed to "future" claimants. *Schweitzer* is not to the contrary. Consequently, the objectors' argument that notice cannot be provided as a matter of constitutional law is without foundation.

The objectors finally argue that it is unfair to require persons without presently manifested injuries to choose between remaining in the tort system and participating in the proposed class settlement. They thus contend that, even assuming the receipt of notice about their options, class members who have not yet manifested an asbestos-related condition do not possess sufficient information to make an informed decision whether to opt out.

In this case, however, class members are not forced by this settlement to make any change in their existing situation at all. Rather, if a class member who has no presently-manifested injury wishes to maintain the *status quo*, he or she may do so simply by opting out. What the settlement offers to such claimants is simply an option to choose a different compensation system in the event that they become ill. This is not a case where class members are forced to chose between various options or fear losing their rights altogether. In short, the class members are not forced into an [sic] premature decision.

I find therefore, that the objectors arguments that notice to the members of the class can never satisfy the requirements of Rule 23 and the due process clause are without merit.

III. CONCLUSION

I conclude that the proposed settlement is fair for the preliminary purpose of sending notice to the class. Also, I conclude that the extensive plan for dissemination of notice designed by the settling parties, and the contents of the notice materials satisfy the requirements of Rules 23(c)(2) and (2) and the due process clause of the Constitution.

Accordingly, the schedule for the dissemination of the notice and the final fairness hearings will be as follows: the plan for dissemination of notice will be implemented starting on November 1, 1993 and ending on December 27, 1993, the mid-term report will be due on December 6, 1993 (one week after the end the first four-week period), the deadline for opting out of the class will be January 24, 1994, the final report will be due on February 16,

1994, and the final fairness hearing will begin at 9:30 a.m. on February 22, 1994, and continue from day to day until completed.

An appropriate order follows.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 93-0215

EDWARD J. CARLOUGH, et al.,

Plaintiffs,

v.

AMCHEM PRODUCTS, INC., et al.,
Defendants and third party
plaintiffs,

v.

ADMIRAL INSURANCE COMPANY, et al.
Third party defendants.

ORDER

AND NOW, this 27th day of October, 1993, upon consideration of the joint motion of the settling parties for approval of notice to the class (Document No. 445), for the reasons discussed in the attached memorandum, having found that the proposed settlement is fair for the preliminary purpose of sending notice to the class, and having found that the plan for dissemination of notice and the contents of the notice materials satisfy the requirements of Fed. R. Civ. P. 23(c)(2) and 23(e) and the due process clause of the Constitution, it is hereby ORDERED that the motion is GRANTED and the plan for dissemination of notice and the contents of the notice materials are APPROVED in

accordance with the instructions in the attached memorandum.[1]

It is FURTHER ORDERED that the schedule for the dissemination of the notice and the final fairness hearings is as follows:

1. The plan for dissemination of notice will be implemented starting on November 1, 1993 and ending on December 27, 1993;[2]

2. The settling parties will file a mid-term report with the Court, as discussed on pages twenty-four to twenty-five (pp. 24-25) of the attached memorandum, no later than 4:30 p.m. on December 6, 1993 (one week after the end the first four-week period);

3. The deadline for opting out of the class will be January 24, 1994;

4. The settling parties will file their sealed final report with the Court in accordance with the instructions on page twenty-five (p. 25) of the attached memorandum no later than 4:30 p.m. on February 16, 1994;

5. The final fairness hearing will begin at 9:30 a.m. on February 22, 1994 in Courtroom 11A at the United States Courthouse, Philadelphia, Pennsylvania, and continue from day to day until completed.

---

[1] Specifically, the settling parties shall amend the contents of the notice in accordance with the instructions on pages thirty-five to thirty-six (pp. 35-36) of the attached memorandum and as agreed to in the CCR defendants' reply memorandum.

[2] Because the changes in the plan for dissemination of notice and in the contents of the notice materials are few, the settling parties may submit the final notice complete with the changes agreed to in the CCR defendants' reply memorandum and the changes directed by this Memorandum and Order on November 1, 1993.

This is not a final, appealable order.[3]

/s/ LOWELL A. REED, JR., J.

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[3] The Court finds that it is not in the interest of the parties to this class action to delay dissemination of the notice pending appellate review. Thus, the Court will not certify this Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

No. 96-270

Supreme Court, U.S.
F I L E D
DEC 16 1996
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners

v.

GEORGE WINDSOR, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

SETTLING PARTIES' MID-TERM REPORT ON IMPLEMENTATION OF NOTICE

In its opinion and order dated October 27, 1993, this Court directed that the settling parties file a mid-term report explaining the steps taken to that date to implement the notice plan approved by the Court. In particular, the Court's decision directed that the interim report set forth "(1) the number of individuals actually notified, (2) the categories of individuals notified, and (3) a description of precisely what efforts the various 'volunteer' organizations and persons have made to notify potential class members." Oct. 27 Dec. at 24-25.[1]

The attached Declaration of Katherine Kinsella, the settling parties' notice consultant, explains in detail the steps that have been taken to date to implement the notice plan approved by the Court. Ms. Kinsella's Declaration shows that, to date, the notice plan has been implemented in accord with the Court's opinion, and that implementation of the plan is either on or ahead of the schedule proposed by the settling parties and approved by the Court. With respect to the specific questions raised by the Court, the answers are as follows.

1. Concerning efforts by unions and others to notify class members, Ms. Kinsella's Declaration explains that AFL-CIO President Lane Kirkland wrote to 48 AFL-CIO unions on October 29 to request their cooperation in the notice effort. Kinsella Decl.

---

[1] The Court's opinion defined such "volunteer" organizations as "unions, plaintiffs' attorneys, other organizations whose members may be in the class, and trade, industrial, and legal publications." October 27, 1993 Dec. at 24 n.25.

¶ 4. Ms. Kinsella's firm, The Kamber Group, began follow-up phone calls to these unions during the first week in November, and the court-approved letter (Exhibit P to the notice materials) asking that the unions cooperate in the notice effort was sent out shortly thereafter. *Id.* As a result of these efforts, 36 national or international unions have agreed to run some version of the court-approved "clip art" (Exhibit E to the notice materials) in union publications delivered individually to approximately 6 million union members and retirees during the notice and opt-out period, and 8 national or international unions have agreed to mail or to have mailed notice materials to almost 350,000 union members and retirees. *Id.* ¶ 5. All in all, then, these union efforts will result in notice materials being delivered individually through the mail to approximately 6.35 million union members and retirees.

In addition, as Ms. Kinsella's Declaration relates (¶ 7), several plaintiffs' attorneys have contacted her and asked that individual notice packets be sent to potential class members. To date, approximately 1,185 individual notice packets have or will be mailed out to potential class members whose names were obtained from plaintiffs' attorneys. *Id.*

Finally, 1,960 individual notice packets were provided in response to a request from the White Lung Association. Kinsella Decl. ¶ 10.

2. With respect to "categories of individuals notified," in addition to notice to union members and retirees, names from plaintiffs' attorneys, and the packets sent to the White Lung Association discussed above, various sets of notice materials have been mailed to 1) almost 21,000 plaintiffs (through their counsel) who have filed a claim against one or more CCR defendants since January 15, 1993; 2) over 1,000 plaintiffs attorneys who have, in the past twenty years, filed claims against one or more CCR defendants; 3) over 8,000 officials of national or international unions, at the national, state, or local levels; 4) 81 trade or other organizations, or trade, industrial or legal publications; 5) over 2,000 national radio stations and wire services, and print, radio, and televisions [sic] outlets; and 6) approximately 1,100 state and federal courts. Kinsella Decl. ¶¶ 3, 7, 9-10, 12-13.

3. Finally, with respect to the number of individuals notified to date, the mailings described above total notice to almost 6.375 million individuals. In addition, as of December 2, 1993, there have been 79,107 calls to the special 800-number, of which 68,409 calls were requests for notice packets, and 271 were requests for a copy of the Stipulation of Settlement. Kinsella Decl. ¶ 8. This means that, as of December 2, notice had been (or will shortly be) delivered to almost 6.45 million individuals.

In short, to date, the notice plan has been implemented entirely in accord with the Court's October 27, 1993 decision. The unions and others have been very responsive in helping to disseminate the notice, and the calls to the 800-number to date show that the media and other efforts are effectively reaching potential class members. Class counsel have also received over 1,000 calls. The notice campaign in this class action is living up to its promise to be the most extensive ever attempted. There is no need for this Court to alter or amend the notice plan in any respect.

Respectfully submitted,

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DATED: December 6, 1993

DECLARATION OF KATHERINE KINSELLA

1. My name is Katherine Kinsella. I am Senior Vice-President and Senior Consultant to The Kamber Group, the largest independently-owned communications company in Washington, D.C. I am responsible for the design and implementation of the notice to the class in *Carlough et al,*. v. *Amchem Products, Inc. et al.*, C.A. 93-CV-0215 (E.D. Pa.). I submitted a Declaration to this Court on August 16, 1993, which described the notice plan proposed by the settling parties. In the October 27, 1993 decision and order largely approving this plan, the Court directed that the settling parties file an interim report — in the middle of the notice and opt-out period — describing implementation of the notice plan. Accordingly, the purpose of this Declaration is to describe, to date, the implementation of the notice. All facts stated in this Declaration are based upon my personal knowledge or information supplied to me by trusted subordinates in the regular course of business.

2. On November 1, 1993, the settling parties filed with the Court a set of final notice materials. For simplicity, the various notice materials will be described in this Declaration by their exhibit numbers in the November 1 filing. Moreover, the description of the implementation, to date, of the notice plan, will follow the same order as the description of the notice plan in my Declaration filed on August 16, 1993 with the settling parties' joint motion for approval of the notice.

Individual Notice

3. In Paragraph 21 of my August 1993 Declaration, I stated that complete individual notice packets, including the full Notice (Exhibit A), the Questions and Answers (Exhibit B), and an appropriate cover letter (Exhibit I), would be sent to counsel for all plaintiffs (or to the plaintiffs directly, if unrepresented by counsel) who have filed lawsuits against one or more CCR defendants from January 15, 1993 forward. Accordingly, on or about November 13, 1993, these notice packets were mailed to counsel for the almost 21,000 plaintiffs who have filed claims against one or more CCR defendants from January 15, 1993 through October 31, 1993. (None of these plaintiffs was not represented by counsel.) As the notice plan provides, the CCR will continue to update this list of

pending claims through January 10, 1994 — two weeks prior to the close of the opt-out period — and we will continue to send notice packets to any plaintiffs (or their counsel, if they are represented by counsel) whose names are generated in this manner.

4. Paragraph 22 of my August 1993 Declaration described the efforts that we would make to obtain help from the 56 national or international unions (listed in Exhibit O to my August 1993 Declaration) to provide notice to their current or retired members. These efforts were aided immeasurably by the commitment of the national AFL-CIO, in its September 24, 1993 *amicus* brief endorsing the settlement, to help in the notice campaign. Accordingly, on October 29, 1993, President Lane Kirkland of the AFL-CIO, wrote to the 48 AFL-CIO unions on the list in Exhibit O, urging each of them to cooperate in the notice effort. We began follow-up calls to all 56 unions listed in Exhibit O during the first week in November, and, shortly thereafter, sent out the letter to these unions prescribed in the notice plan (Exhibit P to the notice materials).

5. As of the date of this Declaration, 36 national or international unions have agreed to run some form of the "clip art" (Exhibit E to the notice materials) in the publications that they will mail during the notice and opt-out period to the homes of their members and retirees, and 8 have agreed to mail or to have mailed notice materials to current and retired members of their unions. Exhibit 1 to this Declaration sets forth the unions who have agreed to publish "clip art" in their individually-delivered publications, and the mailing dates and circulation figures for these publications. Exhibit 2, in turn, sets forth the unions who have agreed to mail or to have mailed notice materials to their members and retirees, and the number of these mailings. All in all, these union efforts will result in the "clip art" being run in publications that will be delivered individually to approximately 6 million union members and retirees, and the mailing of notice materials to almost 350,000 union members and retirees.

6. A few additional unions are still considering our request for help in the notice effort. And the letter to certain local unions (described in Paragraph 23 of my August 1993 Declaration) was mailed during the week of November 22 to 92 locals of the

International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers.

7. Paragraph 24 of my August 1993 Declaration stated that an information and notification packet (consisting of Exhibits J, A, B, C, E, and F) would be mailed to the 1,000-plus attorneys who have represented plaintiffs who have filed claims against one or more CCR defendants. These mailings were sent out on or about November 13. Pursuant to the cover letter accompanying these packets (Exhibit J), several attorneys have contacted me and furnished me with the names and addresses of potential class members to be mailed complete individual notice packets (Exhibit I, A and B). To date, approximately 1,185 names and addresses have been furnished to me by plaintiffs' attorneys. We are in the process of mailing these packets to these names.

8. Paragraph 25 of my August 1993 Declaration explained that every notice document would refer potential class members to a special 1-800 telephone number, from which potential class members could obtain a complete individual notice packet (Exhibits I, A and B). The 800-number has been operational since November 5 (at least one week in advance of the first mailings under the notice plan). As of December 2, 1993, the 800-number has received 79,017 calls, of which 68,409 calls were requests for notice packets. We are in the process of mailing these notice packets to the callers who requested them. Copies of the Stipulation of Settlement also have been or will be sent to 271 callers to the 800-number who requested a copy of this document.

Notification Through Unions and Other Labor Bodies

9. Paragraphs 27 and 28 of my August 1993 Declaration described mailings that would be made (consisting of Exhibits K, A, B, C, E and F) to various officers in 56 national and international unions, in five trade and industrial departments of the AFL-CIO, the AFL-CIO State Federations, AFL-CIO Central Labor Councils, State Building Trades Councils, the Local Building Trades Councils, and over 6,000 local labor unions affiliated with

the 56 national or international unions listed in Exhibit P.[1] These mailings, which totaled over 8,000 packets, were sent out on or about November 13.

Notification Through Trade or Other Organizations and Through Trade, Industrial, and Legal Publications

10. Paragraphs 30 and 31 of my August 1993 Declaration described mailings that would be sent (consisting of Exhibits M, A, B, C, E and F) to 81 trade or other organizations, or trade, industrial or legal publications. These mailings were sent out on or about November 13. In addition, 1,960 individual notice packets were provided to the White Lung Association on or about November 17, 1993, in response to a request from that organization.

Notification Through Paid Media

11. Paragraphs 32-42 of my August 1993 Declaration described the paid television and print advertising components of the notice plan. Under the notice plan, a 30-second television ad (Exhibit D) will be run in 80 media markets during the week before the print advertising (Exhibit C) will be run in 292 newspapers (136 media markets). A second round of print advertising will be run two weeks later in 114 newspapers (59 media markets), and in *Parade* magazine. The television advertising was run throughout the week of November 29, and the first round of print advertising appeared in Sunday newspapers on December 5. The second round of print advertising and the advertisement in *Parade* magazine will run on December 19.

Public Service Media Strategy

12. Paragraph 43 of my August 1993 Declaration explained that a cover letter and press release or newscast script (Exhibits M and G) would be sent to all national radio stations and wire services, and to all major print, radio, and television outlets in the 136 media markets where paid print advertising will be run. These

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[1] My August 1993 Declaration estimated the number of these local unions to be 10,000-15,000. This action number (obtained from the Department to Labor) is 6,403.

mailings, which totaled over 2,000 packets, were sent out on or about November 13.

Notification to State and Federal Courts

13. Finally, Paragraph 44 of my August 1993 Declaration states that complete information and notification packets (consisting of Exhibits N, A, B, C, E and F) would be sent to over 1,000 state and federal courts that have handled asbestos personal injury claims (either at trial or on appeal) against one or more CCR defendants. The mailings to these courts, which totaled approximately 1,100 packets, were sent out on or about November 13.

Timing

14. Paragraph 45 of my August 1993 Declaration set forth the schedule for the notice campaign. To date, the campaign is precisely on or ahead of the schedule set forth in Paragraph 45.

Miscellaneous Matters

15. I understand that the post office box obtained by the settling parties in the name of the Clerk of the Court, has been checked, since November 3, 1993, on a daily basis for Exclusion Requests, and that the settling parties have maintained a list and copies of all Exclusion Requests received.

Conclusion

16. In sum, I believe that implementation of the notice campaign in this class action is to date, in full compliance with the Court's October 27, 1993 decision and order, and that the notice effort is either on or ahead of the schedule that we proposed and the Court ordered.

* * * *

DATED: December 6, 1994 /s/ KATHERINE KINSELLA

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

TRANSCRIPT OF HEARING REGARDING DISCOVERY

* * * *

[Tr. 112] concerning the meetings that were had between class counsel and CCR. And in that respect, I think, to simplify it, one of the things we would like to have are the hourly records of class counsel that participated in this case so we can see when they met and under what circumstances and how much time they put into the settlement. And that's clearly an issue that goes to the adequacy of representation.

THE COURT: Well, the requests you've made in 4, 5, 6 and 7 are overly broad. Data is — generally data is somewhat relevant, but the detail is beyond what's useful to the Court or anybody in deciding whether they negotiated in good faith at arm's length and over a significant period of time and in a rigorous manner and so forth. I think that that's my view of it, on the other hand, some of this data seemed, as I mentioned, seemed to be relevant.

Mr. Aldock, is there anything that you can provide to show the length and breadth of the negotiations and some hard data that counsel can work with? You have made a proffer and I understand it.

MR. ALDOCK: I'm sure, we've made a proffer and we've made a proffer under oath. I will attempt to do something, your Honor, but —

THE COURT: I don't know how detailed it is. I don't know how detailed, I haven't read the —

MR. ALDOCK: Well, we'll attempt to respond to that

* * * *

[Tr. 129] that's fine.

THE COURT: No. 6?

MR. BARON: No. 6, did any such agreements exist.

THE COURT: There is one on the record in this case beyond the settlement agreement in this case?

MR. BARON: Right.

MR. ALDOCK: And the CCR? No. Settlement agreement is the only agreement.

MR. BARON: Okay. Then No. 4, I think —

THE COURT: 4, we've covered.

MR. BARON: Those we've covered and I think we're going to get.

THE COURT: Right.

MR. BARON: The California objectors want the -- some specific date as to the — having a hard time this late in the day. Some specific information on the CCR filings and settlements and verdicts in the State of California. And—

THE COURT: I don't know that — I don't know what's relevant to these proceedings of that request.

MR. BARON: Once again, your Honor if the California people can show that people residing in California will normally in the average case receive substantially more in the tort system than they would under the Carlough settlement, it's very, very relevant as to fairness.

California has a very different system of laws in [Tr. 130] terms of contribution, in terms of all aspects of the case.

THE COURT: What about Alabama, Georgia, Florida?

MR. BARON: Your Honor, I believe those issues are relevant.

THE COURT: Well, my ruling is that all of No. 5 is irrelevant.

MR. BARON: Okay.

THE COURT: There's a lawyer that represents a lot of people out there, objectors, who may be here and I say respectfully that picking out the State of California has no relevance to this case in particular.

MR. BARON: Well, it does to California residents, your Honor.

THE COURT: Well, so does the — the cases everywhere.

MR. BARON: Well, there are, and, your Honor, that's the point of it, as we'll show the Court. If you reside in Massachusetts and you operate under the tort system, this settlement may be the greatest thing since sliced bread because in Massachusetts people don't receive any money and it takes them ten years to get anywhere. But in states like Texas and some of the other states where the docket delays are 12 months and people get large recoveries, this is an absolutely awful deal and that's why we want this information.

* * * *

AFFIDAVITS IN SUPPORT OF MOTION TO CERTIFY CALIFORNIA MESOTHELIOMA OPT-OUT CLASS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT AND OATH OF BRAD SELIGMAN

I, Brad Seligman, declare:

1. I am special counsel for the moving parties. I have personal knowledge of the facts contained in this affidavit, and, if called as a witness, am competent to testify to those facts.

2. Since 1981, I have been associated with the Oakland law firm now known as Saperstein, Mayeda & Goldstein (formerly Saperstein, Seligman and Mayeda). From 1985 until September 1991 I was a partner in the firm (I was managing partner from 1988-91). Since September 1991, I have been of-counsel to the firm. Since joining that firm, my practice has been devoted to class action and individual civil rights litigation, with particular emphasis in the area of employment law. I have been lead or co-counsel in approximately 30 class actions including cases involving discrimination, privacy rights, disability rights, consumer and housing rights. The majority of these cases have been employment discrimination matters. The firm I have been associated with over the last 13 years has litigated more civil rights class cases than any other private firm in California.

3. I have been lead or co-counsel in the two largest class action sex discrimination settlements to date in the United States. I was co-counsel in the *Kraszewski v. State Farm* case, which settled for over $200 million, and I am lead counsel in *Stender v. Lucky Stores*. The parties to that case just announced a $107.25 million settlement, which awaits review by the United States District Court

for the Northern District of California. I have also been lead counsel in the largest class action polygraph testing *(Mest v. The Federated Group)* and psychological testing *(Soroka v. Dayton Hudson Co.)* cases to date. Both of these cases resulted in multi-million dollar state wide settlements.

4. I have lectured and written on class action, civil rights, and attorney fees matters. I have been an invited speaker on class action and civil rights issues by a wide variety of groups including the American Bar Association, the California State Bar and the San Francisco Labor and Employment Sections, the National Employment Lawyers Association, the Massachusetts Bar Association, the National Employment Lawyers Association and the California Employment Law Council. I have taught the class action portion of Stanford Law School's Complex Litigation class (Spring 1993) and have lectured on class action issues at Boalt Hall School of Law, Golden Gate University Law School and the University of San Francisco Law School.

5. I have been on the executive committee of the California State Bar Labor and Employment Section, and the Board of Directors of Equal Rights Advocates and California Rural Legal Assistance, Inc. I am currently on the Board of the Disability Rights Education and Defense Fund (DREDF) Development Partnership, and I am a litigation advisor to DREDF. I am the founder and executive director of The Impact Fund, a public foundation that supports class action public interest litigation through grants and technical support.

I swear under penalty of perjury that the foregoing is true and correct. This affidavit has been executed in Oakland, California.

DATED: Oakland, California
December 15, 1993

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT AND OATH OF DR. ALLAN H. SMITH

I, Dr. Allan Herries Smith, declare:

1. I have personal knowledge of the facts contained in this affidavit, and if called as a witness, am competent to testify to those facts.

2. I am a Professor of Occupational Health Epidemiology at the School of Public Health, University of California at Berkeley and have served in that capacity for the past ten years.

3. I received my Bachelor of Science at the Victoria University of Wellington, New Zealand with a major in mathematics. I then completed my degree in medicine at the University of Otago, New Zealand. That degree, the M.B., Ch.B., is the equivalent to a degree in medicine in the United States. Subsequently, I decided to specialize in epidemiology and I attended the University of Otago, New Zealand where I obtained a Ph.D in epidemiology in 1975.

4. I accepted a post-doctoral fellowship in Epidemiology at the University of North Carolina's School of Public Health in 1975 and was subsequently appointed to their faculty in 1976 where I served until 1978. I then returned to New Zealand to join the faculty in the Department of Community Health, Wellington Clinical School of Medicine, Wellington from 1978 until 1983. During the early 1980s I also held a number visiting academic appointments at the University of North Carolina, Chapel Hill, Victoria University of Wellington, and the International Agency for Research in Cancer in Kitukyushu, Japan. In 1983, I became a Professor of Occupational Health Epidemiology, School of Public Health at the

University of California at Berkeley and I have remained in that position through the present.

5. I belong to numerous professional associations including but not limited to the New Zealand Medical Association, the American Public Health Association, The Society for Occupational and Environmental Health, and the International Epidemiological Association.

6. I have over 100 publications in the epidemiological literature, including four publications on asbestos diseases.

7. I have reviewed a large part of the world's scientific literature on asbestos and disease and keep current on this literature.

8. I have conducted research into asbestos related cancers and have published articles on this research. I have also conducted research on reducing the risk of certain cancers in asbestos exposed workers, for example lung cancers for smokers through the introduction of carotene into the diet.

9. As a professor at Berkeley, I teach graduate students and conduct epidemiological research. Epidemiologists investigate the causes of disease in human populations and how to prevent them. One of the tools of epidemiology is risk analysis or risk assessment, which predicts the risk of getting diseases based on exposures to certain toxic materials. This involves the use of statistical analysis of populations.

10. I have recently attempted to formulate a prediction of the number of cases of mesothelioma which will occur in California's Bay Area over the next ten (10) years. In doing so, I have considered data generated by the SEER (Surveillance, Epidemiology, and End Results) Program of the National Cancer Institute, including the data published by Connelly, et al in "Demographic Patterns for Mesothelioma in the United States", Journal of the National Cancer Institute, vol. 78, No. 6, June 1987. I have also considered more recent data for the Bay Area obtained through the SEER program, which data has not yet been published. In formulating my projection of future mesothelioma cases in the Bay area, I have considered the trend of such cases over a twenty (20) year period.

11. In my opinion, mesothelioma cases will continue to occur in the Bay Area at a rate of approximately fifty (50) cases per year over the next ten years. I feel that this estimate is a conservative one, and that the actual number of cases which occur may well exceed this estimate.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 17th day of December, 1993 in Oakland, California.

/s/ DR. ALLAN HERRIES SMITH

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT AND OATH OF DR. REVELS CAYTON

I, Dr. Revels Cayton, declare:

1. I have personal knowledge of the facts contained in this affidavit, and, if called as a witness, am competent to testify to those facts.

2. I am a physician licensed to practice in the State of California since 1976. I practice medicine in Oakland, California and have hospital appointments at Summit Medical Center in Oakland, California. I am a member of the Board of Directors of the Hill Physicians Association, a consortium of physicians in the Oakland area who are part of area HMOs and PPOs.

3. I received my undergraduate training at the University of California at Berkeley. I attended medical school and obtained my medical degree in 1975 from Case Western Reserve school of Medicine in Cleveland, Ohio. I completed my internship in internal medicine at San Francisco General Hospital in Internal Medicine in 1976, and my junior and senior residency in Internal Medicine at the University of California Medical Center between 1976 and 1978. I then completed a two year fellowship in chest medicine at Highland General Hospital in Oakland, California. I have been in private practice since 1980.

4. I am board certified in both Internal Medicine and Pulmonary Disease. I received my board certification in Internal Medicine on January 2, 1979, and my board certification in pulmonary medicine on June 17, 1980.

5. Because of the proximity of the Bay Area of California to shipyards and other asbestos using industries I have seen examined and treated hundreds of patients with asbestos related diseases,

including mesothelioma, lung and other organ cancers, asbestosis, and pleural disease.

6. I have also served as an examining physician for the Department of Labor, and in that capacity I have examined many individuals with asbestos related diseases.

7. A considerable amount of my practice, in both a private capacity and as a medical examiner for the Department of Labor, has involved the diagnosis, evaluation and treatment of a large number of patients with mesothelioma. As a result of this aspect of my practice, and as a result of my formal training and education, I have gained knowledge and understanding of the nature of this disease, its cause, the manner in which it manifests itself, and its prognosis. I feel that I can competently testify as an expert in this area.

8. In the Bay Area, because of its shipyard and other industrial population, a disproportionate number of workers and their family members have contracted mesothelioma.

9. Mesothelioma is defined as a cancer which arises either in the pleura, the lining of the lung, or the peritoneum, the lining of the abdominal wall. It is a disease which is fatal, generally resulting in death within 12 to 18 months of diagnosis. Death is invariably accompanied by great pain and disability. There is no effective medical treatment or known cure.

10. The only established cause of mesothelioma is asbestos exposure. Where a diagnosis of mesothelioma has been made, and there is evidence that the patient has been exposed, asbestos will be found to be a cause of the illness. However, mesothelioma can result from very slight or incidental exposures to asbestos. For example, many cases of mesothelioma have been reported as occurring among individuals whose only known asbestos exposure arose from living in the same neighborhood as an asbestos mine or asbestos product manufacturing facility, or even in the same neighborhood as an asbestos consuming facility, such as a shipyard. Cases of mesothelioma are also relatively common among individuals whose only asbestos exposure results from household exposure to family members who are occupationally exposed and bring home asbestos on their clothing.

11. As is the case with all asbestos-related diseases, there is a latency period associated with the development of mesothelioma; that is, there is a significant period of time which commonly occurs between the patient's initial exposure to asbestos and the onset of mesothelioma. This period of time commonly ranges between 15 and 40 years, rarely shorter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 15th day of December, 1993 in Oakland, California.

/s/ DR. REVELS CAYTON

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT AND OATH OF AILEEN CARGILE

I, Aileen Cargile, declare:

1. I have personal knowledge of the facts contained in this affidavit, and, if called as a witness, am competent to testify to these facts.

2. I live in Manteca, California.

3. I married Roy Cargile in 1942. From that time until 1993, my husband and I lived in the same home. From approximately 1961 to 1962, he worked as a machinery mechanic in an asbestos manufacturing plant in Stockton, California. My husband was occupationally exposed to asbestos during the course of his employment at the asbestos manufacturing facility. I handled and washed his work clothes, which were often dusty from his work at the plant.

4. My husband died of mesothelioma on August 6, 1993.

5. I have not yet filed a lawsuit against any asbestos defendants for the wrongful death of my husband.

6. I do not currently have any symptoms of an asbestos-related disease, nor have I been diagnosed with any such disease.

7. Because I do not know if I will develop an asbestos-related disease in the future as a result of my own exposure to asbestos, I have not filed a lawsuit against any asbestos defendant for my own injuries.

8. I would like to opt out of the CCR Settlement personally for any wrongful death action I may have for the death of my husband, and for any asbestos related disease I may contract in the future. I also seek to opt out of the CCR Settlement on behalf of all other

similarly situated putative class members I seek to represent through this motion.

I declare under penalty of perjury that the foregoing is true and correct. This affidavit has been executed in Manteca, California on this 3rd day of January, 1994.

/s/ AILEEN CARGILE

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT AND OATH OF STEVEN KAZAN

I, Steven Kazan, declare:

1. I am attorney in good standing, admitted to practice law in the States of New York and California. I represent the moving parties in this Motion to Certify California Mesothelioma Opt-Out Class. I have personal knowledge of the facts set forth in this affidavit and, if called as a witness, am competent to testify to those facts.

2. I am the Senior Partner at Kazan, McClain, Edises & Simon in Oakland, California. For nearly twenty years, the firm has represented plaintiffs in cases involving catastrophic injury, including asbestos disease litigation, environmental and occupational exposures, defective products, and other personal injuries. For almost twenty years, our firm has specialized in representing plaintiffs who have contracted various asbestos diseases. We have focused more and more on mesothelioma cases over approximately the last ten years. The firm decided to develop this specialization because we believe it is important to try to provide the best representation possible to those individuals who suffer the most devastating effects of asbestos exposure.

3. I have personally tried dozens of civil jury cases to verdict during my career, and have argued dozens of appellate cases as well. My curriculum vitae, a copy of which is attached as Exhibit A, includes a partial list of these trials.

4. I have participated in a number of professional organizations, a list of which is included in my curriculum vitae. For example, I am a member of the Board of Governors, and past Vice-President (North) of the California Trial Lawyers Association. I am a past president and member of the Board of Governors of the Alameda/Contra Costa Trial Lawyers Association. Since 1976, I

have been a member of the Asbestos Litigation Group, a nationwide association of plaintiffs' attorneys who specialize in cases involving asbestos disease. I have lectured extensively on the subjects of toxic torts and mass tort litigation.

5. I have been involved with several major asbestos manufacturer bankruptcy cases over the past ten years. I was counsel to the one lay member of the Manville Asbestos Health Claimants Committee. I serve as a member of the Committee of Unsecured Creditors of H.K. Porter Company, Inc., *In re: H. K. Porter Co. Inc.*, Case No. 91-468 WWB, United States Bankruptcy Court for the Western District of Pennsylvania. I serve as an Advisor to the Amatex Victims Creditors' Trust and was a member of the Asbestos Health Claimant's Committee in *In re Amatex Corp.*, Bankruptcy #82-05220S, United States Bankruptcy Court for the Eastern District of Pennsylvania. I am counsel to one of the six members of the Official Asbestos Health Claimant's Committee, *In re: The Celotex Corp., et al.*, Consolidated Case Nos. 90-10016-8B1 and 90-10017-8B1, United States Bankruptcy Court for the Middle District of Florida. I am a member of the MDL 875 Plaintiffs' Steering Committee in this Court. Our firm is one of three class counsel firms for plaintiffs in *Ahearn, et al. v. Fibreboard Corp.*, Civil Action No. 6: 93 CV 526 in the United States District Court for the Eastern District of Texas, Tyler Division.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 3rd day of January, 1994 at Oakland, California.

/s/ STEVEN KAZAN

[Jurat Omitted]

STEVEN KAZAN

171 Twelfth Street, Third Floor
Oakland, California 94607
Ph. (510) 830-2975
Fax. (510) 835-4913

EDUCATION:

1963	Brandeis University, A.B.
1966	Harvard Law School, LL.B.

BAR ADMISSIONS:

1967	Admitted to practice, New York State
1969	U.S. Court of Appeals, Ninth Circuit
1970	California and U.S. District Court, Northern District of California
1971	United States Supreme Court
1979	U.S. District Court, Eastern District of California

PROFESSIONAL EXPERIENCE:

1967-1969	Interstate Commerce Commission, Washington, D.C.
1969-1971	United States Department of Justice, Northern District of California Assistant United States Attorney
1971-1974	Werchick & Werchick, San Francisco, California - Trial Lawyer
1974-present	Kazan, McClain, Edises & Simon, A Professional Law Corporation Oakland, California Founder, Senior Partner and President of the Board of Directors of an eleven attorney firm representing plaintiffs in cases involving catastrophic injury, including asbestos disease litigation, environmental and occupational

exposures, defective products, construction accidents, malpractice and personal injury.

- Approximately 50 civil jury trials to verdict.
- Member, Committee of Unsecured Creditors of H.K. Porter Company, Inc., *In re: H.K. Porter Co., Inc.*, Case No. 91-468 WWB, United States Bankruptcy Court for the Western District of Pennsylvania (1991-present).
- Member, Asbestos Health Claimant's Committee *In re: Amatex Corporation, formerly known as American Asbestos Textile Corp.*, Chapter 11, Bankruptcy #82-05220S, United States Bankruptcy Court, Eastern District Court of Pennsylvania (1982-1989).
- Advisor to Amatex Victims Creditors' Trust, *In re: Amatex Corporation, formerly known as American Asbestos Textile Corp.*, Chapter 11, Bankruptcy #82-05220S, United States Bankruptcy Court, Eastern District of Pennsylvania (1989-present)
- Member, Official Asbestos Health Claimant's Committee, *In re: The Celotex Corporation, et al., Debtors*, Chapter 11, Consolidated Cases Nos. 90-10016-8B1 and 900-10017-9B1, United States Bankruptcy Court, Middle District of Florida, Tampa Division (1991-present)
- Member, Plaintiffs' Steering Committee, Asbestos Multi District Litigation, *In re: Asbestos Products Liability Litigation*, MDL 875, United States District Court, Eastern District of Pennsylvania (1991-present)
- Alameda County Superior Court Plaintiffs' Asbestos Liaison Counsel (1979-present)
- Member, Alameda County Superior Court Civil Calendar Management Task Force (1988-present)

- Member, Alameda County Superior Court Trial Delay Reduction Act Committee (1989-present)

PUBLIC SERVICE

1977-1989	Human Utilization for Experimentation Committee, Peralta Hospital, Oakland, California.
1980-present	Court Appointed Arbitrator, Alameda County Superior Court (Personal Injury Litigation)
October 1985	"People Are Talking," KPIX Television, Asbestos Disease Issues.
1985-1992	Organizer/Chairperson, National Plaintiffs' Asbestos Litigation Annual Seminar, Monterey, California.
August 1986	Editor, "*LIFE AFTER 51: The Trial Lawyers Guide to Joint & Several Liability in California*, published by California Trial Lawyers Association.
April 1987	"Newstalk with Quentin Kopp," KGO Radio.
1987-present	Panelist, Early Disposition Program, Alameda County Superior Court.
1987-present	California Trial Lawyers Association's WORKSAFE! representative.
1989	Conference Moderator, "Health & Safety for California Workers: Setting the Agenda for the 1990's," sponsored by WORKSAFE!
1989-present	Arbitrator, Contra Costa County Superior Court: Special Mediator Program.
1989-present	Panelist, Bench Bar Settlement Program, Contra Costa Superior Court.
March 1990	"60 Minutes" Australia. "Dust to Dust." Discussed asbestos disease, U.S. Navy personnel & justice for Australian sailors.
February 1990	"MacNeil/Lehrer Report," PBS Television. Discussed Johns-Manville bankruptcy and the rights of dying victims.

1990-present	Settlement Commissioner, Special Settlement Mediator Program, Alameda County Superior Court
1976-present	Lecturer, Moderator and Panel Member in various programs for California Trial Lawyers Association & Asbestos Litigation Group including:

- 1976 CTLA Annual Convention Speaker, "Federal Tort Claims"
- 1982 CTLA Annual Tahoe Seminar Speaker, "Asbestosis"
- 1985 CTLA Annual Convention Moderator, "Environmental & Toxic Torts"
- 1986 CTLA Annual Convention Speaker, Prop. 51 Aftermath, "Retroactive Applicability"
- 1986 CTLA Annual Tahoe Seminar Workshop Leader, "Mass Tort Litigation"
- 1987 CTLA Annual Convention Moderator, "Personal Injury/Workers' Compensation Interface"
- 1988 CTLA Annual Convention Speaker, Toxic and Mass Tort Litigation, "Toxic Exposure: Elements of a Successful Case"
- 1988 CTLA Annual Tahoe Seminar Speaker, Prop. 51 Aftermath, "Interpretation and Application"
- 1989 Advocacy College Lecturer, "Cross Examination"
- 1989 CTLA Annual Convention Moderator, "Toxic Torts" The Changing Environment"
- 1990 CTLA Annual Convention Moderator, "How to Successfully Practice Personal Injury in 1990s"

- 1991 CTLA Annual Convention Speaker, "Ergonomics in the Work Place - Repetitive Strain Injuries"
- 1992-1993 Asbestos Litigation Group Moderator - Discussions regarding *Carlough*, Center for Claims Resolution Class Action Settlement

PROFESSIONAL ORGANIZATIONS:

Alameda County Bar Association (1974-present)

State Bar of California (1971-present)

State Bar of New York (1967-present)

New York State Trial Lawyers Association (1975-present)

Federal Bar Association (1969-present)

Association of Trial Lawyers of America (1977-present)

California Trial Lawyers Association (1971-present)
- Board of Governors (1980-present)
- Parliamentarian (1989)
- Vice President, North (1990)

Asbestos Litigation Group (1976-present)

Alameda/Contra Costa Trial Lawyers Association (1974-present)
- Member Board of Governors (1975-1983)
- President (1980)

PUBLISHED OPINIONS RESULTING FROM SOME OF THE FIRM'S CASES:

Cretan v. Director, OWCP, 93 C.D.O.S. 5687 (9th Cir. 1993)

Force v. Director, OWCP, 938 F.2d 981 (9th Cir. 1991)

General Ship Service v. Director, OWCP, 938 F.2d 960 (9th Cir. 1991)

Jackson v. Kaiser Aluminum & Chemical Corporation, 24 BRBS 469 (ALJ) (1991)

Cretan v. Bethlehem Steel Corporation and Director, OWCP 24 BRBS 35 (1990)

Elfreda Martin v. Kaiser Co., Inc. and SAIF Corp., 24 BRBS 112 (1990)

Jackson v. Deft, Inc., 223 Cal.App.3d 1305 (1990)

Lucero v. Kaiser Aluminum and Chemical Corp. and Associated Indemnity/Fireman's Fund, 23 BRBS 261 (1990)

Ponder v. Peter Kiewit Sons' Co. and Aetna Casualty & Surety Co., 24 BRBS 46 (1990

Steele v. Chevron, Inc., 219 Cal.App.3d 1265 (1990)

Force v. Kaiser Aluminum and Chemical Corp. and Fireman's Fund Insurance Co., 23 BRBS 1 (1989)

Jones v. U.S. Steel Corp., 22 BRBS 229 (1989)

Lustig v. Todd Shipyards Corp., 20 BRBS 207 (1988), aff'd 881 F.2d 593 (9th Cir. 1989)

Madden v. Western Asbestos Co. and State Compensation Insurance Fund, 23 BRBS 55 (1989)

Arganbright v. Marin Ship Corp. and State Compensation Insurance Fund, 18 BRBS 281 (1986)

General Foundry Service v. WCAB (Jackson), 42 Cal.3d 331 (1986)

Berkebile v. Johns-Manville Corp., 144 Cal.App.3d 940 (1983)

William Henderson Smith v. Johns-Manville Corp., 45 CCC 557 (1981)

Baptist v. Johns-Manville Corp., 137 Cal.App.3d 903 (1980)

Johns-Manville Products Corp. v. Superior Court of Contra Costa County (Rudkin), 27 Cal.3d 465 (1980)

REPRESENTATIVE TRIALS:

Speake v. Johns-Manville Corp. - $150,000 verdict for mild asbestosis, February 1982; First Johns-Manville factory worker verdict in U.S. The lead case for 200 other cases, followed within months by the Johns-Manville bankruptcy petition.

Bell v. Fibreboard Corp. - $2,700,000 verdict, August 1983; First punitive damage verdict in the Unites States against Fibreboard Corp.

Cardia v. Plant Insulation Co., et al. - $5,093,351 verdict on April 12, 1991, on behalf of a 56 year old self-employed plumbing contractor suffering from mesothelioma.

Garvis v. General Dynamics, et al. - $2,437,500 verdict rendered December 11, 1991 on behalf of a 48 year old man suffering from mesothelioma following exposure during childhood to his father's clothes which had asbestos fibers remaining from his work at a Sacramento railroad; Mr. Garvis was also exposed to asbestos while serving aboard the U.S.S. Skipjack, a nuclear attack submarine.

Morton v. Owens-Corning Fiberglas, et al. - $3,484,170 verdict rendered on December 23, 1992 on behalf of a 52 year old man with mesothelioma who had one year's exposure to asbestos products as a wire puller during construction of the U.S.S. Kitty-Hawk at New York Shipbuilding, Camden, New Jersey.

Bertillo v. Pittsburgh Corning Corp., et al. - $3,877,022 verdict (including $1,900,000 loss of consortium) on March 3, 1993 on behalf of 69 year old man who developed mesothelioma following exposure at Moore Dry Dock and Alameda Naval Air Station.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT AND OATH OF BETTY FRANCOM

I, Betty Francom, declare:

1. I have personal knowledge of the facts contained in this affidavit, and, if called as a witness, am competent to testify to those facts.

2. I live in Napa, California.

3. I married Allen Francom in 1950. From 1950 until his death in 1991, we lived in the same home. From approximately 1958 to 1979, my husband worked at Mare Island Naval Shipyard in Vallejo, California as a laborer, pipefitter helper, boilermaker helper, ship file clerk, and inspector. From approximately 1955 to 1961, he worked at Kaiser Steel's Napa facility as a boilermaker and pipe welder. My husband was occupationally exposed to asbestos during the course of his employment at both Mare Island and Kaiser Steel. During the years he worked at Mare Island and Kaiser Steel, I often did the laundry for our household, which included washing my husband's work clothes.

4. My husband died of mesothelioma on April 17, 1991.

5. I do not currently have any symptoms of an asbestos-related disease, nor have I been diagnosed with any such disease.

6. Because I do not know if I will develop an asbestos-related disease in the future as a result of my own exposure to asbestos, I have not filed a lawsuit against any asbestos defendant for my own injuries.

7. I would like to opt out of the CCR Settlement personally, as well as on behalf of all similarly situated putative class members I seek to represent through this motion.

I declare under penalty of perjury that the foregoing is true and correct. This affidavit has been executed in Napa, California on this 29th day of December, 1993.

/s/ BETTY FRANCOM

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT AND OATH OF JOHN WONG

I, JOHN WONG, DECLARE:

1. I have personal knowledge of the facts contained in this affidavit, and, if called as a witness, am competent to testify to these facts.

2. I live in Oakland, California.

3. I have worked in the construction trades for the past fifty years. From the late 1940s until the late 1980s, I worked as a construction engineer for The Calmar Company. I believe I was occupationally exposed to asbestos in these various jobs.

4. I do not have any symptoms of an asbestos-related disease, nor have I been diagnosed with any such disease.

5. Because I do not know if I will develop an asbestos-related disease in the future as a result of my exposure to asbestos, I have not filed a personal injury lawsuit against any asbestos defendant.

6. I would like to opt out of the CCR Settlement personally, as well as on behalf of all similarly situated putative class members I seek to represent through this motion.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 29th day of December, 1993 at Oakland, California.

/s/ JOHN B. WONG

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT AND OATH OF AARON SIMON

I, Aaron Simon, declare:

1. I have personal knowledge of the facts contained in this affidavit, and, if called as a witness, am competent to testify to these facts.

2. Since 1990, I have been a partner in Kazan, McClain, Edises and Simon, an Oakland, California law firm which specializes in representing plaintiffs in catastrophic injury cases, including asbestos disease litigation. Prior to 1990, I was a partner in the Los Angeles firm of Greene, Broillet, Paul, Simon & Wheeler, where I represented numerous asbestos claimants in civil actions over a twelve year period.

3. Although the language of California Code of Civil Procedure § 36(d) is discretionary, it is my experience that courts grant Section 36(d) motions as a matter of right. In both Los Angeles County and Alameda County courts, my respective offices have filed more than 50 Section 36(d) motions. Although routinely opposed by defense counsel, all of these motions have been granted. I do not know of a single instance in which a California practitioner has filed an unsuccessful motion for a trial date priority under California Code of Civil Procedure § 36(d).

4. I supervised the review and compilation of all verdicts reported in the verdict summary section of *Mealey's Litigation Reports/Asbestos* from Volume 6, No. 23 (January 1, 1992) through Volume 8, No. 18 (October 15, 1993), inclusive. Based on this information, and excluding all zero dollar recoveries, the average verdict for California mesothelioma plaintiffs was $2,790,986. The average verdict for mesothelioma plaintiffs in all other states combined was $1,825,303. Thus, the average

California mesothelioma verdict was 53% higher than that of the other states.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of January, 1994 at Oakland, California.

/s/ AARON SIMON

[Jurat Omitted]

DEPOSITION OF ANNA BAUMGARTNER

* * * *

[Tr. 30] A. I believe I did, yes.

Q. When?

A. Maybe four, five, six, seven months ago. I'm not absolutely sure.

Q. Were you ever told that the case that you filed in Philadelphia had been settled?

A. The case in Philadelphia had been settled?

Q. Yes.

A. Do you mean the class action?

Q. Yes.

A. No.

Q. As far as you know today, the class action has not been settled?

A. No.

Q. Is that right?

A. As far as I know.

Q. Do you ever watch TV?

A. Uh-huh.

Q. A lot?

A. No, not too much.

Q. Have you ever seen anything on television about your case in Philadelphia?

[Tr. 31] A. No, but my brother seen something a few weeks ago, I believe, and he was talking to me about it. There was a 911 number if you had asbestos cases.

Q. Did you call the number?

A. No.

Q. Did your brother?

A. Not that I know of.

Q. But you didn't see anything?

A. No.

Q. Did you read anything about the case in the newspaper?

A. Yes. I seen a small article.

Q. What did it say?

A. To my recollection, is if you were involved in asbestos or thought you had some type of suit, that call this — you know, you could call this number and get additional information.

Q. Did you call the number?

A. No.

Q. Why not?

A. I didn't feel like I had any need to.

Q. Have your lawyers told you when [Tr. 32] they think that the suit in Philadelphia might be settled?

A. No.

Q. Have the lawyers told you how much they think that you might receive from the suit in Philadelphia?

A. Yes.

Q. How much might you receive?

A. If I recall, when Mr. Nolan talked to me and my husband last year, it was a range of like 20,000 to possibly 300,000 if there was an extraordinary claim.

Q. Do you think you have an extraordinary claim?

A. Possible.

Q. Did your husband ever discuss with you prior to his death the case that was pending in Philadelphia?

A. You are talking about the class action?

Q. Yes.

A. Yes.

Q. What did he tell you about it?

A. He felt like it was a good idea because he believed that at least the sicker [Tr. 33] people, and all people, could at least receive

their money sooner and not be caught up in the systems that last five, six, seven, eight years, and that the money could reach the people, and because the lawyers — he didn't like the idea of that, and litigation, and he thought that was a waste of money, and he liked the system about the class action.

Q. Did he think that it was important to be sure that the money went to the sickest people and not to the people that weren't very sick?

A. He believed that anyone that was suffering from it — from an illness, that was really ill from it.

Q. When you say really ill —

MR. LOCKS: Did you finish your answer?

THE WITNESS: I thought I did.

BY MR. BARON:

Q. I thought you did too. What did you mean by really ill?

A. I don't know what he meant by that.

Q. Let me ask you how you feel [Tr. 34] about it. Who should receive the money? Which types of people should receive money?

A. People that are out of work that no longer can work. That probably would be a good issue, I would think.

Q. So would it be fair to say that you believe the right way to handle this case is to give money to those people who are out of work and can't work, but not to the people who are still working?

MS. WHITE: Objection. You mischaracterized her answer.

BY MR. BARON:

Q. Is that right? Or have I missed something?

MS. WHITE: You asked her a priority question.

MR. BARON: Let her answer the question, for God's sake.

MR. McCONNELL: Wait a minute, Fred. You are not going to whistle at counsel. That doesn't appear on the record. Let her state her objection, and let's move on.

MR. BARON: That would be nice.

* * * *

[Tr. 50] A. I don't think so.

Q. Do you think that people who have pleural thickening should receive money from the asbestos companies?

A. If they are suffering from the illness or they are not suffering from the illness?

Q. What do you mean by "suffer"?

A. You are having pleural thickening — they have pleural thickening; do you think they should be compensated if they have an illness from it, or they just have pleural thickening?

Q. If they just have pleural thickening but they are not disabled in any way or impaired.

A. No.

Q. Why not?

A. Because I don't think they should. I think they are not suffering from that yet.

Q. Have you talked to anyone that has non-suffering pleural disease?

A. No.

Q. So you've never inquired how

* * * *

[Tr. 52] file the suit or not, in your mind.

A. File a lawsuit or file under CCR or —

Q. File a lawsuit.

Should they be entitled to make that decision themselves?

A. To file for compensation? Is that what you are saying to me?

Q. Yes. As a lawsuit.

Do you understand my question?

A. No.

Q. Let me try it again.

A. Okay.

Q. Let's say we've got an individual who doesn't see the ad in the newspaper and doesn't see anything on television about this case.

Okay?

A. Uh-huh.

Q. And let's say five years from now that person develops pleural thickening that does not cause any disability.

A. Uh-huh.

Q. Based on your own thoughts, do you think that person should have the right to [Tr. 53] make his or her own decision as to whether to make a claim against CCR under the class, or to file a lawsuit?

A. If they have pleural thickening and have no disability and they are asking for compensation, no.

Q. You do not believe they should file a lawsuit?

A. I don't believe they should be compensated by anyone.

MR. BARON: That's all I wanted to know. Thank you. That's all I've got.

MR. PYLE: I don't have any questions.

* * * *

[Tr. 68] Would you like to take a break?

THE WITNESS: No. Okay. I get upset when I see something like that.

No. To my knowledge, nothing was talked about a class action at that meeting.

BY MR. BARON:

Q. When do you recall the first time that something was talked about a class action? Was it after his death?

A. No, it was about October.

Q. About a month after this?

A. Uh-huh.

Q. Who talked to you about it?

A. Mr. Nolan talked to us in the office with me and my husband.

Q. Did he tell you in October that the class action had already been settled?

A. No.

Q. When did you learn that the class action had been settled?

A. I never knew it was settled.

Q. Up until the last couple of days?

A. I never knew it was settled.

[Tr. 69] Q. Have you read the Stipulation of Settlement in this case? A big thick document?

A. Which paper are you talking about?

MR. BARON: Why couldn't you just show it to her?

THE WITNESS: (Looking at document.) Yes.

BY MR. BARON:

Q. You've read through that document?

A. Yes.

Q. Did you understand it?

A. I may not have understood every word of it, but my husband read it and I read it and pretty well understood what it meant.

Q. When you went through it with your husband, were you and your husband satisfied that it was a good settlement?

A. Yes.

Q. Would it be fair to say that even if the class action doesn't go forward, you want to go forward with the settlement for yourself?

A. Get this settled?

[Tr. 70] Q. Let me try it again.

Under this document, do you understand that you may receive some money for your case?

A. Yes.

Q. And is the money that you expect to receive under this document satisfactory with you?

A. You are talking about the figures here?

Q. Yes.

A. Yes.

Q. If the Court does not approve this settlement, but CCR offers you the settlement anyway, would you be willing to accept it?

A. If the Court doesn't approve this, how is CCR going to offer me anything?

I don't understand what you are saying to me.

Q. Are you aware that CCR has made an offer to settle all of the Greitzer & Locks cases, both past and future, on the terms of that settlement?

MR. LOCKS: Objection.

* * * *

[Tr. 85] MR. WEINGARTEN: You asked all —

THE WITNESS: He asked me a lot of different questions.

MR. WEINGARTEN: One of the things you had done earlier, you asked it in the context of comparing it with mesothelioma.

Now I think you've taken out that comparative nature of the question, so it's a very different question that you are asking now, as I understand it.

MR. BARON: Let's stop.

(Off the record.)

MR. BARON: I would like to see if we can finish this very quickly. I'm sure that you would too.

BY MR. BARON:

Q. I went back through the transcript, and the last series of questions that I asked you were about the individual who has non-disabling pleural disease who has not lost any work, who is able to function on a [Tr. 86] daily basis.

I asked you a series of questions and your last answer is "I don't believe they should be compensated by anyone."

That's a precise recital of your answer.

Do you remember that?

A. Yes.

Q. Is the reason that you think that those people should not be compensated by anyone is that there is not enough money to go around?

A. No.

Q. What is the reason you think that people with pleural thickening, that is not disabling, should not be compensated?

A. I don't feel as though they are suffering from the disease. That is the best way I can put it in a generalized statement.

Q. Have you ever met anyone who has pleural thickening and no other asbestos-related problems?

A. I answered that question before.

Q. What was the answer?

A. I answered that question before.

* * * *

[Tr. 93] share of a range between 20 to 300 thousand was fair, did you give any thought at all to what would be a fair figure for the rest of the defendants in this case?

A. Yes.

Q. And what would that figure be, ma'am? What is that figure?

A. I don't know the exact figures, but I was shown this paper, and I thought it was fair.

Q. When I say the other defendants, I mean the other defendants in your case, the non-CCR defendants who haven't paid you or haven't offered you any money yet.

Do you have any thought about what you would believe to be a fair and reasonable amount of money to settle your claims against the other defendants?

A. No, I don't.

Q. When you made the decision that the amount of money that CCR was offering you was fair and reasonable, did you have anything to compare that offer with?

A. No.

Q. How was it that you arrived at [Tr. 94] the decision that the CCR defendants' share was fair and reasonable in the amount that they are offering?

A. My husband felt, and I did too, that the money was fair to all the people, and that the cost of lawyers' fees and litigations, and people waiting five and ten and fifteen years to hear their cases was part of the issue, and perhaps the money would at least reach the sicker people and allow them to have some quality of life while they were still alive instead of waiting five and ten years.

Q. Now, ma'am, as I understand it, you have actually gotten a settlement in this case from a defendant that is not a CCR defendant; is that right?

A. Yes.

Q. And you indicated that was Babcock & Wilcox; is that right?

A. Yes.

Q. And that was in the traditional tort system; is that correct? That was not in a class action, was it?

A. No.

* * * *

DEPOSITION OF TIMOTHY MURPHY

* * * *

[Tr. 43] A. Just normal wear and tear as you get older.

Q. But you haven't seen anything special in terms of your lung problems; right?

A. Not that I know of, no.

Q. Do you have any reason to believe, as we sit here today, that you have been harmed by asbestos?

A. I'm sure that there has been some damage.

Q. How do you know that?

A. Well, just because I've been exposed for so long that I'm sure that just from information that I've read concerning the potential hazards.

Q. In your mind, anyone that has been exposed has got a potential hazard?

A. Right.

Q. Do you know how long it takes, in terms of exposure time, for you to start having problems?

A. I'm not sure exactly, no.

Q. Any idea of what the ballpark is?

A. Well, what do you mean by that?

* * * *

[Tr. 56] Do you watch television very often?

A. As much as everybody else.

Q. Have you ever seen anything on television about this lawsuit?

A. No.

Q. Do you read the newspapers every once in a while?

A. Every day.

Q. Have you ever seen anything in the newspapers about this lawsuit?

A. I didn't see it.

Q. You have friends that are in the union; have you ever heard tell from any of your friends in the union that they saw something on TV about this lawsuit?

A. I heard somebody on the job site talk about it.

Q. What did he say?

A. Said he saw something about it in the paper. That was about it.

Q. Did he say that people needed to call the District Clerk's Office to get a package?

A. No.

* * * *

[Tr. 108] Q. Would it be fair to say that your primary concern about asbestos-related disease is that you might get it in the future?

A. That's my concern.

Q. Are you concerned about the ability of the asbestos companies to pay you damages sometime in the future?

A. Yes.

Q. Do you have a pretty substantial concern about that?

A. I realize a lot of them are going bankrupt.

Q. So your interest is in being sure that those companies are still able to pay you ten or fifteen years from now if you develop disease; right?

A. Right.

Q. What do you think you can do to guarantee that those companies will be around ten or fifteen years from now to pay you?

MS. WHITE: Objection.

THE WITNESS: What do I think I can do?

[Tr. 109] BY MR. BARON:

Q. Yes.

A. I don't think I can do anything.

Q. Would it be fair to say that you understand that if a lot of people file claims now and receive money for those claims, the

ability of the companies to pay you ten or fifteen years from now will be less?

A. Do I understand that?

Q. Yes. Is that what you believe?

A. What I believe is that hopefully that this class action suit will set back money so in case people like myself develop mesothelioma, there will be money set aside for me.

Q. So your interest is in being sure that there will be money set aside?

A. And that it's done at a fairly swift manner.

Q. Okay. Would it also —

MR. LOCKS: Excuse me. Did you finish your answer? Every time he says okay —

THE WITNESS: A swift manner and fair.

* * * *

[Tr. 112] what's going to happen as a result of this settlement?

A. I have no idea.

Q. You've not looked into that issue?

A. I know that according to the facts that I have, that it's, with this settlement, with this class action suit, that it will free money — that there will be money and it will be quicker and a fair — on average, fair.

Q. Do you know where that money will be freed up from?

A. I have no idea.

Q. So you don't know whether it's coming out of the pockets of other asbestos victims, do you?

MS. WHITE: Objection.

THE WITNESS: I assume not.

BY MR. BARON:

Q. If it could be shown to you that a large percentage of people who are presently receiving benefits will not receive benefits so that claims in the future could be paid, would you think that's fair?

* * * *

[Tr. 117] Q. Mr. Murphy, my name is Brian Wolfman. I represent some of the other objectors in this case.

If you don't understand a question, just ask me to repeat it or to recharacterize it in some way. There has been a lot of talk about whether you saw the settlement, when you saw it.

I just want to ask you a basic question:

As far as you can tell, as far as you learned by reading it or talking to others, and use as much time as you need, describe to me the terms of this settlement.

A. The way I understand the settlement to be is that it will provide money — not money, but an opportunity for people like me who have been exposed occupationally [Tr. 118] over the years. If we get sick, we will be able to go through, bypass the majority of the court system, and get a fair settlement involving these companies, these twenty companies.

Q. Are you aware of the various amounts that you would get depending upon what disease —

A. Right.

Q. Are you aware of that?

A. Yes. And I understand that to be based on an average, averages of settlements over the last few years.

Q. Are you married?

A. Yes.

Q. Did you discuss this lawsuit with your wife?

A. Yeah.

Q. Do you know, to your knowledge, if your wife had any discussions with any of the attorneys that you had discussions with?

A. Not — no, I don't think she did.

Q. To your knowledge, is your wife aware that she's a representative plaintiff?

* * * *

[Tr. 137] that the amounts of money that CCR paid in lung cancer cases was a lot more than what you were agreeing to, there would

be other factors that you would have to take into account before you would determine whether it was fair or not fair?

A. Right. There would be other factors involved.

Q. The other asbestos workers that you have spoken to — I'm sorry. Since you've become a class representative, have you spoken to other asbestos workers?

A. Yes.

Q. And you've told them about your position in this thing; is that right?

A. Right.

Q. Have you advised any of those people that they have the right to opt out of this settlement?

A. I've explained to them how it works. We've got — our international journal came out with an article telling how to do it.

MR. ROSENBERG: Does anybody else have any questions?

Mr. Murphy, thank you very much.

DEPOSITION OF LAVERNE WINBUN

* * * *

[Tr. 10] Q. When did Mr. Winbun pass away?

A. In November of 1991.

Q. What did he die from?

A. Mesothelioma.

Q. How did you learn that he had died from mesothelioma?

A. Well, we requested a — what do you call it?

Q. An autopsy?

A. An autopsy.

Q. Had you known before he died that he had mesothelioma?

A. No, we didn't.

Q. So up until he died and the autopsy came forward, you had no idea what killed him?

A. Well, we knew he had cancer. We knew he had lung cancer, but we didn't know what type.

Q. How did you know that he had lung cancer.

A. Well, because the doctors told him.

* * * *

[Tr. 12] Q. Was that before he developed lung cancer?

A. No. He already knew he had the cancer.

Q. So after he was diagnosed with lung cancer, somebody told him that he had asbestosis?

A. Yeah. It was — yeah.

Q. Who was that?

Do you remember what doctor that was?

A. Dr. Boatrite, I think.

Q. Okay, Dr. Boatrite.

Did he tell you before he died —

A. No, no. We got it from — when Dr. Boatrite — every once in a while we would have to have a verification that he needed the oxygen, and the place where we got the oxygen they was supposed to send them a letter. Well, by mistake they sent the letter to us, and that's how come we found out that he had the asbestosis in his lungs, but I don't think that even then that my husband realized about it.

Q. So up to his death, as far as [Tr. 13] you are concerned, he never really understood that he had an asbestos-related disease; is that right?

A. I don't think so.

Q. Did you ever discuss with him the fact that he had worked around asbestos?

A. No, we never talked about it.

Q. So to your knowledge, as long as he was alive, you never knew that he worked with asbestos; right?

A. I never heard anything about — anything about asbestos.

Q. Now, when he died, did you seek legal advice?

A. Not right away.

Q. Did he seek legal advice during his lifetime for an asbestos-related injury?

A. No, but he did go and have some breathing tests where some lawyers — it was — they were — I think had been railroad lawyers.

Q. Railroad lawyers?

A. Yeah, at one time. And all the men were having these tests made on their hearing. They was having tests made on their hearing.

* * * *

[Tr. 39] Q. Have you seen this case on television?

A. No.

MR. WEINGARTEN: You mean the advertisements?

MR. BARON: Yes.

BY MR. BARON:

Q. You've not?

A. No.

Q. Do you watch television very often?

A. Not very often.

Q. Have you seen anything about this case in the newspapers?

A. No.

Q. When I say "anything about this case," let's be more specific.

Allegedly there was a notice that was published in certain newspapers about this class action.

Do you have any recollection of [Tr. 40] ever seeing that?

A. No.

Q. And allegedly there were television promotions describing this class action.

Do you recall ever having seen any of those?

A. No.

Q. Do you recall ever receiving information from anybody about how to opt out or get out of this case?

A. No.

Q. Do you ever read the newspaper?

A. Not very often. I don't take the newspaper.

Q. Was your husband a member of a union?

A. Yes, he was.

Q. Which union?

A. Well, I don't know what union it was. It was a railroad union.

Q. Did that union ever notify you about this class action?

A. No.

* * * *

DEPOSITION OF CARLOS RAVER

* * * *

[Tr. 15] Q. When did they start doing that?

A. That was just about the same time, sir, the early '70s.

Q. So since the early '70s, about once a year they have you take an x-ray and a breathing test?

A. Yes, sir.

Q. Do you understand why you have to do that?

A. They want to monitor you.

Q. For what?

A. See if any changes.

Q. Have you, yourself, had to pay for those x-rays and breathing tests, or does the company pay for them?

A. The company pays for them, sir.

Q. As of today, have you yourself spent any money out of pocket for x-rays or breathing tests or anything else to see if you have asbestos disease?

A. No, sir.

* * * *

[Tr. 20] Q. Was I incorrect in my statement there?

Did you understand about the hazards of asbestos before the doctor told you something?

A. No, sir.

Q. So when the doctor told you that there was something in your lungs, that was your first notice that asbestos could be a problem for you; is that right?

MS. WHITE: Objection. A problem, or a problem for him?

MR. BARON: For him. That's what I said.

THE WITNESS: That was the first I knew that I had a problem, sir.

BY MR. BARON:

Q. Before the doctor said anything to you, did you have any inkling or knowledge that asbestos could be a problem for you?

A. No, sir.

Q. You just never thought about it, did you?

A. Never thought about it that way.

Q. The doctor told you that you had [Tr. 21] asbestos in your lungs, and you went to see a lawyer.

Why did you go to see a lawyer?

A. Because down the road, I wanted to be compensated. If anything ever come up, I wanted to be compensated.

I didn't want my wife to have to go without the necessities and everything that I could provide for her the way I am.

Q. You wanted to be sure you were taken care of if something developed?

A. Right.

Q. Now, you signed a second contract with your lawyer; it looks like about the same day here.

- - -

(Deposition Exhibit R-2 referenced.)

- - -

BY MR. BARON:

Q. We will call this one R-2. For the record, this is a "Contract of Employment and Power of Attorney, Re Asbestos Evaluation."

This contract calls for a claim against Manville and other asbestos suppliers for any asbestos-related disease, and it was

* * * *

[Tr. 48] Q. What did your lawyer tell you?

MR. NOLAN: Objection.

THE WITNESS: About what, sir?

BY MR. BARON:

Q. About what to do next after you got this report.

A. Sir, I don't think — I don't think — I think you misunderstood — misunderstood the whole thing.

My lawyer did not tell me — did not — he did not come to me and tell me to sue or to get money or anything else. I went to them. I went to them, sir.

And they have done — I have talked it over with them. They have done just what I wanted them to do.

Q. What do you want them to do?

A. I want to be — I want to have a — a clear mind. I want to be able to look down the road and say, "Some day I'm going to be compensated if I get sicker. I'm sick now, and if I get sicker, I want to be compensated for it."

Q. What are you sick with now?

A. I've got asbestos in my lungs, [Tr. 49] sir.

Ms. Bollinger — Dr. Bollinger told me that two or three years, two or three years she said I had asbestos in my lungs.

Q. Did she tell you that you had any diseases?

A. She said it was changing. Two years — she said my lungs was changing, yes, sir.

Q. You told your lawyer that you wanted to be protected down the road?

A. Yes, sir.

Q. And what options did he give you to protect you down the road?

A. There again, sir, I don't remember any options he actually gave me.

I'm the one that went in to him, if he would sign me up to workmen's comp.

Q. That was in 1991, wasn't it?

A. Yes, sir.

Q. Did you ever give him instructions to file a class action lawsuit for you?

A. Yes, sir.

Q. When did you give him those [Tr. 50] instructions?

A. There again, sir, you asked for these dates, and there has been so much, I can't pinpoint everything down, sir.

Q. How did you know to tell him that he should file a class action lawsuit for you?

A. It was on TV. It was in the papers.

Q. And that's what tipped you off that you should have one of those? Is that right?

A. Yes, sir. That's what —

Q. So until you saw it on the television and in the newspapers, you hadn't given a thought to filing a class action; is that right?

MR. NOLAN: Objection to the form of the question.

THE WITNESS: No.

MR. NOLAN: I'm not sure I understand. I don't know what you mean when you say "it."

BY MR. BARON:

Q. Did you see some things on the [Tr. 51] television and in the newspaper about a class action lawsuit over the last couple of weeks?

A. I can't say the last couple weeks, sir. It was before that I seen it in the paper.

Q. About when.

A year ago? Six months ago?

A. Yeah. It was probably close to a year ago, sir.

Q. So about a year ago you saw something in the newspaper about a class action?

A. (Nodding.)

Q. Is that the first time you thought about it?

A. I don't know. I'm not going to say for sure, sir.

Mr. Nolan and I have talked about it, and whether I brought it up, whether he brought it up, I can't say for sure.

Q. I'm trying to pin this down a little bit.

Let's see if we can't tie down some specific dates, and I know it's hard for you, but do the best you can, if you would, for [Tr. 52] me.

Since November 1st, or, say, the last two and a half months, have you seen anything on the television about a class action lawsuit concerning asbestos that you can recall?

A. It hasn't been just recently, but whether it's been back that far or not, I can't pin it down.

Q. What did it say about class action lawsuits?

A. I can't tell you that, sir. I can't tell you that. All I seen on there was asbestos-related and to get a hold of — to get into this class action. It was a good thing. I mean, that was — and I thought it was a good thing. My wife and talked about it before we — we talked about it, and it looked like a very good thing to me.

Q. So you saw it on the television, you talked about it, and then did you call your lawyer to see if you could get involved?

MR. NOLAN: Objection.

BY MR. BARON:

Q. Is that what happened?

* * * *

[Tr. 83] Q. After having signed an agreement giving Mr. Nolan the power to file a claim against the Manville Trust and other asbestos suppliers in 1991, you didn't file such a claim?

A. No, sir.

Q. And I'm trying to find out why not.

A. Because I don't deserve any money, sir.

I don't want any money. I don't want any money — I don't need any money right now.

But if I do need money, I would like to have it. It would give me great peace of mind, if I do need money down the road, that it would be — that I would be taken care of.

Q. Did you conclude in 1991, sir, that based on your physical condition at that time that you, in your words, didn't deserve any money and didn't need any money?

Was that a decision that you made?

[Tr. 84] A. Yes, sir.

Q. When you filed this lawsuit, the one that was filed in January of 1993, at the time that you filed the lawsuit, had you decided that based on your condition at that time that you didn't deserve any money and didn't want any money at that time?

A. That's true, sir. I didn't want any money at that time. Still don't want any money.

Q. Am I correct that you have decided that as long as your physical condition remains as it is today, you will neither deserve nor want any money in compensation for that condition; that's true?

A. That's true, sir.

MR. LOCKS: Mr. Riley, not that I would ever cut you off, especially since you were kind enough to share a drink with me last night, but for the last fifteen minutes in the questions, I can't for the life of me understand what that has to do with the client you purport to represent, and particularly in light of the circumstances of your client's position of not being in the marketplace after

* * * *

[Tr. 105] Q. Is it your view that those screenings were sufficient to, in your mind, see whether you had any problems related to asbestos?

A. As far as I can see fit, they were, sir. I'm no doctor, but...

Q. So as far as you are concerned, you didn't see the need to pay for any of your own screenings in addition to what Congoleum was paying for?

A. No, sir.

Q. As you sit here today, are you asking the defendants in this suit to pay for medical screenings?

A. No, sir. I'm not asking anybody to do anything.

Q. In January 1993, when you filed this suit, did you have a need for the defendants to pay for any of your screenings?

A. No, sir.

Q. So far as you know, you weren't asking for any payment for monitoring of your medical condition by the defendants in 1993?

A. No, sir.

[Tr. 106] Q. In January of 1993; is that correct?

A. Yes, sir, that's correct.

MR. WOLFMAN: That's all I have.

MR. BARON: One or two quick ones, Mr. Raver.

- - -

EXAMINATION

- - -

BY MR. BARON:

Q. Are you a member of a union?

A. No, sir.

Q. Have you discussed this class action with other people that you work with?

A. Yes.

Q. Has anyone ever asked you how to exclude themselves from the class action?

A. No, sir.

Q. Do you know how someone would exclude themselves from the class action if they wanted to?

A. I think so.

Q. When did you learn that? Was that yesterday, when you met with the lawyers?

A. No. I read about it at home

* * * *

[Tr. 115] Limitations because of the x-ray reading that occurred in 1990?

MR. NOLAN: Objection.

MS. WHITE: Objection.

BY MR. BARON:

Q. Did you understand?

MR. NOLAN: Do you understand, sir?

THE WITNESS: Yes. Yes. Yes.

BY MR. BARON:

Q. That was the reason why you thought this was a good idea?

A. Yes.

Q. So that you could protect yourself from the three-year Statute of Limitations?

A. Yes.

Q. And you believed, did you not, that you were first told or diagnosed with an asbestos-related injury in 1990; is that right?

A. October of 1991, wasn't it, sir? 1990. I'm sorry, 1990.

Q. I think on the contract —

A. I think it's 1990, too, sir.

Q. In the contract it says 1990.

* * * *

DEPOSITION OF NAFSSICA KEKRIDES

* * * *

[Tr. 10] Q. So the mesothelioma, as I understood it, turned up in July of 1992?

A. Yes.

Q. Is that right?

A. Uh-huh.

Q. And he became much worse off while you were on vacation in Greece?

A. Yeah. I bring him back after twenty days I am in Greece. I take him back to Florida, straight to a hospital, and he started on chemotherapy.

Q. Was he in Florida at the time that he developed the disease?

A. Yes.

Q. Were you living in Florida at the time?

A. Uh-huh.

Q. Are you a resident of Florida now?

A. Yeah. I have one sister in Florida.

Q. Does she live in Florida with you?

A. No. With me, just in my place.

Q. What city did you and your [Tr. 11] husband live in when he became disabled?

A. Philadelphia, and then the doctor for Philadelphia transferred for Tampa. The weather is more nice in Florida after he had the accident.

Q. So at the time that you found out your husband had mesothelioma, you were living in Florida?

A. Yes.

Q. Now, before your husband became disabled, what type of work did he do?

A. Painter.

Q. He was a painter?

A. Yes. He was working very hard.

Q. How long was he a painter?

A. From 1967 to '81.

Q. What did he do before he was a painter?

A. Before he was living — I think in 1962, he come to the United States, in California, and he working in a redwood, plywood.

Q. Redwood and plywood?

A. Yeah, this kind of company working before. In 1966, come back to [Tr. 12] Philadelphia.

Q. So he lived in California from the time he came from Greece in 1962?

A. Yes.

Q. You think?

A. Yes. Through '66.

Q. Through '66, and he worked in the lumber business?

A. Yes, lumber business. Uh-huh.

Q. Then in 1966, he moved to Philadelphia?

A. Yes.

Q. Did he become a painter when he came to Philadelphia?

A. Yes.

Q. When he passed away, how old was he?

A. 56-1/2. 1936 is born, June 26.

Q. From 1936 up until 1962, when he moved to the United States, do you know, did he live in Greece?

A. Yes.

Q. Do you know what types of work that he did in Greece?

A. Yeah. His mother had a farm.

[Tr. 13] Q. His mother had a farm?

A. And he sold milk.

Q. So he was in the milk business?

A. Yes.

Q. Did he do any other type of work when he was in Greece?

A. He was working in a factory fixing up shoes.

Q. Fixing up what?

A. Shoes. Leather shoes.

Q. Did your husband ever tell you before he developed this cancer —

A. No.

Q. — that he had worked with asbestos?

A. No. Last year we find out he was sick for asbestos.

Q. You told me that in July of 1992 is when he found out he was sick from asbestos, from this cancer?

A. Uh-huh.

Q. Right?

A. Yes.

Q. Before he learned that he had this asbestos cancer in July of 1992, had he [Tr. 14] ever talked to you about working with asbestos?

A. No.

Q. Did you know before he became sick with this cancer that he had ever worked with asbestos?

A. No.

Q. Did you even know what asbestos was before he got sick with this problem?

A. No.

Q. No?

A. No.

Q. How did he learn that his problem might be related to asbestos? Or do you know?

A. I don't know.

Q. Before he died, did he tell you that he had worked with asbestos?

A. Yes.

Q. Did he tell you when and where he had worked with asbestos?

A. You mean the place he was working?

Q. Yes.

A. Yes. He was working in Sun Oil Company and used a lot of asbestos.

[Tr. 15] Q. So his exposure to asbestos was at Sun Oil Company?

A. Yes.

Q. When did he start working for Sun Oil?

A. Working from 1966 for different companies; Myers and Watters, Murphy Company. I can't remember any other companies.

Q. When did he start working for Sun Oil; do you remember?

A. He was working from 1969.

Q. So he began working for Sun Oil in 1969?

A. Yes.

Q. Did he work there until he became disabled in 1991?

A. Yes. The time he fell down is disabled.

- - -

(Off the record.)

- - -

BY MR. BARON:

Q. Mrs. Kekrides, your husband became disabled in 1981?

A. Yes.

[Tr. 16] Q. Not 1991?

A. No.

Q. So his employment was for a painting contractor who did some work at Sun Oil?

A. Yes.

Q. And that began in 1967 and continued through '81; is that right?

A. Yes.

He was going all over, you know.

Q. To many different jobs?

A. Yeah, different jobs.

Q. Do you know whether your husband ever used any paint that contained asbestos?

A. He used it. I don't know exactly when, you know.

Q. Did he tell you that he used asbestos paint?

A. Yes.

Q. He did?

A. (Nodding.)

And he mix her up, the asbestos, the paint.

Q. After you found out that your husband had mesothelioma, how did you learn [Tr. 17] that it was caused by asbestos?

A. Well, the doctor made the operation for my husband July 27, 1992. He say, Mrs. Kekrides, "Your husband have asbestos, mesothelioma, and does not have life and he need chemotherapy to see."

And my husband very strong man, and after he started operation, he got sick and sick and sick.

Q. What made you decide to see a lawyer — or what made him decide to see a lawyer?

A. After my doctor told me he have mesothelioma, I talked to my lawyer, Steve Wilson.

Q. Did you know Steve before?

A. No. I know another lawyer, Mike Deutsch.

Q. Where is Mike Deutsch located?

A. Here in Philadelphia, Chestnut Street.

And he give me Mr. Steve Wilson specially for asbestos.

Q. When did you call Mr. Deutsch; do you remember?

[Tr. 18] A. Yeah. July of 1992. 28th.

Q. Oh, you know that?

A. Oh, yes.

Q. July 28th of 1992 you talked to Mr. Deutsch?

A. Mike.

Q. And he gave you the name of Mr. Wilson?

A. Yes.

Q. Did your husband do that or did you do that?

A. I am do it because my husband is very sick after the operation.

Q. Did your husband remain in Florida from the time of his operation until the time he died?

He didn't come back up here to Philadelphia, did he?

A. No.

Q. After you contacted Mr. Deutsch and he told you about Mr. Wilson, did you call Mr. Wilson?

A. Oh, yes. And Mr. Wilson come to my house in Tampa, and my husband is knowing everything for asbestos in there from [Tr. 19] Mr. Wilson, yeah.

Q. So Mr. Wilson came to Tampa?

A. Yes.

Q. And he met with your husband and your husband gave him information?

A. Yes.

Q. Was there a retainer agreement signed at that time? A contract?

MR. WILSON: There was a retainer signed, actually, which was sent by mail prior to my visit.

MR. BARON: If we could just get a copy of it real quick?

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(Deposition Exhibit 1 referenced.)

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MR. BARON: Let me mark this as K - 1.

BY MR. BARON:

Q. Mrs. Kekrides, I'm going to hand you a document that I've marked as Document Number K-1.

Do you see that particular document?

MR. WEINGARTEN: Is there a [Tr. 20] question pending?

BY MR. BARON:

Q. Is that the document that you in fact signed with your husband?

A. Yes.

Q. Now, the date on that document is what?

A. 9 - 8 - 9 2.

Q. 9 - 8 - 9 2.

Do you recall signing that document?

A. Yes.

Q. Did you sign it when Mr. Wilson came down to visit with you?

A. Yes.

Q. Well, then, would that tell you that Mr. Wilson came down to visit with probably in the first part of September of 1992?

A. Uh-huh.

Q. Does that sound right?

A. Yes.

Q. Did he just come once or did he come on many occasions?

A. He come two times, and before my [Tr. 21] husband died, he come down with another lawyer, Jim —

Q. Another lawyer?

MR. WILSON: Jim Long.

BY MR. BARON:

Q. Did Mr. Wilson say he was going to file a lawsuit?

A. Yes.

Q. Who did he say he was going to file a lawsuit against? Did he say?

A. To the company that make the asbestos.

Q. Did he file the lawsuit, to your knowledge?

A. I don't know yet.

Q. You don't know whether he's filed it yet?

A. (Indicating in the negative.)

MR. BARON: Steve, was there a lawsuit filed in Florida?

MR. WILSON: The lawsuit was filed in Philadelphia, Court of Common Pleas, as well as the class action.

BY MR. BARON:

Q. Mr. Wilson told you they were [Tr. 22] going to file a lawsuit for you in Philadelphia; is that right?

A. Yes.

Q. Did he tell you that in September of 1982 when he came down to visit with you?

A. Yes.

Q. He came down in September of 1982 and visited with you and your husband.

When was the next time that you heard from anyone from his law firm?

A. I think February and March, 1993.

Q. That was the next time you heard from them?

A. Yes.

Q. What did they tell you in February or March of 1993?

A. They told me he's working for my husband's case and not finished yet, you know.

Q. So they told you they were working on your husband's case and nothing had happened yet; is that right?

A. Uh-huh.

Q. Now, did you hear from them [Tr. 23] again after February or March of 1993?

A. Yes.

Q. When was the next time?

A. This coming April, in my house again.

Q. So it would have been April of 1993, and that would have been about the time your husband passed away?

A. Before my husband died. 15 April 1993.

Q. So they came to see you April 15, 1993?

A. Uh-huh.

Q. What did they have to tell you on April 15, 1993?

A. They come and check — talked to my husband, and my husband not well to talk, you know. And they take video of my husband's body because he was very bad. Left side, my husband big like this (indicating) from the mesothelioma.

Q. So they took a video of your husband.

Did he give his deposition? Did he give testimony like this?

[Tr. 24] A. No. Is come more lawyers; I don't know the names. I forgot the names. Nobody going upstairs to talk to my husband because he's very sick.

Q. So some lawyers came over?

A. Yes.

Q. But you told them they couldn't see your husband because he was too sick?

A. Yes.

Q. Was it explained to you that a deposition had been set up, but it had to be canceled because your husband was too sick?

A. Yes. Yes.

Q. At the time they came over to see you on April the 15th of 1993, did anyone mention to you that your case had been settled?

A. Not yet.

Q. When was the first time that you learned that there might be a settlement in the case that you had filed in Philadelphia?

MR. WILSON: I'm going to object to that question. It is confusing.

The testimony is there have been two cases filed in Philadelphia.

BY MR. BARON:

[Tr. 25] Q. Do you know that there have been two cases filed in Philadelphia?

A. Yes.

Q. Do you know when they were filed?

A. No. I don't know.

Q. But you gave authority to have them filed on September the 8th of 1992; correct?

A. I don't know.

Q. When you signed the contract —

A. Yes.

Q. — with the lawyers on September 8th of 1992, you gave them authority to file lawsuits that were necessary?

A. Yes. Yes.

Q. Did you give them authority, if they were able to, to try to settle the cases for you?

A. I don't understand this.

Q. All right. You don't understand.

Did anyone from Greitzer & Locks, the law firm in Philadelphia, contact you in the fall of 1992, in September or

* * * *

[Tr. 37] Q. Did you do that shortly after his death?

A. Yes.

Q. After he died, did they communicate with you about the class action case in Philadelphia?

Did they talk to you about it?

A. At the time my husband died, I speak to the doctor, the chemotherapy doctor, and I make special treatment, my husband, and he keep it, the mesothelioma in the lung for asbestos.

And everything, my lawyer have.

Q. At the time your husband died, did you know anything about what was happening in the class action case that had been filed in Philadelphia? Or did you learn that information later?

A. Yeah, I know from my lawyer.

Q. What did your lawyer tell you before your husband died about the class action case in Philadelphia?

Now, before your husband died.

MR. WILSON: Meaning at all times before? Not immediately before he died, [Tr. 38] but at any time before he died?

MR. BARON: Right.

THE WITNESS: Yeah, I have case; my husband case, I have case for asbestos.

BY MR. BARON:

Q. Yes?

A. Because my husband died from asbestos.

Q. Yes?

A. And that's all.

Q. So you understood that you had a case because your husband died from asbestos?

A. Yes.

Q. And that's all you really knew about the case?

A. Yes.

Q. Did he ever sit down and explain to you, before your husband died, how much money you might be able to receive?

A. He not say exactly, no.

Q. Did he give you a range?

A. I know for the book I see here, for 20,000 to 200.

Q. When did you first see the book?

That's the settlement book, is [Tr. 39] it not?

A. Yes.

Q. When did you first see that?

A. I see here yesterday.

Q. Was that the first time you had seen the settlement?

A. Yes.

Q. Do you know whether your husband had seen that book before he died?

A. No.

Q. Before yesterday, had you been told that there was a settlement in the class action case?

A. Yes.

Q. When were you told that?

A. Two weeks before.

Q. Two weeks ago?

A. Uh-huh.

Q. Before two weeks ago, did you know that there had been a settlement in the class action case?

A. No. Two weeks ago, I know I come here in Philadelphia for today for deposition.

Q. Right. I understand.

[Tr. 40] Let me see. I don't want to put words in your mouth, so stop me if I am. I'm just trying to be certain I understood what you said.

Two weeks ago, for the first time, you learned that the class action had been settled and you were going to have to come to Philadelphia for a deposition; right?

A. Yes.

Q. So before two weeks ago, you did not know the class action had been settled; is that correct?

A. Yes.

Q. Were you surprised two weeks ago to learn that the class action had been settled?

A. No, it's not surprise. I know I have case because my husband died from asbestos.

Q. Were you happy when you found out two weeks ago for the first time that the class action had been settled?

A. I not happy because I lost my young husband, but, you know, I do not have a choice.

[Tr. 41] Q. Before two weeks ago when you learned that the class action was settled for the first time, had you seen anything in the newspapers about the class action?

A. Yes. I see — my sister see in Florida, one woman sued a company for a million dollars because her husband died from asbestos.

Q. She saw an article about a suit in Florida for a million dollars?

A. Yes.

Q. Have you seen anything in the newspaper about your case in Philadelphia, the class action case?

A. No.

Q. Have you seen anything on the television about your case in Philadelphia, the class action?

A. It's my brother-in-law see it on the TV.

Q. I didn't ask about your brother-in-law. I'm asking if you saw anything.

A. No, no.

Q. So you, yourself, did not seeing [Tr. 42] anything in the newspaper, nor did you see anything on television about the class action Philadelphia case; is that right?

A. Yeah.

Q. Did you, before two weeks ago, receive anything else in the mail about the class action case in Philadelphia?

A. No.

Q. Do you know what a class action is?

A. For the people have problem for asbestos.

Q. When did you learn what a class action was?

A. My son explained to me here. I have one son.

Q. When did he explain that to you?

A. A couple months before.

Q. What was the name of the doctor who did the autopsy.

Do you remember?

A. It was the Town and Country Hospital.

* * * *

DEPOSITION OF AMBROSE VOGT

* * * *

[Tr. 9] And then I just kind of drifted around in and out of school, and it was 1974 when I actually got into the Local, and I've been doing it ever since.

Q. So your first full-time "this is my profession, insulation work" began in 1974?

A. Yes.

Q. Is that when you became an actual apprentice in the insulation trade?

A. Right. That's when I was sworn into the Local as an apprentice.

Q. What was the name of the local union who you were sworn into?

A. Local 11.

Do you want the number?

Q. No. What's the actual title?

A. International Brotherhood of Heat and Frost Insulators and Asbestos Workers.

Q. Are you still a member of that union?

A. Yes.

Q. Are you still working full-time as an asbestos worker/insulator?

A. Yes.

Q. Now, Mr. Vogt, I've been given a [Tr. 10] copy of your medical records, and it appears from time to time that you've had x-rays taken of your chest; is that right?

A. Yes, sir.

Q. About how often does that occur?

A. I'd say since around '83 is probably average; maybe one a year, maybe one every eighteen months or so. They skip a year.

Q. Is that to monitor your condition?

A. The ones from '83 and '84 were for physicals because I was working at a nuclear power plant and you had to have a physical to get in. Now, whether they were read by a B reader or not, I don't know.

After that, when I started working for Porter Hayden and PTX, I was getting them about every year, and they were read by B readers.

Q. When you say B readers, those are people specially trained to read x-rays for asbestos-related disease?

A. Yes.

Q. So to summarize, would it be fair to say that for the last ten years or so [Tr. 11] you've had regular examinations to determine whether there are any changes in your chest related to asbestos disease?

A. Right.

Q. Would it also be fair to say that all of those examinations and x-rays and things of that nature have been paid by the companies that you worked for?

A. Yes.

Q. Have you, yourself, as of today, spent any out-of-pocket money trying to determine whether or not you have an asbestos-related-disease?

A. I had a physical in 1991 that was paid for by my insurance company, and I had that x-ray read by a B reader. That was with Dr. Schwartz, and all I paid was a $10 co-payment.

Q. So as of today, the total amount of money that you have spent, yourself, out of pocket to monitor yourself for asbestos-related disease is about $10?

A. Yeah. Not counting gas to get back and forth and so forth.

Q. Right. Not counting gas to get [Tr. 12] to the doctors.

And that has been for eleven years — ten years?

A. Ten years.

Q. Do you expect that your employers will continue to provide you with free x-ray services and diagnostic services in the future?

A. That would depend on who I worked for. If I worked for an asbestos removal company, they are required by law to do that, yeah.

Q. Is that who you are working for now?

A. The company I am working for now is Pinnacle Insulation, and they have a subsidiary called PTX, Incorporated, and PTX does the asbestos removal — everything — you know, they have the same office, the same bosses, just a different company and a different colored check is the only difference.

Q. Are those companies, and particularly PTX, required by law to pay for your x-ray review every year for asbestos screening?

[Tr. 13] A. Yes.

And from what I understand, they have to keep those records on file for thirty years, I think.

Q. So long as you stay in the business that you are in, you will have free x-ray screenings for lung disease?

A. Yes.

Q. Do you have any current plans to change your business?

A. If I could find something suitable that paid as much, I would be gone tomorrow.

Q. Wouldn't we all?

A. Yeah.

Q. Have you found anything over the last few years?

Have you got anything in mind specifically now?

A. No.

* * * *

[Tr. 17] Q. Have you ever gone to a lawyer and said, "Sue somebody for me; I think I'm due some money from asbestos exposure"?

A. No.

Q. Have you ever authorized a lawyer to file a suit for you for damages for asbestos exposure?

A. Just this one.

Q. Are you seeking money damages in this case?

A. Not at this time. I just want the assurance that there will be some money left if anything ever develops.

Q. So you are interested in assuring that all of the money won't be spent on your friends?

A. Yes.

Q. That get sick, anyway?

A. Yes.

Q. So that if in the future you were to get sick, you want to be certain there's going to be plenty money left to compensate you?

[Tr. 18] A. Yeah.

Q. Would it be fair to say that that's your primary concern in this case?

A. I've seen, over the years, a lot of people get a lot of money. Some people get very little.

All in all, I've seen the well running dry; you know, a lot of big outfits going bankrupt, and there's still a lot of people out there that have been exposed to asbestos like myself that somewhere down the line may get — may have complications from that.

And I would just like to see something set aside, something that's — something that would be fair for everybody involved, even the people that are sick now.

Q. So your primary interest, then, in this case is being sure that there is enough money set aside for people like yourself and others that will get sick later?

A. Right.

MS. WHITE: objection. He gave you a much more complicated answer than that before.

[Tr. 19] MR. BARON: It's on the record.

BY MR. BARON:

Q. Does that basically sum it up?

A. Would you state that again?

Q. So your primary interest—and I say primary interest—in this case is being sure that there is enough money set aside for people like yourself and others that might get sick later?

MR. NOLAN: Objection.

MR. WILSON: Objection.

MS. WHITE: Objection.

BY MR. BARON:

Q. Is that true?

A. Sick from asbestos?

Q. From asbestos.

Is that right?

A. I would say yeah.

Q. Has anyone ever told you that you will definitely get an asbestos-related disease?

A. There have been people that have said that, but nobody with — you know, that really means anything. I mean just other insulators and so on.

* * * *

[Tr. 28] MR. BARON: Are you going to instruct him not to answer?

MS. WHITE: I do not have the authority to instruct him not to answer.

BY MR. BARON:

Q. Answer it.

A. No, I'm not going to swear to it.

Q. Did he have a copy of the Complaint that was going to be filed on the 15th?

That's another document, and I've got a marked-up copy that has my own notes on it that looks like this.

A. I think you — I don't know. I don't know. Not on the 14th; I can't be certain. I can't be certain.

But I had copies of both of them very shortly.

Q. Did Mr. Nolan ask for your feeling about how much money people should get who had asbestos-related diseases?

A. He showed me the schedule of awards for the different classifications of illnesses that day, yes.

[Tr. 29] Q. On the 14th?

A. On the 14th, yes.

And they seemed — you see, I — I don't — I don't really know, you know, what's fair and equitable. It's all based on an individual — the individual cases.

But the ranges that he showed me seemed fair to me; from the people I know who have had cases settled, that they were well within the boundaries of what they got.

Q. For instance, you know Daniel Minor, Jr., do you not?

A. Yes.

Q. Daniel Minor, Jr. had an asbestos-related claim; right?

A. Yes.

Q. And he received some money for it?

A. Yes.

Q. Do you know how much he received?

A. No.

Q. Do you have an idea?

A. No idea at all.

* * * *

[Tr. 33] A. I don't know. I can't answer that honestly.

I mean, there may be somebody living in the mountains somewhere, you know.

Q. Did you see the advertisement in the newspaper for this settlement?

A. No.

Q. Did you see the television advertisement for this settlement?

A. I don't think so, no.

Q. Well, how did you know about the settlement other than what your lawyer told you?

A. I had a copy of it there.

Q. If you hadn't had a copy of it, how would you know about it?

A. I don't know. I guess watch more television, or word of mouth.

Well, as a matter of fact, I got a letter from the — from the International Heat and Frost Insulators, from their international office, stating that there was a class action suit in progress.

[Tr. 34] Q. Did they explain to people how they could exclude themselves?

A. I didn't read the whole correspondence. It was a couple of pages, and I was being represented by Steve and I just didn't bother to read it, no.

Q. On January 15, 1993 when this lawsuit was filed in Federal District Court in Philadelphia, did you feel like you had been harmed by asbestos?

A. Harmed? No. Just exposed.

Q. On January 15, 1993 when this lawsuit was filed in Philadelphia, did you feel like the asbestos companies owed you some money then?

A. No.

Q. When I say "some money," I mean anything more than zero.

A. Yeah.

Q. That's what you understand that to mean?

A. Uh-huh.

Q. So on January 15, 1993 it was your belief that the asbestos companies did not then owe you any money at all?

[Tr. 35] A. Right.

Q. When was the next time that you heard from Mr. Nolan about this case?

A. Let me see.

I received copies of the Complaint and copies of the settlement, and he called me — let's see. I signed some medical release forms that he mailed me, and I sent them back, and I guess it was about — I don't know; five or six months later he called me back just to fill me in on what was happening, the progress.

Q. So you heard from him five or six months after you first talked to him?

A. Yeah, I would say —

Q. Is that about right?

A. Yeah. At least that.

Q. Would it have been sometime during the summer?

A. I believe it was, yes. Summer or early fall.

Q. And that would have been the time after January 14th?

A. Yeah.

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DEPOSITION OF JAMES CRAPO

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[Tr. 24] BY MR. BARON:

Q. How did he define the right people who should be compensated?

A. He never defined that for me.

Q. How did you understand it?

A. I understood it, from using my own concepts and standards, as being individuals who had suffered a personal injury as a result of asbestos exposure would be deserving of compensation, and that's the class that should be compensated uniformly and fairly and consistently across the class.

Q. I think you told me you've reviewed over four hundred cases, have you not?

A. Yes.

Q. Would it be fair to say that a large number of those cases that you've reviewed would not meet the standards of this settlement?

MR. HOUFF: Objection.

If you know the answer, you can answer.

THE WITNESS: I couldn't give you a quantitative answer to that.

[Tr. 25] A substantial number wouldn't have met it and a substantial number would have met it, but I couldn't really break it down and say anything more precise than that.

BY MR. BARON:

Q. But you would agree, then, and I think your answer was, a substantial number would not have met this criteria?

A. That's correct.

Q. And why is that?

A. They didn't have an injury.

Q. But those are cases that were being handled by lawyers for purposes of compensation in the tort system, were they not, as you understood it?

A. Yes, and many of those cases weren't compensated when they went through the tort system.

Q. How do you know that?

A. Because the trials didn't award them an injury.

Q. Of the four hundred cases that you've reviewed, how many cases actually went to trial?

* * * *

[Tr. 45] I think this is — this is an opinion that would be at the outer fringe of the practice and philosophy in pulmonary medicine today, and I don't think that would represent the consensus opinion of the majority of the pulmonologists in the United States today.

BY MR. BARON:

Q. Have you ever taken a vote?

A. I've talked with a substantial number of people.

I think I have a pretty good feeling for their consensus opinion.

Q. Would it be fair to say that there are a lot of different doctors with a lot of different opinions on how to diagnose asbestosis, based on the fact that you've seen four hundred of these cases?

A. I think that there is clearly variability on how doctors would diagnose it, but I think there is a clear-cut consensus opinion within the mainstream of pulmonary medicine today. For example, the kinds of pulmonary medicine — the subspecialty board, for example, where it would be an appropriate [Tr. 46] question to represent consensus. And I think you would find it easy to define that.

There have been meetings on that held by the best societies in chest disease, and there are written documents on it that have given you better criteria than that for the diagnosis of asbestosis.

Q. Are you familiar with the Canadian government's standards for diagnosing asbestosis?

A. No.

Q. Are you familiar with the British government's standards for diagnosing asbestosis?

A. No.

Q. Do you believe there are physicians in the United States who would diagnose asbestosis without the criteria of this settlement document having been met?

MR. HOUFF: Objection. You can answer.

THE WITNESS: Yes.

BY MR. BARON:

Q. You just happen to disagree with them?

[Tr. 47] MR. HOUFF: Mischaracterization.

THE WITNESS: I don't just happen to disagree with them. I disagree with them after very carefully studying the pathophysiology of the disease, and the extensive published literature on it, and carefully reviewing the basis for which a proper diagnosis should be made. It's not just "happen to disagree."

BY MR. BARON:

Q. I understand. But you are aware that in each of the cases that you have testified in that an individual did not have an asbestos-related disease, there was somebody else testifying that he did, or she did?

Right?

A. I'm not aware of that, actually, but I assumed that was probably the case.

I have never been in the presence of a deposition or trial for anyone in which other than myself was speaking — with only one exception to that.

* * * *

[Tr. 85] claim under either the "Pleural" or the "Asbestosis" section of the "Medical Conditions" section, because they would have to allege that there was either an asbestos-induced injury either in the pleura or in the lung in order for them to have a pleural effusion.

It would go under that category, and you'd ask for a special exception if that occurred. I don't think you will find one patient that meets that criteria.

Q. I would like you to meet about ten or twelve of them, but that isn't here nor there.

A. Send them to me.

Q. Yeah, I'm really going to.

MR. HOUFF: Objection. That's abusive and harassing.

MR. BARON: I'm sorry.

BY MR. BARON:

Q. Doctor, do you believe that underlying asbestosis has to be present before you can attribute lung cancer to asbestos exposure?

A. Do I believe that underlying [Tr. 86] asbestosis —

Q. Yes.

A. Yes.

Q. Do you think that's a settled issue or is it up in the air?

A. I think it should be a settled issue, but there is still debate about it.

Q. Have you talked to Dr. Roggli about it?

A. Yes.

Q. Dr. Roggli disagrees with you, does he not?

A. I think Victor would — the difference between Victor and I, Victor would accept it based on a pathologic definition of asbestosis whereas I would not.

Q. Have you read Dr. Roggli's brand new book that he just published on this issue?

A. Yes.

Q. It says, "The issue of asbestosis as the primary cause of lung cancer among asbestos workers should not be considered to be settled, and more studies are needed to resolve this question with certainty."

[Tr. 87] Do you agree with that?

MR. HOUFF: I object.

THE WITNESS: I'm always interested in the continued investigation of medical diseases, and I would agree we need more

research to understand that process, because we don't understand its pathogenesis.

There is, however, a significant body of literature in existence on that topic already.

BY MR. BARON:

Q. There is a very significant body of literature?

A. And that significant body of literature says it requires asbestosis in order for the — I'm talking about the actual data, not the opinions of people, or the interpretations thereof.

I'm talking about the data itself.

The data says that if you don't have asbestosis, you don't have an increased risk for lung cancer.

Q. Do you believe fibrogenesis and carcinogenesis are basically the same thing?

[Tr. 88] MR. HOUFF: Objection. You can answer if you —

THE WITNESS: No.

BY MR. BARON:

Q. They are different processes?

A. Yes.

Q. Then why is it necessary to have fibrosis before you can attribute carcinogenicity?

MR. HOUFF: I don't understand the question. I object.

BY MR. BARON:

Q. Do you understand?

A. That's a nonsense question to me.

I don't understand.

Q. Why is it necessary, then, to have underlying fibrosis before you can attribute the etiology of the carcinoma of the lung?

MR. HOUFF: To asbestos?

BY MR. BARON:

Q. To asbestos.

A. You are asking for my opinion?

Q. Well, do you know the answer?

[Tr. 89] A. Nobody knows how asbestos contributes to the development of tumors precisely.

So once you start asking for the pathogenic sequence evolved, you are — there is only a limited amount of data, and you are largely going to be relying on opinion.

So I don't, in that sense, know the answer, but I do have an opinion.

Q. You are aware that there are many people that disagree with your opinion, are you not?

It's an open question, isn't it?

A. I think the majority of the people would agree with my opinion.

Q. Have you taken a vote?

A. I've talked to many people.

MR. HOUFF: Objection.

BY MR. BARON:

Q. That primarily the asbestos industry has introduced you to?

A. They include no one that the asbestos industry has introduced me to.

Q. Do you know Dr. Craighead?

A. Yes.

* * * *

[Tr. 91] THE WITNESS: I've read a lot of literature, so you would have to give me the article if you want me to comment on it.

BY MR. BARON:

Q. There (handing). There isn't a more recent one, is there?

MR. HOUFF: That's exactly right.

THE WITNESS: I don't know of one.

MR. HOUFF: That was my objection, Mr. Baron, because you are reading from what you don't identify.

BY MR. BARON:

Q. Do you know whether Dr. Craighead has changed his mind?

MR. HOUFF: Objection. Asked and answered.

He said he didn't know what Dr. Craighead's opinion was.

BY MR. BARON:

Q. How do you know what the consensus is? I'm curious.

A. I have had an opportunity to meet with and talk with large numbers of people [Tr. 92] about what goes on, what's going on currently in pulmonary medicine, and in the last four or five years I've served as the head of the Annual Meeting Committee for the American Thoracic Society, which I did all the planning of the meeting, and led the meeting with assemblers and worked with all major components.

I've led the American Thoracic Society, which meant that I met with colleagues on almost a weekly or monthly basis.

I also was chair of the Pulmonary Disease Advisory Committee, National Institutes of Health, and in that capacity met with some of my top professional colleagues three to five times a year in conferences, and we would go out to dinner together and we would talk about what's going on.

The asbestos controversy is one of the central themes that's going on in pulmonary medicine today because of all the litigation in this field, and it's been an issue on which we've talked on occasion.

So I've had many chances to move and talk among the people who lead the field of [Tr. 93] lung disease for the past decade, and I have a reasonably good feeling for what the consensus opinion is and what's mainstream and what's not mainstream.

Q. I take it you feel Dr. Roggli could not be mainstream?

A. I think Dr. Roggli is a very well-respected member of the community, and I think he is somebody whose opinions I would very highly respect.

I don't necessarily agree with all of them, but I think he comes from the point of view of a pathologist. Except for one small difference, he and I would be identical in our feelings.

The difference comes from the fact that I am trained as a practicing — I'm trained as a practicing pulmonary physician and he's trained as a clinical pathologist.

He views the literature in his experience as one would view it as a clinical pulmonary pathologist. As a result, he would diagnose cases as asbestosis based on pathologic findings.

In my opinion, a pathologic [Tr. 94] change does not create a disease until it's altered the ability of the patient to function or in some way created some type of either impairment or functional change in the patient.

That represents sort of a philosophical approach to it that comes from him being a pathologist and me being a clinician. But other than that, we are very good friends, and we don't see — we see these things quite similarly, and we can share these things. We can write articles together on it. We do not have a major disagreement.

Q. Well, you are not going to sit here and tell us that there is no disagreement among very qualified physicians about whether it is necessary to have underlying asbestosis in a lung cancer case to attribute it to asbestos?

You are not going to tell me that, are you?

A. That there would be —

Q. That there is no disagreement among very qualified —

A. No, I didn't say that. No, there is disagreement on that topic.

[Tr. 95] I told you that I believed that the medical literature, if you look at the data itself and not the way that it's interpreted, the data says that you have to have fibrosis to a clinically significant degree before it increases the risk for development of lung cancer.

Q. But would you agree with Dr. Roggli that that's a hotly debated issue in the medical community now?

A. I would say the heat comes from the legal profession and not from the medical profession.

I don't see — when I go to the medical meetings, we don't get up and yell at each other and talk about it with any great degree of vehemency.

I've attended every session of the American Thoracic Society in which this kind of topic would have been on the agenda and I've never seen an argument in four or five years.

* * * *

[Tr. 116] Q. So as we sit here today, you cannot tell me that any individual has received money that shouldn't have received money in the tort system; is that right?

MR. HOUFF: Objection. Mischaracterizes his answer.

THE WITNESS: I don't really know the data on that.

What I said was — the statement I would stand behind is that I do believe that if there are — that this will compensate people who should be compensated, and if there are people who are being compensated today who will not be compensated by this, they are people who shouldn't be compensated.

BY MR. BARON:

Q. That's your belief?

A. That's my belief.

Q. What do you base that on, other than just a gut feeling?

A. I base it on extensive knowledge of the types of injuries that are caused by exposure to asbestos, and reading this document here to see if there is any kind of individual who would have a significant disability or [Tr. 117] injury, personal injury, as a result of asbestos exposure who wouldn't qualify under one of the pathways here to be compensated.

I can't find any significant process that should be compensated that doesn't fall in here. And by that, I mean a person who has a personal injury resulting from asbestos exposure.

So I've not been able to identify — I've been able to identify people who I think might qualify under this criteria and get compensated who I don't believe have a personal injury.

I think this will go in the direction of overcompensating, but I think it will do very little in terms of missing people who should be compensated.

Q. But you have no opinion one way or the other as to whether it will cut out people who are presently being compensated; is that right?

MR. HOUFF: In the tort system?

MR. BARON: In the tort system.

MR. HOUFF: I object.

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[Tr. 123] A final is what? Is it going to change? Is there going to be new data?

Q. Is there anything else you have remaining to do with regard to this?

A. No. No, not that I know of.

Q. You haven't been asked to do anything further?

A. No.

Q. So as of today, you have an opinion that you don't anticipate changing in the future?

A. That's correct.

Q. What is your final opinion with regard to this settlement?

MR. HOUFF: Objection. Asked and answered.

THE WITNESS: It is that this is a fair compromise, and that it will miss — I don't believe it will miss any significant number of people who would have a compensable injury in response to asbestos exposure.

My opinion is that it will compensate people who do not have an injury resulting from an asbestos injury.

I think it will — it tends a [Tr. 124] little bit on the lenient position of identifying people who are — who have minimal or no injury and providing compensation.

BY MR. CLARK:

Q. How do you define "significant number of people"?

MR. HOUFF: Objection.

THE WITNESS: I can't think of any class that would be excluded, but as I'm trying to speak with some rigor, I would have

an open mind if someone could identify an individual or type of injury that won't be compensable.

It has a clause in here called the special claim — exceptional pathway, and with that, I think it should pick up all of them.

BY MR. CLARK:

Q. You just testified that you didn't think this was a significant number of people?

MR. HOUFF: Objection. I think he answered it.

THE WITNESS: That's what I said. I don't think — in fact, it shouldn't [Tr. 125] miss any, being that it has a pathway for any unanticipated problem to be compensated for by going through the exceptional pathway.

BY MR. CLARK:

Q. Probably, but you are not sure; is that what I'm gleaning?

MR. HOUFF: Objection.

THE WITNESS: I said it's my opinion that it will compensate all the people who should be compensated and has a pathway for correction of any potential unforeseen errors that could occur.

BY MR. CLARK:

Q. Have you just changed your opinion in the last four questions?

A. No, it's the same answer. I was trying to say it in different ways so that you will understand it.

Q. I understand that you are saying it in different ways, but did you not just testify that you did not believe that this would miss a significant number of people who should be compensated?

MR. HOUFF: Would you restate your question, please?

* * * *

[Tr. 138] BY MR. CLARK:

Q. If no one is going to fall through the cracks, why does that provision have any meaning to you at all?

MR. HOUFF: You are arguing with the witness.

THE WITNESS: Why do we have it sitting in our Constitution that the head of the House of Representatives becomes the President

of the United States if the four people ahead of him die, and it's never going to happen?

I mean, surely something crazy may happen. When that becomes a real problem, then we have a provision for it. That's what's going on here.

BY MR. CLARK:

Q. Because you don't have all the answers; isn't that true?

MR. HOUFF: Objection.

BY MR. CLARK:

Q. There are things that could happen, there are cases that could come up that you can't sit here and possibly anticipate?

[Tr. 139] A. I've been asked to a reasonable degree of medical certainty if I believe this covers the cases that are out there, and if this will provide an appropriate compensation, and not allow people to fall through who should be compensated.

My answer to that is that this is a good document, that should address this issue, and that the exceptional pathway provides an additional guarantee that if someone feels they have not been treated properly, by this pathway they can appeal through that pathway.

I believe overall this will result in a far more uniform and far more fair compensation to people with injury than the current adversarial system does.

Q. Which we've already established you don't have any basis for your understanding as to what people are paid in personal injury asbestos actions; isn't that correct?

MR. HOUFF: Objection. That mischaracterizes —

BY MR. CLARK:

Q. What's the basis for your [Tr. 140] understanding as to how much people are paid in personal injury asbestos actions brought in the traditional system?

A. Only informal and approximate type conversations, and I don't really have hard numbers about specific individuals or diagnoses and what was compensated. That's never been revealed to me.

Q. What other concerns did you have? Let's just keep going through.

MR. HOUFF: I object to —

BY MR. CLARK:

Q. Would it be fair to say all of the concerns you had were that people were going to be paid who shouldn't be paid?

A. I was pointing out I thought this was a generous settlement, and to counterbalance the justification for creating a generous settlement, the defendants are obviously going to encounter a much less onerous burden of defense and workup of their cases, and that probably justifies setting up this kind of settlement and making it fair to both sides.

However, I did not have concerns [Tr. 141] based on individuals who should be compensated that would fall through the crack.

Q. Let me restate my question.

Isn't it true that the only concerns that you had were that people were going to be paid who you didn't believe may be entitled to compensation?

Would that be a fair statement?

MR. HOUFF: Objection.

You can answer it.

THE WITNESS: Yes.

BY MR. CLARK:

Q. Give me some examples of people who you think — making reference to specific diseases and specific categories, who you think might get paid who shouldn't get paid.

MR. HOUFF: Objection.

THE WITNESS: A person who is a heavy smoker; they've been exposed to asbestos in a building trade where their exposure is not heavy, but who has a heavy smoking history and develops an adenocarcinoma of the lung and happens to have bilateral small calcified pleural plaques; that person would be compensated, and I don't believe that person —

* * * *

[Tr. 162] Q. Doctor, as to the criteria that has been discussed here in the document, would it be fair to say that over the last several years this is generally the type of criteria that you've been applying when you have been working on these cases for the asbestos industry?

A. The criteria in this document?

Q. Yes.

A. The criteria for what? For the diagnosis, you mean?

Q. Yes.

A. Because I don't get involved in compensation.

Q. No, I understand.

A. I only get involved in diagnoses.

The criteria I apply are probably — are not exactly the ATS consensus criteria, but they are very close to those.

Q. That's not what I'm asking you.

I'm asking you about the criteria in this document, the settlement stipulation, for the diagnosis of asbestosis.

[Tr. 163] Would it be fair to say that the criteria that are in the document, the settlement stipulation, are by and large essentially the same criteria that you've used for the last few years in determining whether these people have asbestosis that you are reviewing for the asbestos companies?

MR. HOUFF: Objection. You can answer.

THE WITNESS: I've already told you that these are generous criteria, and I use the ATS criteria. They are not identical to these.

So these are more lenient towards the plaintiffs than I believe represents the correct status.

BY MR. BARON:

Q. I'm not talking as to cancer. I'm talking as to asbestosis.

A. I'm talking asbestosis too.

They only use exposure, latency, 1/0 on a chest x-ray, and some modest functional data, pulmonary function test to diagnose. They miss all the other criteria that relate to it.

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DEPOSITION OF TY ANNAS

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[Tr. 14] A. Nothing that I'm aware of.

Q. So as of today, other than the diabetes, you feel like you are in good health?

A. I do.

Q. Have you noticed any problem — let me back up.

Your lawyer responded to some requests that we made about you, and I asked him for a copy of any medical bills that you had as a result of treatment for asbestos-related disease.

Have you incurred any such bills?

A. I don't have no bills, no.

Q. So as of today, you've not spent one red cent on any problem related to asbestos; right?

A. Not to my knowledge.

MR. RICE: For his health?

MR. BARON: Right.

BY MR. BARON:

Q. I'm just talking about your health.

A. Right.

Q. As of today, have you lost any [Tr. 15] wages as a result a result of your exposure to asbestos?

A. No, sir.

Q. As of today, can you think of any out-of-pocket loss that you've had as result of your exposure to asbestos?

A. Not from mine.

Q. So, Mr. Annas, would it be fair to say that you don't believe you've lost money at all as a result of your exposure to asbestos?

A. No, sir.

Q. Is that fair to say?

A. Not at this point in time.

Q. Well, I think I double-negatived that one. Maybe I should ask it the right way, which would be unusual for me.

MR. RICE: That's true.

BY MR. BARON:

Q. Mr. Annas, let's take it back to the date of the filing of the lawsuit.

As of January 15, 1993, did you have any money lost to yourself as a result of your exposure to asbestos?

A. No.

Q. Now, as of January 15, 1993, did [Tr. 16] you authorize anyone to sue for money losses for yourself as a result of your exposure to asbestos?

A. No, I did not.

Q. So you, on January 15, 1993, had no interest in recovering money for yourself from the asbestos companies; is that right?

MR. RICE: For his money losses, you said?

MR. BARON: For his money losses.

MR. RICE: For his out-of-pocket losses?

BY MR. BARON:

Q. Just for any money losses that you have; is that right?

A. For myself.

Q. Right, for yourself.

Now, has any member of your family been injured as a result of exposure to asbestos?

A. Yes.

Q. Which one?

A. My wife of 43 years.

* * * *

[Tr. 36] suffering in her death, and I've got two children that's going to do the same thing.

Why shouldn't I be interested in it?

Q. I am not asking you about whether you were interested in asbestos.

I'm asking you about the lawsuit in Philadelphia. That's what I'm asking you about right now.

MR. RICE: And I think he was speaking to the lawsuit in Philadelphia.

BY MR. BARON:

Q. When I asked you earlier what was your reason for filing the lawsuit in Philadelphia, you told me that you wanted to do it before the money was all gone.

A. I felt there was a better way.

Q. And there had to be a better way.

A. Absolutely.

Q. I want to know what was the primary, the first top-of-the-list reason why you filed it.

A. What's going to happen to me?

Q. Well, when you say "you," you [Tr. 37] are worried about yourself; is that, then, the reason why you filed it?

A. And my children.

Q. So your reason for filing the lawsuit in Philadelphia is your concern about yourself and your family members?

A. And my friends who I worked with for many years.

Q. You said earlier that you were concerned about the money running out was another reason.

Is that one of the reasons that you filed or not?

A. Money drives everything.

Q. Money does drive everything, particularly in this case.

A. Exactly.

MR. RICE: it's obviously driving you, Mr. Baron.

THE WITNESS: And I think you should move on to another line of questioning.

BY MR. BARON:

Q. You don't want to answer any of my questions in this line of questions?

A. I think I've answered them.

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[Tr. 53] MR. RICE: Just against the CCR defendants?

MR. BARON: Yes.

MR. RICE: You are speaking lawsuits versus claims?

MR. BARON: Yes.

MS. WHITE: Objection.

THE WITNESS: If the courts apply what's in that package, I have no problem.

BY MR. BARON:

Q. Cutting off their rights to file a suit?

A. Exactly.

Q. Do you know that somebody that has pleural plaques that is not impaired gets zero money under this settlement?

A. Yes.

Why should they?

Q. Excuse me?

A. Why should they?

Q. Why should they get money?

A. Yeah. They are not injured.

* * * *

[Tr. 61] Q. What I want to know is did anyone from Ness Motley tell you that they had a contract with CCR such as the one I've just described to you?

A. I can't say yes to that because I am not sure.

Q. Mr. Annas, as we sit here today, do you believe that the CCR people owe you any money today?

A. I hope they don't ever owe me any money.

Q. On January 15, 1993, was it your intention to sue CCR for money damages for yourself, for your own injuries?

A. No.

MR. BARON: That's all I have. Thank you very much, Mr. Annas, and I'm sorry to bother you.

MR. RICE: Any other by any other counsel?

MR. CLARK: Yes, sir.

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[Tr. 69] Q. In 1992, had your wife manifested a mesothelioma?

A. In 1992 — what does "manifest" mean?

Q. The doctors were telling you that she had mesothelioma?

MR. BARON: Objection. Leading.

THE WITNESS: Yes.

BY MR. RICE:

Q. Do you believe you or your wife had more asbestos exposure throughout your career?

A. I certainly had. I worked in it.

Q. You, yourself, after watching what your wife went through, are you concerned that the asbestos that you inhaled throughout your career that's in your lungs may be causing damage and may continue to cause damage in the future?

MR. BARON: Objection. Leading.

THE WITNESS: I certainly am concerned.

BY MR. RICE:

Q. Do you have any concerns about [Tr. 70] your future health as it relates to your occupational exposure to asbestos?

A. Yes.

Q. Do you have any concerns for your children, who were living at home at the same time your wife was washing your clothes, et cetera?

A. Yes.

Q. Now, in 1992 you told Mr. Baron that you met with Mr. Lyle and discussed with him the concepts of a better way?

MR. BARON: Objection. Leading.

THE WITNESS: Yes.

BY MR. RICE:

Q. Did you at that time tell Mr. Lyle anything about your support or belief that this would be a better way?

MR. BARON: Objection. Leading.

THE WITNESS: Yes.

BY MR. RICE:

Q. Shortly after January 1993, did you receive a packet of information from Mr. Lyle that included a stack of documents?

MR. BARON: Objection. Leading.

THE WITNESS: Yes.

* * * *

[Tr. 77] BY MR. BARON:

Q. Mr. Annas, do you subscribe to the Wall Street Journal?

A. No, I can't afford any paper. I don't take a newspaper.

Q. So then you've never seen anything about this lawsuit in the newspaper, have you?

A. I got a — I had — down at my daughter's there was — about three weeks ago, [Tr. 78] maybe, I glanced at the paper she had there on the floor and this thing leaped out. It was one of these intervenor things.

Q. It was an intervenor thing? What was an intervenor —

A. One of the local lawyers.

Q. Some local lawyer put something —

A. Had, yeah. That's all I know.

Q. Because you don't subscribe to a newspaper, you would not have seen an advertisement in the newspaper, then, would you, sir, that was put in there by the court concerning this case?

A. No.

MS. WHITE: Objection.

BY MR. BARON:

Q. Have you seen anything about this case on television?

A. I don't watch much television.

Q. You don't watch much television? So you haven't seen anything about this case on TV, have you?

A. No.

* * * *

[Tr. 91] Q. You know Armstrong World Industries, do you not?

A. Yes, sir.

Q. Do you know how much insurance they have got?

A. I have no idea.

Q. Do you know how much money the company is worth?

A. No, sir.

Q. Do you know GAF Corporation?

A. Yes, sir.

Q. Do you know how much money they have got?

A. No.

Q. Do you know how much insurance they have got?

A. No. Why should I? I'm just a layman.

Q. Have you ever instructed a lawyer to sue anyone for your mental anguish for your own condition?

A. No. And I hope I never have to.

Q. Have you ever instructed a [Tr. 92] lawyer to seek damages for you for your own mental anguish?

A. No.

Q. When you signed the release for CCR, did you have to release any claim that you yourself might get in the future?

A. On my case?

Q. Yes.

A. I don't have a suit.

Q. You've not filed a suit for your own damages, have you?

A. No. No.

Q. Now, I asked you earlier about any medical expense, and I think you've told me you've had none so far?

A. The only expense I have is my yearly physical.

Q. Who pays for that?

A. I do.

Q. How much do you pay a year out of pocket, that's not covered by insurance?

A. $600 first.

Q. And what have you been paying recently per year?

A. I imagine it's going to be $750.

[Tr. 93] Q. When is the last time you had a full physical exam?

A. Last year.

Q. Was that limited to asbestos or did you have a full exam?

A. It was a real physical. You know what that is.

Q. That's every piece.

Have you ever had an exam just to determine whether you have asbestos-related disease?

A. Only the x-rays.

Q. How much do the x-rays cost; do you know?

A. About $125.

Q. Do you pay for that out of pocket, or do you have somebody that pays for it for you?

A. Well, I'm on Medicaid, and I pay it, but they file the claim.

Q. And then it gets reimbursed; is that right?

A. Or they refuse it.

Q. Or they refuse it?

A. Whatever.

[Tr. 94] Q. So as far as asbestos-related expenses, from now until forever, if you don't develop any asbestos-related disease, do you think they will be small?

A. Let that register here a minute.

Q. Did you understand it?

Let me ask it a better way.

A. Until you put that last sentence in there.

Q. Let's hope and assume that you never develop an asbestos-related disease. All right?

A. Yes.

Q. If that is the case, would you expect, then, that the asbestos companies don't owe you anything?

A. Not me.

MR. BARON: That's it. Thank you very much, Mr. Annas. I appreciate it.

* * * *

DEPOSITION OF LAWRENCE FITZPATRICK

* * * *

[Tr. 74] We did try to have a green card program, albeit it wasn't tremendously successful.

Prior to 1991, we had announced an administrative claim program where we offered to take claims directly from individuals and they didn't have to be represented by a lawyer.

Those are some of the things we had done to try and deal with the pleural problem.

Q. By the end of 1991, did you personally believe you were making a lot of headway in dealing with the pleural problem?

A. I did not.

Q. Now, had you also been active in the Legislature, in Congress, to try to get some relief?

A. The CCR had not been active in Congress in trying to get legislative relief.

* * * *

[Tr. 96] BY MR. BARON:

Q. I will ask you if you have seen this particular document before and whether you authorized Mr. Aldock to send it to Professor Brickman.

A. In answer to your questions, I do recognize the document entitled "A Critical Analysis of the Report of the Ad Hoc Committee on Asbestos Litigation."

This is the document that we previously discussed. It was prepared by Shea & Gardner.

I don't specifically recall being asked for permission for this article to be sent to Professor Brickman, but again, that may have happened or it may not have happened, and I see no reason to withhold it from him.

Q. What was the purpose of authorizing this report?

A. Well, the Renquist Committee had issued a report. There were some things in the report that we agreed with and there were others that we did not agree with.

To the extent that we did not agree with items in that report, we felt it was [Tr. 97] important that we get our comments in writing.

Q. If you will turn with me to the table of contents, there is a discussion under paragraph Roman numeral II:

"The report is premised on a fundamental misunderstanding of the asbestos litigation and its current problems."

Do you see that?

A. Yes, sir.

Q. Under subtopic (4) under Roman numeral II, (b), there is a discussion of class actions.

Do you see that?

A. Yes, sir.

Q. Do you know why Mr. Aldock made the decision to discuss class actions in this report?

A. Yes.

Because the Rehnquist Committee Report had referenced class actions, so I think Mr. Aldock felt it appropriate to respond in this paper.

Q. Would it be fair to say that Mr. Aldock concluded that class actions are inappropriate in mass tort cases, other than go [Tr. 98] through this with you?

A. No, sir.

I think it would be fair to say that Mr. Aldock concluded that litigation class actions are unfair to asbestos defendants and unwise on policy grounds.

Q. Unwise to who? Unwise to the judicial system?

A. That's correct.

Q. So if a class action is a litigation class, would it be the view of CCR that that would be unwise, but if it was a settlement class, that would be wise?

A. Yes. We draw a distinction between settlement class actions and litigation class actions.

Q. Can you describe to me what the difference is?

A. Well, I think there are many differences.

One of the main differences is it has been our experience that litigation class actions, such as the ones that have happened down in Texas, don't solve the problem; they exaggerate the problems.

[Tr. 99] Q. I'm going to stop you for a minute because we didn't communicate on that question and answer.

A. I'm sorry.

Q. How would you define, in your own mind, to an untrained observer such as me, what the difference is between a litigation class action and a settlement class action?

A. Well, a litigation class action is filed and involves litigated issues.

A settlement class action is filed merely for the purposes of accomplishing an agreement upon settlement.

I think there is a major difference there.

Q. So that I can understand it:

A settlement class action, in your mind, is one where all of the issues have been agreed upon before the lawsuit is filed?

MR. HANLON: Objection to the form of the question.

BY MR. BARON:

Q. Such as Carlough; correct?

A. Not necessarily.

* * * *

[Tr. 114] Q. Would it be fair to say that one of the topics on which there was a disagreement among the plaintiffs lawyers was whether pleural cases should be compensated?

A. Yes.

Q. So did you then try to find lawyers who you felt might be more sympathetic to your position in starting up this settlement class action?

A. No.

Q. Did you pick lawyers who you knew would never agree to exclude pleural cases when you decided to start negotiating this CCR deal?

A. No.

We decided to target two law firms for our initial settlement discussions. Those firms were the firms of Ness Motley and Greitzer & Locks.

We picked them for a number of reasons.

Gene Locks and Ron Motley were the co-chairpersons of the plaintiffs attorneys' MDL Steering Committee.

Both the firm of Ness Motley and [Tr. 115] Greitzer & Locks had traditionally been leaders among the asbestos plaintiffs bar in a variety of forms, like the Manville bankruptcy and the UNARCO bankruptcy and several others.

Ness Motley had probably the most number of cases, when its cases and all its affiliates were taken into account, and was also active in their Asbestos Litigation Group.

So I think for those reasons, we decided to initiate discussions with Greitzer & Locks and Ness Motley at that time.

Q. When you say "we picked them," do you mean that you went through several other names in going through the process of selection?

A. We didn't get to that point.

We initially decided that we should focus on those two as leaders of the plaintiffs bar.

If we were able to convince them to deal with us, we felt that other asbestos plaintiffs attorneys would think that the deal was fair because Ness Motley and Greitzer & Locks thought the deal was fair.

Q. Now, you had had experience [Tr. 116] before with Ness Motley in terms of negotiating the earlier global resolution; right?

A. Well, in terms of attempting to negotiate the earlier global resolution, yes, sir.

Q. Had you also had experience with Greitzer & Locks in trying to deal with the earlier global resolution?

A. Well, Greitzer & Locks had been involved in those discussions, but my general impression was that their emphasis was more on case management during the course of those discussions as opposed to settlement, if that makes sense.

Q. What was the approach that CCR decided to make to these two law firms? How was it accomplished?

A. Well, we had an initial series of meetings in early 1992, perhaps late 1991, with Ness Motley and with Greitzer & Locks.

Q. Before those initial meetings, did CCR have in mind generally a framework for how they wanted this class structured?

A. Yes, sir, I think we did.

Q. And did CCR have in mind that [Tr. 117] one of the principal things that it was looking for was deferral of pleural cases?

A. Yes.

Q. So before Greitzer & Locks or Ness Motley got involved in the deal, CCR had decided that this might be a way that they could accomplish what they hadn't been able to accomplish before, which was a national deferral of pleural cases against CCR?

MR. HANLON: Objection to the form.

BY MR. BARON:

Q. Right?

A. We were attempting to find a more rational way to deal with the pleural case problem through these negotiations.

Q. Prior to attempting these negotiations with Ness Motley and Greitzer Locks, had anyone at CCR or on behalf of CCR discussed CCR's belief that there were too many pleural cases with Judge Weiner?

MR. HANLON: Objection to the form.

THE WITNESS: Yes.

* * * *

[Tr. 341] Q. All right. As best you can do.

A. All right.

Many of these agreements use the language as found in paragraph 5, "Law firms will not file any future asbestos personal injury claims."

Q. Okay.

A. After many of these agreements were signed, there was an ABA advisory ethical opinion that arguably had some bearing on these agreements; I think people could differ as to whether it had any bearing at all.

But when that opinion came out, out of an overabundance of caution, we decided to make a change from the language that said, "will not file" to basically language that said, "will recommend."

We didn't view it as significant, because we really didn't view these kinds of provisions as legally binding documents, if you will. They were more of a commitment, a good faith commitment as to how these people were going to deal with us in the future.

Q. Why did you not view these [Tr. 342] documents as legally binding?

A. I don't see how you can sue on a document like this to enforce it.

The remedy, if somebody wants to breach an agreement like this, is to deal differently with them in the future, and is not to sue.

Q. If they weren't enforceable agreements, why did somebody go through the trouble of having everybody sign one?

A. We wanted to memorialize in writing their commitment to the future. It was a moral commitment, if you will.

Q. Did you expect them to abide by that moral commitment?

A. Sure. And if they did not, we would have dealt with them differently in the future.

Q. In what way?

A. We would not have trusted them and would have been less reluctant to deal with them.

MR. MOTLEY: You mean more reluctant?

THE WITNESS: I'm sorry. More

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FITZPATRICK DEPOSITION EXHIBIT 5:

A CRITICAL ANALYSIS OF THE REPORT OF THE AD HOC COMMITTEE ON ASBESTOS LITIGATION

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The issue of "general causation" is *not* a significant issue in many asbestos cases, for there is little debate that, at least at some exposure levels, asbestos exposure may cause certain diseases. To be sure, there can be a general causation question in some asbestos cases, such as, for example, whether there is indeed a causal relationship between asbestos exposure and colon cancer, or between chrysotile fiber and mesothelioma.[17] The usual causation issue in the vast majority of asbestos cases, however, is specific causation — that is, does this plaintiff in fact have an asbestos-related disease due to exposure to this defendant's products. Included within this specific causation determination are the issues of 1) whether the plaintiff's condition is asbestos-related at all (*e.g.*, are the plaintiff's breathing problems due to asbestosis or emphysema?): and 2) if so, whether exposure to a particular defendant's products was a substantial factor in causing the plaintiff's condition.

Second, the Report may be suggesting that Congress should eliminate these specific causation problems by declaring that any exposure to asbestos — no matter how small — shall be deemed to have caused a compensable injury. But that determination would flatly contradict the substantial body of medical and scientific opinion (discussed below) that low levels of exposure to asbestos (particularly to chrysotile fiber) do not represent a meaningful health hazard. Moreover, any such Congressional determination would revolutionize the requirement of proximate causation in torts. In effect, such a determination would make every individual in the

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[17] Such general causation arguments are only raised in instances where there is significant scientific and medical authority to support them. We see no justification for any proposal that would resolve these controversies in favor of plaintiffs.

United States a potential plaintiff, inasmuch as we all are exposed to and inhale asbestos fibers every day.

Finally, even if Congress declared asbestos "absolutely dangerous" so that every exposure would be deemed to cause injury, the defendants would still not be "absolutely liable" unless Congress were also willing to alter even further the law of products liability in every state. As explained above, liability under strict liability or negligence principles in an asbestos case generally requires not only a showing that the product caused harm, but also a showing that the supplier knew or had reason to know of the product's hazards, that a warning on the product was necessary and any warning given was inadequate, and that a different warning would have made a difference. Thus, to impose "absolute liability" upon asbestos defendants, based on the mere showing of some exposure to those defendants' products, would require a fundamental change in the law of all fifty states, and would represent a major alteration in the principles of tort liability.

In sum, the Report has two fundamental oversights — a failure to discuss the problem of unimpaired or meritless claims and a failure to acknowledge that defendants have viable defenses to many asbestos claims. The Report also shows a remarkable misunderstanding of the legal issues in asbestos cases. The reasons for these oversights and misunderstandings may be found in the other inaccuracies and misstatements that pervade the Report, which we now discuss, in reviewing the Report section-by-section.

B. Specific Inaccuracies and Misstatements

1. "Introduction"

a. In this section, the Report characterizes the asbestos problem as "a tale of danger known in the 1930s," with "exposure inflicted upon millions of Americans in the 1940s and 1950s." This characterization is both unfair and untrue. While, with hindsight, it is always possible to argue what "should" have been known, actual knowledge of the hazards of asbestos has emerged slowly over a long period of time, as acknowledged experts on the health effects of asbestos have written. For example, A. Churg and F. Green, *Pathology of Occupational Lung Disease* 216 (1988), contains a bar chart showing when the link between asbestos and certain diseases was first "noted," was first

"proposed," and was first "generally accepted by the medical community." This chart thus shows the evolutionary nature of the acceptance of a link between asbestos and various diseases. A similar point is made in H. Weill and J. Hughes, "Asbestos as a Public Health Risk: Disease and Policy," 1986 *Ann. Rev Pub. Health* 171, 174 ("Clearly, knowledge of the types of disease and the circumstances of causal asbestos exposure did not appear suddenly, but evolved over several decades.") Indeed, even Dr. Selikoff has acknowledged that, as of the 1960s, the link between asbestos and certain diseases "rested on scattered reports of small numbers of cases," that the link to cancer was "contested," and the dangers of the lower levels of exposures resulting from the "environmental controls proposed in the 1930s" was "not known." I. Selikoff & D. Lee, *Asbestos and Disease* 31 (1978).

Furthermore, apart from the issue of when it was generally accepted that there was any link between asbestos and certain diseases, knowledge of the dangers at lower levels of exposure became known even later. This is what Dr. Selikoff meant when, as quoted above, he stated that, in the 1960s, the effects on disease incidence of the "Environmental controls" instituted in the 1930s were "not known." This is also demonstrated by the fact that the Occupational Safety and Health Administration ("OSHA"), which first adopted a

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The statement that the number of asbestos claims "has not begun to crest" (Report at 7) is inaccurate, at least as far as claims for significant impairment are concerned. Thus, when it promulgated the current workplace exposure levels in 1986, OSHA noted that two prominent medical researchers had testified in the OSHA proceedings "that asbestosis mortality and severe asbestosis morbidity is on the decline" due to lowered workplace exposure levels in the past few decades, and that this view is corroborated by the works of other researchers, 51 Fed. Reg. 22624 (June 20, 1986).

The references to the number of claims filed in various courts is, in some respects, misleading. For example, the huge increase in the number of cases pending in the City of Baltimore (Report at 9) is caused partially by the fact that many cases have been filed in or transferred there by plaintiffs' counsel eager to take advantage

of a mass consolidation trial scheduled to begin in that jurisdiction in late April 1990. Similarly, the high number of filings in some other federal districts is caused by the fact that judges in those districts, such as Judge Parker in the Eastern District of Texas, have employed radical consolidation or class action techniques, such as in *Cimino* v. *Raymark Industries, Inc.*, C.A. No. B-86-0456-CA (E.D. Tex.), that are widely acknowledgedly to have significantly favored the plaintiffs. Such techniques naturally encourage hundreds or thousands of new claims to be filed in those districts.

b. "*Delay.*" This section points out that asbestos claims can be highly complex with "an average of 20 defendants," "lengthy discovery," "[t]hirty or more legal issues," "complicat[ed] issues of causation," and "difficult" product identification issues (Report at 11). These complexities, however, just illustrate why a mass consolidation or collective trial of asbestos cases would be unmanageable, and why, because of their undifferentiated nature, such mass proceedings generally result in high verdicts for all claims, including many unmeritorious ones.

The Report lists several statistics concerning the *Cimino* case as an illustration of the complexity of in an asbestos case (Report at 11). It should be noted, however, that *Cimino* is hardly a typical example; it involved an attempt to resolve over 2000 claims in one consolidated trial.

c. "*Costs.*" In discussing the high transaction costs of the recently concluded four plaintiff trial in Cleveland, Ohio (Report at 12-13), it should be noted that the trial resulted in complete defense verdicts in the three pleural cases (on the grounds that the claimants had no asbestos-related disease), and a plaintiffs' verdict of $166,000 in the fourth case, a mesothelioma claim. *Mealey's Litigation Reports (Asbestos)* 19 (Dec. 14, 1990). Thus, it appears unlikely that these high transaction costs can be attributed to defense intransigence. Moreover, this trial shows that it can cost defendants a great deal to defend claims that are found to be without merit.

It is also somewhat misleading to highlight as typical the number of lawyers involved in *Cimino* and *In Re School Asbestos Litigation* (Report at 13). As noted above, *Cimino* was a massive

consolidation involving over 2000 claims, while *In Re School Asbestos Litigation* is an opt-out class action for asbestos property damage by school districts nationwide. Even the Brooklyn Navy Yard trial referred to in the same paragraph was a fairly large consolidation, involving over 60 claims.

It is also unfair to note that one 1984 study reported that 37 cents of each dollar spent on the asbestos litigation goes to defense costs (Report at

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claimants, but may *also* leave inadequate funds for future claimants. No discussion of the high costs of asbestos litigation is complete without a discussion of plaintiffs' attorneys' fees. Indeed, one of the reasons that the CCR supports transfer of all pending asbestos cases to a single federal district is that such a transfer would enable the transferee court to scrutinize plaintiffs' attorneys' fee arrangements.

4. "Asbestos Litigation: Unsatisfactory Resolution"

a. "Consolidation." The Report notes (at 17) that "[c]onsolidations [in asbestos cases) * * * have met with the approval of the appellate courts." It should be noted, however, that the two decisions cited in support of this conclusion — *Hendrix* v. *Raybestos-Manhattan, Inc.*, 776 F.2d 1492 (11th Cir. 1985), and *Van Buskirk* v. *Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985) — involved consolidations of *four* and of *eleven* claims, respectively, that the four workers whose claims were consolidated in *Hendrix* "worked out of the same union hall * * * frequently on the same jobs * * * [with] exposure to asbestos-containing insulation products * * * during the same time frame," 776 F.2d at 1495-96; and that the eleven claims consolidated in *Van Buskirk* all involved workers from the same asbestos product manufacturing plant. 760 F.2d at 485. No appellate court has sanctioned the type of mass consolidation or collective proceeding advocated as a "back-up" recommendation by the Committee, and which the Committee correctly concluded could be instituted only with a change in current law.

b. "Class Actions." We discuss in detail in Part III below why mass consolidations or class action trials of asbestos claims are both unfair to the defendants and unwise on policy grounds. We

note, however, that the Report offers no support for its conclusion that "[v]irtually every federal judge who has tried to cope with a substantial asbestos docket" agrees that "aggregate or class proceedings" "with issues of liability and damages being resolved for the entire class or subclass" are needed (Report at 19). Indeed, other than Judge Parker in the Eastern District of Texas, no federal court has attempted such aggregate proceedings for asbestos personal injury claims.

Furthermore, it is unfair to list (*id.*) the advantages of such aggregate proceedings with no reference to the disadvantages. Disadvantages include (as discussed in Part III) submergence of defenses and individual issues, to the detriment of the defendants, with a significant skewing of the balance to the plaintiffs and a great increase in the defendants' liability.

The Report's discussion of the use of class actions in the asbestos or mass tort area is incomplete in several other respects. First, in *Jenkins* v. *Raymark Indus., Inc.*, 782 F.2d 468, 471 (5th Cir. 1986), one of two cases cited in the Report (at 20) where a court of appeals has sanctioned the use of a class action in asbestos cases, only a few issues were to be resolved on a class basis; individual issues for each class member were to be resolved after the class issues in "mini-trials" of seven to ten plaintiffs each. *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), the other asbestos class action cited in the Report, involves asbestos property damage claims, has not yet been tried, and, in affirming the class certification order, the Third Circuit noted its "misgivings on manageability" (*id.* at 998).

Second, the Fifth Circuit did not mandamus Judge Parker's attempted class action in *Cimino* simply because "Texas law required trial of individual claims * * * " (Report at 21). Instead, the court of appeals found that "[t]here are too many disparities among the various plaintiffs for their common concerns to predominate," that the procedures ordered by the district court "may alter the liability of the defendants in fundamental ways," and that those procedures "comprise something other than a trial * * *. It is called a trial, but it is not." *In re Fibreboard Corp.*, *supra*, 893 F.2d at 711-12.

Finally, the Report states (at 21) that "[i]n other mass tort actions, class action proceedings have been used successfully to reach disposition," citing class certification decisions in the Bendectin and Agent Orange litigation. But the Report fails to note that the class certification order in the Bendectin proceedings it cites was reversed on mandamus, *In re Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1984); and that the class certification order in the Agent Orange litigation was upheld on appeal *only* because of "the centrality of the military contractor defense" in that litigation. *In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 151, 166 (2d Cir. 1987). Indeed, the Second Circuit expressly held that "[w]ere this an action by civilians based on exposure to dioxin in the course of civilian affairs," and thus without the military contractor defense, "we believe certification of a class action would have been error" (*id.* at 166).[18]

c. "Judicial Panel on Multidistrict Litigation." As set forth in the CCR's recent response to the order to show cause filed before the MDL Panel (March 18, 1991), transfer to a single federal district cannot, under present law, achieve mass consolidation or class action trials for asbestos claims; instead, the transferee court's powers are limited to pretrial proceedings only. The Committee is incorrect, however, that, whatever the MDL Panel orders, "it will still be necessary to provide a mechanism for resolving these [asbestos] trials in an expeditious manner" (Report

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[18] To the extent that this section of the Report, or the Report's back-up recommendation for mass consolidations or collective proceedings in asbestos cases, is intended to endorse the approach in *Cimino* v. *Raymark Industries, Inc.*, C.A. No. B-86-0456-CA (E.D. Tex.), that endorsement is most inappropriate. *Cimino* is still pending in the district court and, absent a settlement, most surely will be appealed. The judge who issued the legal rulings in *Cimino* is a member of the Committee, and the Judicial Conference represents the entire judiciary that will adjudicate the appeals from the *Cimino* rulings. Accordingly, an endorsement of *Cimino* by the Committee or the Conference at this time seems questionable. See Code of Judicial Conduct, Canon 3(b)(9) ("A judge shall not, while a proceedings is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness * * *.").

at 22). Instead, as set forth in the CCR's MDL response, there are five measures that the transferee court could order that would provide immediate and substantial relief to the parties and the courts: 1) implement a national program for deferral of unimpaired claims; 2) sever all claims for punitive damages; 3) adopt a uniform case management plan to control case flow and to facilitate settlement; 4) supervise the reasonableness of contingent attorneys' fees; and 5) establish a model for, and a forum for coordination with, the state and bankruptcy courts in all these respects. Such steps by the transferee court would go a long way towards eliminating the backlog of asbestos claims in the federal and state courts, and would also encourage the current efforts at a consensual national settlement of all asbestos claims.

d. "Collateral Estoppel." The Report suggests that use of collateral estoppel in asbestos cases "would enable trial courts to deal more efficiently and effectively with the asbestos caseload * * *" (Report at 23). One major difficulty, however, in applying collateral estoppel in the asbestos litigation is that, as discussed in Part III below, many of the most crucial issues in any asbestos case are the individual issues of causation and damages. See generally M. Green, "The Inability of Offensive Collateral

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asbestos claims be resolved through mass consolidations or collective trials. As we now show, this "back-up" recommendation would be both unfair to the defendants, and would also be unwise on policy grounds.

III. Mass Consolidation or Collective Trials Would Be Both Unfair to the Defendants and Ill-Advised.

A. Unfairness to the Defendants

The primary reason that asbestos claims cannot be fairly handled in mass proceedings is because, at bottom, each claim is different with respect to most elements of each plaintiff's cause of action. As the MDL Panel has observed, the issues that predominate in asbestos personal injury litigation are individual, not

common, issues: injury, medical causation, and damages.[19] Just last year the Fifth Circuit reaffirmed that "[t]here are too many disparities among the various [asbestos] plaintiffs for their common concerns to predominate." *In re Fibreboard Corp.*, *supra*, 893 F.2d at 712. The problem with trying such issues in a consolidated trial is that, by their undifferentiated nature, such trials sweep along to large verdicts many unmeritorious cases. Further, such trials unfairly skew the balance set up by the tort system by effectively depriving defendants of their ability to focus the jury's attention on the individual issues. As the Fifth Circuit observed in *In re Fibreboard*, "[t]o create the requisite commonality for [a class action or consolidated] trial, the discrete components of the class members' claims and the asbestos manufacturers' defenses must be submerged" (*id.*). Such procedures thus "rework[ ] the substantive duty owed by the manufacturers" (*id.*). Judge Hogan made a similar point in his dissenting statement to the Report:

> "[U]se of class action 'collective' trials * * * of asbestos cases * * * is a novel and radical procedure that has never been accepted by an appellate court. It has been challenged as being constitutionally suspect in denying defendants their due process and jury trial rights as to individualized claimants, as well as conflicting with the court's obligation to apply state law. It would establish a new form of tort liability with far reaching ramifications to other mass tort cases." (Report at 41.)

It is essential to observe that many asbestos claims are not meritorious as to these individual issues, with the result that defendants continue to win outright defense verdicts in many cases tried individually or in small groups with minimal judgments in others.[20] Many claims involve no injury or minimal injury; others involve injury that is not asbestos-related; others involve exposure to products manufactured by non-defendants; others involve contributory fault or other situations where warnings would have

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[19] *In re Asbestos & Asbestos Insulation Material Products Liability Litig.*, 431 F. Supp. 906, 909-10 (J.P.M.L. 1977).

[20] See discussion of the defense verdicts won by defendants represented by the ACF or the CCR at p. 15, above.

made no difference; and others involve cases barred by the statute of limitations. Indeed, there are examples of hundreds or even thousands of unmeritorious cases being identified and dismissed.[21]

It has repeatedly been held that these individual issues cannot be avoided by artifice or short cut without unwarranted infringement of the defendants' rights. For example, efforts to impose market share liability to eliminate the need for proof of individual causation have been rejected by every court to consider the matter.[22] Likewise, bids to displace state tort law — with its requirement of individual proof of each element for each plaintiff— through the creation of federal common law have been uniformly rebuffed.[23] And "procedural" efforts to short-circuit the

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[21] See, for example, the discussion of the dismissals of tireworker and other asbestos claims at pp. 12-13, *supra*.

[22] Federal court decisions include *White* v. *Celotex Corp.*, 907 F. 2d 104, 106 (9th Cir. 1990) (Arizona law); *Bateman* v. *Johns-Manville Sales Corp.*, 781 F.2d 1132, 1133-34 (5th Cir. 1986) (Louisiana law); *Blackston* v. *Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1483 (11th Cir. 1985) (Georgia law); *University System* v. *United States Gypsum Co.*, 1991 U.S. Dist. LEXIS 1191 (D.N.H. 1991); *Marshall* v. *Celotex Corp.*, 651 F. Supp. 389, 392-94 (E.D. Mich. 1987); *Vigiolto* v. *Johns-Manville Corp.*, 643 F. Supp. 1454, 1460-65 (W.D. Pa. 1986), *aff'd mem.*, 826 F.2d 1058 (3d Cir. 1987); and *In re Related Asbestos Cases*, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982).

State court rulings include *Gaulding* v. *Celotex Corp.*, 772 S.W.2d 66, 70-71 (Tax. 1989); *Mullen* v. *Armstrong World Indus.*, *Inc.*, 246 Cal. Rptr. 32, 35-38 (Ct. App. 1988); *Celotex Corp.* v. *Copeland*, 471 So. 2d 533, 536, 539 (Fla. 1985); *In re Asbestos Litig.*, 509 A.2d 1116, 1118 (Del. Super. Ct. 1986); *Leng* v. *Celotex Corp.*, 554 N.E.2d 468, 469-71 (Ill. App. Ct. 1990); *Sholtis* v. *American Cyanamid Co.*, 568 A.2d 1196, 1203-05 (N.J. Super. Ct. App. Div. 1989); *Goldman* v. *Johns-Manville Sales Corp.*, 514 N.E.2d, 691, 699-702 (Ohio 1987); and *Case* v. *Fibreboard Corp.*, 743 P.2d 1062, 1064-67 (Okla. 1987).

[23] See *Jackson* v. *Johns-Manville Sales Corp.*, 750 F.2d 1314, 1323- (continued...)

adjudication of exposure, causation, and injury for each individual plaintiff have been rejected as well.[24]

In this regard, the "averaging" and "extrapolation" procedures recently ordered by Judge Robert Parker in *Cimino* v. *Raymark Industries, Inc.*, Civil Action No. B-86-0456-CA (E.D. Tex.) — termed "the most radical solution" by the Report (at 21) — are far beyond the courts' legitimate authority. Under those procedures, the court tried certain "sample" cases representing five disease categories, computed the "average" verdicts in each of the disease categories, and then awarded the remaining over 2000 plaintiffs, whose cases were not tried as to exposure or medical issues, compensatory damages equal to the average verdicts in the sample cases. Plainly, those procedures do not comport with either the letter or the spirit of the Fifth Circuit's *Fibreboard* opinion, which set aside a similar set of procedures as violating both *Erie* and the constitutional separation of powers. 893 F.2d at 709-11 (5th Cir. 1990). In any event, it has repeatedly been held in cases involving large numbers of individual claims that a defendant's right to due process bars the calculation and award of damages based upon the trial of sample cases followed by such "averaging" and "extrapolation" techniques, regardless of the asserted policy reasons for doing so.[25] Such procedures also impermissibly deprive

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[23] (...continued)
27 (5th Cir. 1985) (*en banc*); *Jackson* v. *Johns-Manville Sales Corp.*, 781 F.2d 394, 397 n.3, 415 (5th Cir. 1986) (*en banc*); *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990); *In re School Asbestos Litig.* 789 F.2d 996, 1007 (3d Cir. 1986); *Wammock* v. *Celotex Corp.*, 793 F.2d 1518, 1528 (11th Cir. 1986); *Blackston* v. *Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1485-86 (11th Cir. 1985); see also *Robertson* v. *Allied Signal, Inc.*, 914 F.2d 360, 378 (3d. Cir. 1990).

[24] *E.g.*, *In re Fibreboard Corp.*, *supra*.

[25] See *Windham* v. *American Brands, Inc.*, 565 F.2d 59, 72 (4th Cir. 1977) (*en banc*); *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 236 & n.8 (9th Cir. 1974); *In re Hotel Telephone Charges*, 500 F.2d 86, 89-90 (9th Cir. 1974); *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d (continued...)

defendants of, among other things, their Seventh Amendment jury trial rights.[26]

Cimino may best illustrate the unfair results that can occur in a mass consolidation. Under the procedures in *Cimino*, every one of the over 2000 non-sample claimants will receive a judgment equal to the average verdicts in the sample cases; no claims of the non-sample claimants will be found without merit.[27] In addition, the average verdicts in the disease categories are very high; for example, the average verdict to be applied to each claimant with pleural changes is $558,900, a figure far in excess of what pleural claimants have received around the country in cases that were not tried on a mass or aggregate basis. Moreover, the oddity of the average verdict for pleural claims is illustrated by the fact that it exceeds the average verdict for lung cancer claims ($545,200), again a result inconsistent with results around the country in cases not tried in aggregate proceedings.[28]

It should also be noted that even the questions that are sometimes asserted to be common in asbestos cases — like the

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[25] (...continued)
1005, 1013-14, 1017-18 (2d Cir. 1973); *vacated on other grounds*, 417 U.S. 156 (1974); *In re Industrial Gas Antitrust Litig.*, 100 F.R.D. 280, 301 (N.D. Ill. 1983); *Wilcox Dev. Co.* v. *First Interstate Bank*, 97 F.R.D. 440, 446 (D. Or. 1983); *Al Barnett & Son, Inc.* v. *Outboard Marine Corp.*, 64 F.R.D. 43, 55 (D. Del. 1974).

[26] See generally *Granfinanciers, S.A.* v. *Nordberg*, 109 S. Ct. 2782 (1989); *Beacon Theatres* v. *Westover*, 359 U.S. 500, 508 (1959) (Seventh Amendment guarantees "a full jury trial of every * * * issue" in a case at law). Concerns about efficiency or convenience provide no excuse for infringements on the Seventh Amendment. See *Granfinancers, S.A.*, 109 S. Ct. at 2802 n.18; *Pernell* v. *Southall Realty*, 416 U.S. 363, 384-85 (1974); *Reiner* v. *New Jersey*, 732 F. Supp. 530, 533-34 (D.N.J. 1990).

[27] The sample claimants, however, will each receive the verdict rendered in their actual cases.

[28] The average verdicts for the five disease categories in *Cimino* are set forth in *Mealey's Litigation Reports (Asbestos)* 11 (Dec. 3, 1990).

alleged unreasonable dangerousness of asbestos-containing products and each defendant's purported knowledge of particular dangers to certain plaintiffs during specific periods of time — are only "common" as to narrow groups of cases. Asbestos litigation involves a wide array of products which, in varying conditions and at varying locations, were subjected by varying techniques to many different kinds of uses or applications. See *Gideon* v. *Johns-Manville Sales Corp.*, 761 F.2d 1129, 1145 (5th Cir. 1985) ("[A]ll asbestos-containing products cannot be lumped together in determining their dangerousness.") To fairly try those issues, therefore, it is necessary to make a separate determination, for each permutation of these variables, as to whether sufficient dust could be produced to cause injury or disease; if so, how long such exposure would have had to occur to potentially cause each alleged kind of malady and when each defendant knew or should have known of these dangers. The issue of whether adequate warnings were given would raise additional factual variations. Here too, efforts at radical streamlining techniques, such as the use of collateral estoppel, stare decisis, or judicial notice, have been rejected because they would be unfair to defendants.[29] The need to divide these "common issues" issues so finely raises the separate issue of the manageability of a mass proceeding.

Furthermore, even if these limited "common" issues could be handled on a consolidated basis, such a trial would not substantially improve efficiency or advance the resolution of these cases. As noted above, individual issues predominate. And that is especially true in practice, since many courts employ "reverse bifurcation" to first try the individual issues of injury, medical causation, and damages — which often results in either a defense verdict or settlement — and hence do not spend time trying the supposedly "common" issues.

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[29] See *Hardy* v. *Johns-Manville Sales Corp.*, 681 F.2d 334, 341-48 (5th Cir.1982) (collateral estoppel and judicial notice); *Harrison* v. *Celotex Corp.*, 583 F. Supp. 1497, 1502 (E.D. Tenn. 1984) (collateral estoppel); v. *Migues* v. *Fibreboard Corp.*. 662 F.2d 1182, 1187-89 (5th Cir. Unit A 1981) (stare decisis).

Another significant manageability problem in any national consolidation would be the requirement to apply fifty varying state laws. As noted above, state law applies in these diversity cases, and efforts to concoct federal common law have been rejected. Furthermore, in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 814-23 (1985), the Supreme Court held that due process prohibits a forum state from applying its substantive law to a nonresident plaintiff's claim absent a "significant contact or significant aggregation of contacts" between the forum state and the plaintiff's claim. Since the vast majority of asbestos cases will have no significant contact to whatever particular forum is chosen for the consolidated trial, due process will require that the forum apply the laws of all fifty states and the District of Columbia.

This requirement to apply all fifty state laws will lead to immense manageability problems. As even Judge Parker has recognized, "You have to have a uniform set of rules if you are going to have a National Class. You can't have 50 sets of rules."[30] Indeed, under similar (though less complex) circumstances, courts have found that the need to apply the varying laws of multiple states in a products liability lawsuit precludes a finding of commonality, not to mention one of manageability.[31]

A. Mass Consolidations Would Be Unwise

Even if class or mass consolidation trials could be instituted, they would be ill-advised. As noted, such proceedings, as in

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[30] *Linscomb* v. *Pittsburgh Corning Corp.*, C.A. No. 1:86-MC-456 (E.D. Tex.), 8-20-90 Tr. at 25.

[31] See *Kirkpatrick* v. *J.C. Bradford & Co.*, 827 F.2d 718, 725 (11th Cir. 1987), *aff'g Sanders* v. *Robinson Humphrey/American Exp., Inc.*, 634 F. Supp. 1048, 1067-69 (N.D. Ga. 1986); *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1016-17 (D.C. Cir. 1986); *In re Northern Dist. of Cal., Dalkon Shield IUD Products Liability Litig.*, 693 F.2d 847, 850 (9th Cir. 1982); *Walsh* v. *Ford Motor Co.*, 130 F.R.D. 260, 271-75 (D.D.C. 1990); *Ikonen* v. *Hartz Mountain Corp.*, 122 F.R.D. 258, 265 (S.D. Cal. 1988); *Osborne* v. *Subaru of America, Inc.*, 243 Cal. Rptr. 815, 819-22 (Ct. App. 1988); see also *In re School Asbestos Litig.*, 789 F.2d 996, 1010-11 (3d Cir. 1986) (expressing doubt as to manageability in light of varying state laws).

Cimino, have produced drastically inflated liability for the defendants. Thus, if such proceedings were instituted, both the verdicts and the settlements would become much higher.[32]

Obviously, this would be grossly unfair to the defendants — each of which is not just some abstract legal entity, but rather a composite of its employees, suppliers, customers, communities, and investors. The unfairness and harm to the defendants and all of these related people would also likely soon result in injury to state court and future plaintiffs. In addition to the federal cases which were the concern of the Report, there are over 60,000 cases pending in the state courts, and undoubtedly there are future cases that will some day be filed in state or federal court. By producing artificially inflated judgments that would likely bankrupt at least some defendants, class action or mass consolidation proceedings in the federal court cases would leave less money for paying meritorious claims of at least some state court and future plaintiffs. This would be plainly unwise. Indeed, the Committee even recognizes that its recommendation for legislation to allow consolidation and collective trials of federal court claims, if enacted, "may prejudice the chances of plaintiffs in state court cases, as well as of future claimants, to obtain deserved compensation (Report at 36).

Conclusion

The Ad Hoc Committee properly recommended that Congress establish a nationwide administrative claims handling program for asbestos claims, with the dual objectives of "achieving timely and appropriate compensation" to

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[32] Indeed, it has been observed that the kind of "extrapolation" techniques recently used in *Cimino* "would drastically increase the class action defendant's substantive liability." *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1136 (7th Cir. 1979), citing *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974).

DEPOSITION OF MICHAEL ROONEY

* * * *

[Tr. 409] THE WITNESS: There is certainly coding of cases, as your cases are settled, as there continue to be throughout the country, coding of cases within one of the three non-malignant categories.

But my understanding of the agreement with your firm is the cases are negotiated individually on a monthly basis, and we have regular disputes with respect to the value of cases.

I'm not sure what your question is there, then.

MR. BARON: Let's take a break. Maybe you can think of an answer.

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(Recess.)

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BY MR. BARON

Q. Mr. Rooney, so that I can clear up one thing here — I want to be sure I understood you correctly:

In these letters that you received from Greitzer & Locks where they say "It is further understood that in the future Greitzer & Locks will not handle or process [Tr. 410] claims against the CCR defendants unless they meet certain mutually agreeable disease criteria," was it your understanding that that was going to be a term that was going to be filled in later and would be the criteria that were agreed to in the Carlough case?

A. Generally, that's correct.

Q. So the agreement with Greitzer & Locks to settle their present cases would be the agreement, in terms of the medical criteria aspect of it, that was reached in Carlough?

MR. HANLON: Objection. Mischaracterizes his testimony.

BY MR. BARON:

Q. Correct?

A. We agreed that we would reach mutually agreeable disease criteria.

Q. So a mutually agreeable disease criteria that you would reach with Greitzer & Locks would be the same disease criteria you would reach in Carlough; correct?

A. Perhaps.

Q. Well, that was your understanding of how it was going to work, wasn't it?

* * * *

[Tr. 416] Q. Was the medical criteria that was set out in these restrictive agreements for Ness Motley the same medical criteria that you agreed to in Carlough?

A. Yes, I believe so.

Q. And you at least understood that they would not sue you in cases that didn't reach that criteria?

When I say "you," I mean CCR.

A. They agreed to comply with the original language we put forth in the original agreements.

Q. Did you have two separate sets of negotiations with Ness Motley, one for the criteria for their own inventory futures deal and one separate for Carlough?

Or did you negotiate the two together?

A. We never, never negotiated their [Tr. 417] present inventory at the same time as the Carlough negotiations.

Q. Let me show you something, and let's see if we can clarify this a little bit.

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(Deposition Exhibit 4 referenced.)

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MR. BARON: For the record, R-4 says it is a CCR Settlement Agreement, it's a four-page document, and it's signed 14 January, 1993.

BY MR. BARON:

Q. Have you seen that document before?

A. Yes.

Q. Is that your signature affixed to the back of it?

A. Yes.

Q. What was the purpose of that agreement, as you understood it?

A. This was a confirmation of an agreement to settle Ness Motley's pending cases in the State of South Carolina, and it also included an agreement on the payment terms, and it also included an agreement with respect to [Tr. 418] future cases.

Q. Now, is there a group of medical criteria set out in that agreement?

A. Yes, there is.

Q. Are those criteria identical to the criteria that were set out in Carlough?

MR. HANLON: Can we look at the material in Carlough?

MR. BARON: Sure.

BY MR. BARON:

Q. When I say the same, I mean essentially the same.

A. There are certain requirements in the Carlough action that are not part of this agreement, but I would characterize it as being substantially similar with respect to pulmonary function tests and things of that nature.

Q. Is that a coincidence that they are substantially similar?

A. No.

Q. Why not?

A. At the time we signed this agreement, we had an understanding with respect to the Carlough criteria.

* * * *

[Tr. 457] Q. Did you participate in the negotiations of these case flows?

A. Yes.

Q. Did class counsel ask for more than 15,000 claims the first year when they were negotiating with you?

A. I'm sure, like any negotiation, there were higher numbers discussed at some point than what we ultimately agreed to.

I'm sure we discussed lower numbers.

BY MR. BARON:

Q. Well, in the negotiations of these case flow numbers, did class counsel ever present you with data indicating that these numbers would not compensate enough people?

MR. LOCKS: Objection.

THE WITNESS: I don't recall any review of data.

BY MR. BARON:

Q. Mr. Rooney, while you've been at CCR, do you recall ever having settled a case that involved only medical monitoring?

A. Not to my recollection, no.

Q. Do you recall ever settling a [Tr. 458] case, since you've been at CCR, where the plaintiff agreed that he had not received any nature of an asbestos-related injury, but wanted money for emotional injury?

A. I'm not aware of any such claim being settled.

Q. Are you aware of Greitzer & Locks or Ness Motley ever asserting such claims in the past against CCR?

A. Such claims?

Q. As medical monitoring only, or emotional injury only?

A. I'm not aware of any such filings by class counsel, no.

Q. What physicians did CCR utilize, if any, in negotiating the medical criteria of this settlement?

A. I don't know which physicians our negotiators on the medical contacted.

Q. Did you participate in the negotiation of the medical criteria?

A. I did not participate in the negotiation of the criteria, no.

Q. Who did?

A. Primarily Mr. Beers and

* * * *

DEPOSITION OF ROBERT GEORGINE

* * * *

[Tr. 65] Q. Have you ever gone to a lawyer for your own personal reasons to file a claim for damages for yourself —

A. No.

Q. — for asbestos-related injury?

A. No.

Q. And why is that?

A. I haven't had a problem.

Q. Is that still true today? That you haven't had a problem?

A. Well, I don't — I breathe normal — I don't have any problems that I'm aware of.

That's not to say that one can't develop.

Q. Oh, I understand that.

A. Okay.

Q. And God forbid, I hope nothing ever does develop, but until you develop an asbestos-related problem, you have no intention of filing a lawsuit for damages, do you?

A. Other than the present — present case?

Q. Well, in the present case, do you believe that the asbestos companies owe you [Tr. 66] money? M-o-n-e-y.

A. Owe me personally?

Q. Yes.

A. I believe that if there was anything that happened to my lungs that was asbestos-related, that they would owe me money, yes.

Q. But as of today, nothing has happened to your lungs that's asbestos-related that you know of?

A. That letter tells me that there is nothing that shows.

Q. So as of today, you are not seeking money from the asbestos companies for yourself; is that right?

A. For myself, that's right.

Q. Mr. Georgine, if the doctor's report had come back telling you that you had damages to your lungs as a result of asbestos, would you then want to seek money damages from the asbestos companies for yourself?

A. As a member of this class.

Q. And if the doctor came back and told you that you had pleural plaques, for instance, would you want to seek money damages

* * * *

[Tr. 113] A. Yeah, I think so, if I thought that I was psychologically damaged.

Q. Do you believe that you are, sir?

A. No.

Q. You don't have —

A. Now, others may have a different opinion. I don't know about that.

Q. As you sit here today, you are not suffering any emotional distress because you might come down with an asbestos —

A. No, I am not. I am not.

Q. And you were not at the time you entered this lawsuit?

MR. McCONNELL: Brian, time is limited. That was the sixth time.

MR. WOLFMAN: That was the first time.

I said, as he sits here today, is he suffering any emotional distress. His answer was no. I began my next question, and you interrupted me.

BY MR. WOLFMAN:

Q. My next question is:

As of the time you entered the [Tr. 114] lawsuit, were you suffering any emotional distress on account of asbestos exposure?

A. No, I was not.

Q. Let me ask you a few questions about the process by which the AFL-CIO became involved in this suit.

How did the AFL-CIO, as an organization, go about making the public statement that it approved the proposed settlement in this case?

Let me back up.

Was there a meeting of the Executive Council concerning this settlement, to your knowledge?

A. Concerning this settlement?

Q. Yes.

A. No.

Q. How many of the AFL-CIO affiliates sit on the Executive Council?

A. 33.

Q. Do you sit on the Executive Council, sir?

A. I do.

Q. So to your knowledge, the settlement in this cases was never brought to

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. No. 93-0215

GEORGINE, et al.,

Plaintiffs,

v.

AMCHEM PRODUCTS, INC., et al.,

Defendants and
Third Party Plaintiffs,

v.

ADMIRAL INSURANCE COMPANY, et al.,

Third Party Defendants.

ORDER

AND NOW, this 2nd day of February, 1994, in accordance with this Court's Order of January 29, 1993 appointing Professor Stephen Burbank as Special Master pursuant to Fed. R. Civ. P. 53 and the Court's inherent power, to assist the Court in its consideration of the proposed settlement submitted by the parties, Special Master Burbank having received and reviewed sensitive, confidential and privileged data from the settling parties, it is hereby ORDERED that the Clerk of the Court shall docket and file of record the attached reports of Special Master Burbank on the inventory settlements of class counsel in Pennsylvania and South Carolina and shall distribute copies of the reports to all counsel of record.

/s/ CHARLES R. WEINER, J.

Report of the Special Master on Inventory Settlements I: South Carolina

I. INTRODUCTION

I have been asked as Special Master to analyze confidential information for the purpose of assisting the Court in evaluating the so-called inventory settlements reached by class counsel with the Center for Claims Resolution in 1993. Specifically, I have been asked to compare the inventory settlements with the settlements reached by class counsel and CCR during the period 1988-92.

As a representative sample of the inventory settlements, I chose the agreements covering the home states of the Ness, Motley and Greitzer & Locks firms, South Carolina and Pennsylvania respectively. In addition, I asked Mr. Baron and Mr. Pyle, counsel for certain objectors, to designate two additional jurisdictions. They chose Illinois for Ness, Motley and New Jersey for Greitzer & Locks.

In this report, I discuss the work performed, and the conclusions reached, with respect to settlements between Ness, Motley and CCR in South Carolina. In a separate report of this date, I discuss settlements between Greitzer & Locks and CCR in Pennsylvania. Reports on the Illinois and New Jersey settlements will be prepared and submitted separately.

II. CONCLUSION

The conclusion of my analysis and comparison of the settlement data for South Carolina involving Ness, Motley and CCR is that the inventory settlement averages were lower than the Ness, Motley/CCR historical settlement averages in three categories (Mesothelioma (living), Lung Cancer, and Non-Malignant) and higher in one category (Mesothelioma (deceased)). In the remainder of this report I describe how I arrived at historical settlement averages and provide more detail concerning the results of comparing the historical averages with the inventory averages.

III. DISCUSSION

I received from Ness, Motley and from CCR historical data on settlements between Ness, Motley and CCR in South Carolina during the period 1988-92. The lists provided each included 160

cases and were broken down into four disease categories (Mesothelioma, Lung Cancer, Other Cancer, and Non-Malignant). The lists also included the amount attributed to the settlement of each case by the providing entity, as well as total amounts and cases by category. Moreover, the CCR data permitted me to break down Mesothelioma cases into deceased and living categories, which was necessary because of the structure of the South Carolina inventory settlement.

I compared the lists provided to determine (1) discrepancies as to cases listed, (2) discrepancies as to disease categories, and (3) discrepancies as to amounts. I determined that 147 cases were included under the same disease categories in both lists. An additional 8 cases were included in both but under different disease categories. 10 cases appeared on only one list, 5 cases on each list. I also determined that the difference in total dollars attributed to all settlements on the lists provided was 1.28% of the highest total so attributed by either providing entity.

I initiated inquiries by telephone to Mr. Rice of Ness, Motley and Mr. Hanlon, representing CCR, asking each to verify the cases he had listed but that were not included on the other's list and to determine why cases listed by the other were not included on his list. I also asked each of them to verify the disease categories of the 8 cases differently listed by Ness, Motley and CCR. These inquiries revealed that 5 cases listed by Ness, Motley had been excluded from CCR's data as atypical (because of significantly less claimant exposure to CCR products than the overall exposure mix or because deemed a "no pay" settlement), while 2 cases listed by CCR had been excluded by Ness, Motley as atypical (because of inability to establish product identity or a prior settlement with another defendant). In addition, Ness, Motley had erroneously failed to include 2 cases included by CCR, while CCR had erroneously included 1 case which, upon further inquiry, turned out to be a settlement by another defendant.

At the end of this process of reconciliation, the lists included 149 cases under the same disease categories. The difference in total dollars attributed to these settlements was .36% (one third of one percent) of the highest total so attributed by either of the providing entities. I compared the 149 cases, by category, in order to calculate historical averages. I first totaled the amounts

attributed by each providing entity to cases in a disease category and calculated the dollar and percentage differences (as a percentage of the highest total amount). The dollar differences were a net figure of individual case differences going both ways, and the percentage differences also went both ways, depending on disease category. Those calculations yielded the following percentage differences: (1) Mesothelioma (deceased) - 5.9%; Mesothelioma (living) - 4.7%; (2) Lung Cancer - 1.9%, and (3) Non-Malignant - 5.6%. There was only 1 case listed as "Other Cancer" by a providing entity, and it was included under a different disease category on the other list

Responses to my inquiries to counsel and my experience as a result of serving as a special master in MDL 875 suggest that these differences in settlement dollars attributed to the same cases are due primarily to varying practices in the allocation of group settlements.

Because Ness, Motley and CCR attributed different total dollars, and hence different averages, to disease categories in the reconciled historical data, it was necessary to devise a method for imputing a single historical average to each disease category. For the purpose of computing such historical averages to compare to the averages under the South Carolina inventory settlement agreement between Ness, Motley and CCR, I used an amount reflecting one half the difference in the total amounts allocated to the cases in a disease category. Thus, for example, if Ness, Motley attributed $1,000 to the 10 cases in a disease category and CCR attributed $1,400 to the same 10 cases, the average ($120) would be based on $1200, the midpoint between $1400 and $1000.

Proceeding in this way, I then calculated the dollar and percentage differences (as a percentage of the highest average) between the Ness, Motley/CCR South Carolina historical averages and the averages used in the South Carolina inventory settlement agreement. The percentage differences are indicated below, with a notation whether the inventory average is lower or higher than the historical average:

(1a) Mesothelioma (deceased): 6.1% higher
(1b) Mesothelioma (living): 3.6% lower
(2) Lung Cancer: 3.4% lower
(3) Non-Malignant: 3.5% lower

There is no percentage difference between the inventory average for "Other Cancer" cases and the amount attributed to the only case so classified by one of the providing entities in the historical data.

It should be noted that Mesothelioma cases, the overall number of which is not broken down in the South Carolina inventory settlement agreement, represent 6.8% of the total cases covered by that agreement. Lung Cancer cases account for 14.2%, Other Cancer cases for .8%, and Non-Malignant cases for 78%.

Finally, both Ness, Motley and CCR have provided me with accounts of the reasons for differences between their South Carolina historical averages, as they perceive them, and the averages agreed to in the inventory settlement agreement. I do not believe, however, that there is need to summarize their accounts in this report.

February 1, 1994

/s/ STEPHEN B. BURBANK
Special Master

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Report of the Special Master on
Inventory Settlements II: Pennsylvania

I. INTRODUCTION

I have been asked as Special Master to analyze confidential information for the purpose of assisting the Court in evaluating the so-called inventory settlements reached by class counsel with the Center for Claims Resolution in 1993. Specifically, I have been asked to compare the inventory settlements with the settlements reached by class counsel and CCR during the period 1988-92.

As a representative sample of the inventory settlements, I chose the agreements covering the home states of the Ness, Motley and Greitzer & Locks firms, South Carolina and Pennsylvania respectively. In addition, I asked Mr. Baron and Mr. Pyle, counsel for certain objectors, to designate two additional jurisdictions. They chose Illinois for Ness, Motley and New Jersey for Greitzer & Locks.

In this report, I discuss the work performed, and the conclusions reached, with respect to settlements between Greitzer

& Locks and CCR in Pennsylvania. In a separate report of this date, I discuss settlements between Ness, Motley and CCR in South Carolina. Reports on the Illinois and New Jersey settlements will be prepared and submitted separately.

II. CONCLUSION

The conclusion of my analysis and comparison of the settlement data for Pennsylvania involving Greitzer & Locks and CCR is that the inventory settlement averages were lower than the Greitzer & Locks/CCR historical settlement averages in all four categories (Mesothelioma, Lung Cancer, Other Cancer and Non-Malignant). In the remainder of this report I describe how I arrived at historical settlement averages and provide more detail concerning the results of comparing the historical averages with the inventory averages.

III. DISCUSSION

I received from Greitzer & Locks and from CCR historical data on settlements between Greitzer & Locks and CCR in Pennsylvania during the period 1988-92. One of the lists provided included 1740 cases and the other 1716 cases. Both were broken down into four disease categories (Mesothelioma, Lung Cancer, Other Cancer, and Non-Malignant). The lists also included the amount attributed to the settlement of each case by the providing entity, as well as total amounts and cases by category.

I compared the lists provided to determine (1) discrepancies as to cases listed, (2) discrepancies as to disease categories, and (3) discrepancies as to amounts. I determined that 1703 cases were included under the same disease categories in both lists. One list included 37 cases not found on the other, which in turn included 13 cases not found on the first. 49 of the 50 cases not common to both lists were classified an Non-Malignant. I also determined that the difference in total dollars attributed to all settlements on the lists provided was 2.2% of the highest total so attributed by either providing entity.

I initiated inquiries by telephone to Mr. Locks of Greitzer & Locks, and Mr. Hanlon, representing CCR, asking each to verify the cases he had listed but that were not included on the other's list and to determine why cases listed by the other were not included on his list.

These inquiries revealed that Greitzer and Locks had erroneously listed 6 cases that were settled in a different time period and had erroneously failed to include 11 cases that they had in fact settled with CCR during the relevant time period. Greitzer & Locks could find no record of 1 case listed by CCR. In addition, CCR had erroneously listed 1 case that was settled with other counsel and had erroneously failed to include 4 cases because the initial attribution to other counsel was incorrect. It was also determined that 21 cases listed by Greiter & Locks had been excluded from CCR's data as "no pay" settlements or because settled in the wrong time period and that CCR could find no record of 6 cases. Finally in this aspect, as a result of researching my inquiries, Greitzer & Locks revised the amounts attributed to 3 cases (a total net decrease of $2500)

At the end of this process of reconciliation, the lists included 1718 cases under the same disease categories. The difference in total dollars attributed to these settlements was 3.0% of the highest total so attributed by either of the providing entities. I compared the 1718 cases, by category, in order to calculate historical averages. I first totaled the amounts attributed by each providing entity to cases in a disease category and calculated the dollar and percentage differences (as a percentage of the highest total amount). The dollar differences were a net figure of individual case differences going both ways, and the percentage differences also went both ways, depending on disease category. Those calculations yielded the following percentage differences: (1) Mesothelioma - 5.0%; (2) Lung Cancer - 2.4%, (3) Other Cancer - 11.5%, (4) Non-Malignant - 5.9%.

Responses to my inquiries to counsel and my experience as a result of serving as a special master in MDL 875 suggest that these differences in settlement dollars attributed to the same cases are due primarily to varying practices in the allocation of group settlements.

Because Greitzer & Locks and CCR attributed different total dollars, and hence different averages, to disease categories in the reconciled historical data, it was necessary to devise a method for imputing a single historical average to each disease category. For the purpose of computing such historical averages to compare to the averages under the Pennsylvania inventory settlement agreement between Greitzer & Locks and CCR, I used an amount reflecting

one half the difference in the total amounts allocated to the cases in a disease category. Thus, for example, if Greitzer & Locks attributed $1,000 to the 10 cases in a disease category and CCR attributed $1,400 to the same 10 cases, the average ($120) would be based on $1200, the midpoint between $1400 and $1000.

Proceeding in this way, I then calculated the dollar and percentage differences (as a percentage of the highest average) between the Greitzer & Locks/CCR Pennsylvania historical averages and the averages used in the Pennsylvania inventory settlement agreement. The percentage differences are indicated below, with a notation whether the inventory average is lower or higher than the historical average:

(1) Mesothelioma: 12.3% lower
(2) Lung Cancer: 12.8% lower
(3) Other Cancers: 12.0% lower
(4) Non-Malignant: 14.2% lower

Finally, both Greitzer & Locks and CCR have provided me with accounts of the reasons for differences between their Pennsylvania historical averages, as they perceive them, and the averages agreed to in the inventory settlement agreement. I do not believe, however, that there is need to summarize their accounts in this report.

February 1, 1994

/s/ STEPHEN B. BURBANK
Special Master

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT OF STEVEN KAZAN IN SUPPORT OF REPLY BRIEF ON MOTION TO CERTIFY CALIFORNIA MESOTHELIOMA OPT OUT CLASS

I, Steven Kazan, declare:

1. I am an attorney in good standing, admitted to practice law in the States of New York and California. I represent moving parties Betty Francom, Aileen Cargile and John Wong.

I have personal knowledge of the facts set forth in this affidavit and, if called as a witness, am competent to testify to those facts.

2. I am the Senior Partner and President of Kazan, McClain, Edises & Simon, a Professional Law Corporation, in Oakland, California. For nearly twenty years, the firm has represented plaintiffs in cases involving catastrophic injury, including asbestos disease litigation, environmental and occupational exposures, defective products, and other personal injuries.

3. My firm never files asbestos personal injury claims in federal court. There is no theory of federal jurisdiction, and there rarely exists diversity jurisdiction because local California-based manufacturers or distributors of asbestos products are often named as defendants. Based on my experience with the plaintiffs' asbestos bar and as a Board Member of California Trial Lawyers Association, it is my belief that all other California attorneys practicing in the area of asbestos personal injury also file cases primarily in state court. Indeed, since the Asbestos Multi-District Litigation process began in 1991, my opinion is that it would be legal malpractice to file an asbestos personal injury claim in federal

court if there was any good-faith basis for alleging state court jurisdiction.

4. Occasionally, defendants have attempted to remove my firm's cases to federal court. In virtually all such cases, the federal courts have immediately remanded those cases to state court.

5. CCR conducted an analysis of their settlement history, which focused on settlements that were for amounts in excess of the maximum value for such claims if treated as Non-Extraordinary Claims under the CCR Settlement. CCR 2000281. For all high value mesothelioma claims, the national average was $359,715 as contrasted with the $200,000 maximum allowed under the Settlement. *Id.* 15% of these high value claims were from California and the statewide average for these claims was $419,674, the highest average for any state. *Id.* Notably, the California average was over 209% above the maximum allowable recovery for Non-Extraordinary claims. As further described below, the Extraordinary Claim process, which will allow for certain mesothelioma claims to be settled at an average of $300,000, cannot handle even 25% of predicted California mesothelioma claims.

6. Based on CCR's historical settlement data, we can predict that approximately 12% of all mesothelioma claims will originate in California. (422 claims out of a total of 3566, settled between October 1988 and January 1993). CCR 2000306 - 307. Applying this percentage to the allowable mesothelioma case flow in the first year of the settlement (700), we can estimate a quota of only 84 mesothelioma claims for California. Stipulation at Exhibit A. Given that only 3% of mesothelioma claims may be found to be "Extraordinary Claims" under the Settlement, or 21 claims annually, only one of every four California claims may be found qualified for "Extraordinary" status and eligible for compensation in excess of $200,000. This, of course, assumes that no cases from other than California will be designated "Extraordinary," which is not realistic nor would it be fair. Based on historical compensation levels in California for mesothelioma claims, the CCR Settlement will not adequately compensate the California mesothelioma class.

7. CCR's settlement history data demonstrates that only 3.7% of all mesothelioma claims have been settled for zero dollars.

(137 zero dollar dispositions of 3703 total mesothelioma case dispositions). CCR 2000308.

8. Attached hereto as Exhibit A is a true and correct copy of the opinion in *Coughlin v. Owens-Illinois*, 94 C.D.O.S. 82 (Dec. 29, 1993).

9. Attached hereto as Exhibit B is a true and correct copy of the confidential documents produced by the CCR which are referenced in this affidavit as well as the Reply Brief In Support Of Motion To Certify California Mesothelioma Class.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 4th day of February, 1994 at Oakland, California.

/s/ STEVEN KAZAN

[Jurat Omitted]

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT
SUMMARY OF CCR CLOSED CLAIMS THROUGH 1991 THAT EXCEED THE PROPOSED MAXIMUM VALUE FOR NON-EXTRAORDINARY/QUALIFYING CLAIMS BY STATE AND DISEASE

	DISEASE														
	1. MESOTHELIOMA			2. LUNG CANCER			3. OTHER CANCER			4. NON-MALIGNANT			TOTAL		
STATE	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG
AL	–	–	–	–	–	–	–	–	–	2	130,580	65,290	2	130,580	65,290
AR	–	–	–	–	–	–	–	–	–	2	65,024	32,512	2	65,024	32,512
CALA	4	1,975,000	493,750	–	–	–	1	52,733	52,733	8	472,783	59,098	13	2,500,515	192,347
CASF	14	5,579,136	398,510	10	1,455,407	145,541	–	–	–	49	2,392,677	48,830	73	9,427,220	129,140
CO	2	462,000	231,000	–	–	–	–	–	–	–	–	–	2	462,000	231,000
CT	1	476,712	476,712	–	–	–	–	–	–	5	215,247	43,049	6	691,958	115,326
DC	1	345,000	345,000	1	106,791	106,791	–	–	–	5	172,916	34,583	7	624,707	89,244
DE	–	–	–	1	100,000	100,000	–	–	–	5	179,616	35,923	6	279,616	46,603
FL	4	1,223,108	305,777	8	899,522	112,440	3	106,972	35,657	19	779,464	41,024	34	3,009,066	88,502
GA	2	645,600	322,800	1	141,960	141,960	–	–	–	7	338,172	48,310	10	1,125,732	112,573
HI	–	–	–	1	157,168	157,168	–	–	–	–	–	–	1	157,168	157,168
IA	–	–	–	–	–	–	–	–	–	2	72,500	36,250	2	72,500	36,250
IL	1	521,100	521,100	1	90,320	90,320	–	–	–	–	–	–	2	611,420	305,710
IN	–	–	–	–	–	–	1	38,750	38,750	–	–	–	1	38,750	38,750
KS	–	–	–	–	–	–	–	–	–	1	275,000	275,000	1	275,000	275,000

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT
SUMMARY OF CCR CLOSED CLAIMS THROUGH 1991 THAT EXCEED THE PROPOSED MAXIMUM VALUE FOR NON-EXTRAORDINARY/QUALIFYING CLAIMS BY STATE AND DISEASE

	DISEASE														
	1. MESOTHELIOMA			2. LUNG CANCER			3. OTHER CANCER			4. NON-MALIGNANT			TOTAL		
	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG
KY	1	370,000	370,000	—	—	—	—	—	—	1	35,000	35,000	2	405,000	202,500
LA	—	—	—	—	—	—	—	—	—	8	566,476	70,810	8	566,476	70,810
MA	—	—	—	—	—	—	—	—	—	1	34,163	34,163	1	34,163	34,163
MD	3	1,284,297	428,099	33	4,391,624	133,080	1	36,500	36,500	47	2,505,640	53,311	84	8,218,061	97,834
MI	5	1,394,750	278,950	—	—	—	—	—	—	21	798,313	38,015	26	2,193,063	84,349
MN	5	2,241,780	448,356	2	236,250	118,125	2	86,250	43,125	28	2,948,640	105,309	37	5,512,920	148,998
MO	2	700,000	350,000	1	202,800	202,800	—	—	—	7	296,903	42,415	10	1,199,703	119,970
MS	—	—	—	—	—	—	—	—	—	1	42,500	42,500	1	42,500	42,500
NC	1	339,276	339,276	—	—	—	—	—	—	4	149,900	37,475	5	489,176	97,935
NH	—	—	—	—	—	—	—	—	—	1	96,783	96,783	1	96,783	96,783
NJ	13	3,357,768	258,290	3	290,000	96,667	1	35,000	35,000	37	1,485,673	40,153	54	5,168,441	95,712
NY	20	8,138,982	406,949	39	5,961,133	152,850	19	750,000	39,474	110	6,688,536	60,805	188	21,538,651	114,567
OH	1	347,400	347,400	5	610,477	122,095	2	115,000	57,500	29	1,577,971	54,413	37	2,650,848	71,645
OK	1	577,922	577,922	—	—	—	—	—	—	1	34,740	34,740	2	612,662	306,331
OR	1	465,000	465,000	—	—	—	—	—	—	—	—	—	1	465,000	465,000
PAE	6	1,795,814	299,302	14	1,681,461	120,104	6	254,546	42,424	265	11,059,812	41,735	291	14,791,633	50,830

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT
SUMMARY OF CCR CLOSED CLAIMS THROUGH 1991 THAT EXCEED THE PROPOSED MAXIMUM VALUE FOR NON-EXTRAORDINARY/QUALIFYING CLAIMS BY STATE AND DISEASE

	DISEASE														
	1. MESOTHELIOMA			2. LUNG CANCER			3. OTHER CANCER			4. NON-MALIGNANT			TOTAL		
	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG
PAW	1	200,000	200,000	3	345,000	115,000	1	50,000	50,000	22	897,641	40,802	27	1,492,641	55,283
SC	—	—	—	2	218,085	109,042	—	—	—	8	288,396	36,049	10	506,480	50,648
SD	1	356,085	356,085	—	—	—	—	—	—	—	—	—	1	356,085	356,085
TN	—	—	—	1	86,850	86,850	1	65,900	65,900	4	185,083	46,271	6	337,833	56,305
TX	24	8,472,023	353,001	9	1,266,458	140,718	2	101,000	50,500	101	5,038,641	49,888	136	14,878,122	109,398
VA	3	982,500	327,500	—	—	—	—	—	—	14	732,356	52,311	17	1,714,856	100,874
VI	—	—	—	—	—	—	—	—	—	1	131,800	131,800	1	131,800	131,800
WA	1	364,870	364,870	1	91,881	91,881	—	—	—	—	—	—	2	456,751	228,375
WI	1	190,000	190,000	—	—		—	—	—	—	—	—	1	190,000	190,000
WV	—	—	—	1	225,000	225,000	—	—	—	4	167,015	41,754	5	392,015	78,403
ALL	119	42,806,122	359,715	137	18,558,185	135,461	40	1,692,651	42,316	820	40,855,957	49,824	1,116	103,912,914	93,112

* * * *

CENTER FOR CLAIMS RESOLUTION
ALL DISPOSITIONS
10/3/88 (INCEPTIONS) - 1/15/93

	MESOTHELIOMA			
	Without Zero Dollar Dispositions		With Zero Dollar Dispositions	
	#	AVG	#	AVG
OVERALL MEAN	3,566	$68,657	3,703	$66,117
MEAN EXCLUDING TOP 3%	3,530	$62,915	3,666	$60,459
MEAN EXCLUDING TOP 5%/BOTTOM 5%	3,210	$56,322	3,333	$54,046
MEAN EXCLUDING CLAIMS SETTLED WITHIN TEN DAYS OF TRIAL & POST VERDICTS	2,543	$54,760	2,652	$52,510
MEAN EXCLUDING GREITZER & LOCKS AND NESS, MOTLEY INVENTORY SETTLEMENTS; AND MD, NY POWERHOUSE, & BRKLYN NAVAL SHIPYARD CONSOLIDATIONS	3,153	$62,392	3,289	$59,812

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT OF LARRY SARTIN

I, Larry Sartin, declare as follows:

1. I am an International Representative for the Oil, Chemical and Atomic Workers International Union (OCAWIU).

2. I am the Coordinator of the O.C.A.W.I.U. Occupational Disease Screening Program. In that capacity, I arrange for asbestos screenings for OCAWIU members and retirees. Any legal case that arises from those screenings is referred to local counsel.

3. One of my regular duties is to keep records of the settlements/judgements obtained for each case referred to local counsel.

4. I have reviewed all of the records of the OCAWIU cases that have been settled with the CCR defendants as of January 3, 1994, with the exception of those referred to in paragraph 5 below. Those records reflect the following:

WEST VIRGINIA	
74 Pleural cases	$10,000.00 per case
58 Asbestosis cases	$10,000.00 per case
VIRGINIA	
33 Pleural cases	$15,000.00 per case
3 Asbestosis cases	$20,000.00 per case
2 Lung Cancer cases	$50,000.00 per case
1 Lung Cancer case	$30,000.00
OHIO	
2 Pleural cases	$2,000.00 per case
1 Asbestosis case	$2,000.00

KENTUCKY	
1 Pleural case	$ 6,500.00
16 Asbestosis cases	$15,000.00 per case
Other Cancers	$25,000.00 per case*
Lung Cancer	$50,000.00 per case*
Mesothelioma	$90,000.00 per case*
CALIFORNIA	
1 Lung Cancer	$125,000.00

*The specific number of cases are not yet available; however, the per case amount has been agreed upon.

5. I have been informed that settlements were reached recently in all CCR/OCAW cases, which number approximately 1000. However, the precise number of cases and settlement amounts have not yet been provided to me.

Further affiant sayeth not.

/s/ LARRY SARTIN

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 93-0215

ROBERT A. GEORGINE, et al., PLAINTIFFS,

v.

AMCHEM PRODUCTS, INC., et al., DEFENDANTS and
THIRD PARTY PLAINTIFFS,

v.

ADMIRAL INSURANCE COMPANY, et al.,
THIRD PARTY DEFENDANTS.

ORDER

AND NOW, this 14th day of February, 1994, in accordance with this Court's Order of January 29, 1993 appointing Professor Stephen Burbank as Special Master pursuant to Fed. R. Civ. P. 53 and the Court's inherent power, to assist the Court in its consideration of the proposed settlement submitted by the parties, Special Master Burbank having received and reviewed sensitive, confidential and privileged data from the settling parties, it is hereby ORDERED that the Clerk of the Court shall docket and file of record the attached reports of Special Master Burbank on the inventory settlements of class counsel in Illinois and shall distribute copies of the reports to all counsel of record.

/s/ LOWELL A. REED, JR., J.

REPORT OF THE SPECIAL MASTER ON INVENTORY SETTLEMENTS IIIA: ILLINOIS (LAKIN)

I. INTRODUCTION

I have been asked as Special Master to analyze confidential information for the purpose of assisting the Court in evaluating the so-called inventory settlements reached by class counsel with the Center for Claims Resolution in 1993. Specifically, I have been asked to compare the inventory settlements with the settlements reached by class counsel and CCR during the period 1988-92.

As a representative sample of the inventory settlements, I chose the agreements covering the home states of the Ness, Motley and Greitzer & Locks firms, South Carolina and Pennsylvania respectively. In addition, I asked Mr. Baron and Mr. Pyle, counsel for certain objectors, to designate two additional jurisdictions. They chose Illinois for Ness, Motley and New Jersey for Greitzer & Locks.

In this report, I discuss the work performed, and the conclusions reached, with respect to settlements between Ness, Motley/the Lakin firm (hereinafter Ness, Motley) and CCR in Illinois. In a separate report of this date, I discuss settlements between Ness, Motley/the Bono firm and CCR in Illinois. Reports on the South Carolina and Pennsylvania settlements were submitted on February 1, 1994. A report on the New Jersey settlements will be submitted next week.

II. CONCLUSION

The conclusion of my analysis and comparison of the settlement data for Illinois (Lakin) involving Ness, Motley and CCR is that the inventory settlement averages were lower than the Ness, Motley/CCR historical settlement averages in three categories (Lung Cancer, Other Cancer, and Non-Malignant) and higher in one category (Mesothelioma). In the remainder of this report I describe how I arrived at historical settlement averages and provide more detail concerning the results of comparing the historical averages with the inventory averages.

III. DISCUSSION

I received from Ness, Motley and from CCR historical data on settlements between Ness, Motley and CCR in Illinois during the

period 1988-92. One of the lists provided included 195 cases and the other 121 cases. Both were broken down into four disease categories (Mesothelioma, Lung Cancer, Other Cancer, and Non-Malignant). The lists also included the amount attributed to the settlement of each case by the providing entity, as well as total amounts and cases by category. Ness, Motley's data included two lists for Non-Malignant cases, one including and one excluding 30 cases that were settled by the Lakin firm before Ness, Motley became affiliated counsel. I used the list excluding those cases, but toward the end of this report I show what their impact would have been on the comparison of historical and inventory averages if included.

I compared the lists provided to determine (1) discrepancies as to cases listed, (2) discrepancies as to disease categories, and (3) discrepancies as to amounts. I determined that 107 cases were included under the same disease categories in both lists. An additional 3 cases were included in both but under different disease categories. One list included 85 cases not found on the other, which in turn included 11 cases not found on the first. 94 of 96 cases not common to both lists were classified as Non-Malignant. I also determined that the difference in total dollars attributed to all settlements on the lists provided was 22.7% of the highest total so attributed by either providing entity.

I initiated inquiries by telephone to Mr. Rice of Ness, Motley and Mr. Hanlon, representing CCR, asking each to verify the cases he had listed but that were not included on the other's list and to determine why cases listed by the other were not included on his list. I also asked each of them to verify the disease categories of the 3 cases differently listed by Ness, Motley and CCR.

These inquiries revealed that 10 cases listed by Ness, Motley had been excluded from CCR's data as settled by other counsel, while 31 cases listed by CCR had been excluded by Ness, Motley as settled by other counsel (30 of which appeared on the additional list provided by Ness, Motley). In addition, Ness, Motley had erroneously included 1 case settled in the wrong time period, while CCR had erroneously included 54 cases that, upon further inquiry, turned out to be settlements with another law firm (Bono).

At the end of this process of reconciliation, the lists included 107 cases under the same disease categories. The difference in total dollars attributed to these settlements was 1.74% of the highest total so attributed by either of the providing entities. I compared the 107 cases, by category, in order to calculate historical averages. I first totaled the amounts attributed by each providing entity to cases in a disease category and calculated the dollar and percentage differences (as a percentage of the highest total amount). The dollar differences were a net figure of individual case differences going both ways, and the percentage differences also went both ways, depending on disease category. Those calculations yielded the following percentage differences: (1) Mesothelioma - 0% (i.e., no difference in total dollars); (2) Lung Cancer - 12.7%; and (3) Other Cancer - 13%; and (4) Non-Malignant - 2.5%.

Responses to my inquiries to counsel and my experience as a result of serving as a special master in MDL 875 suggest that these differences in settlement dollars attributed to the same cases are due primarily to varying practices in the allocation of group settlements.

Because Ness, Motley and CCR attributed different total dollars, and hence different averages, to most disease categories in the reconciled historical data, it was necessary to devise a method for imputing a single historical average to each disease category. For the purpose of computing such historical averages to compare to the averages under the Illinois (Lakin) inventory settlement agreement, I used an amount reflecting one half the difference in the total amounts allocated to the cases in a disease category. Thus, for example, if Ness, Motley attributed $1,000 to the 10 cases in a disease category and CCR attributed $1,400 to the same 10 cases, the average ($120) would be based on $1,200, the midpoint between $1,400 and $1,000.

Proceeding in this way, I then calculated the dollar and percentage differences (as a percentage of the highest average) between the Ness, Motley/CCR Illinois historical averages and the averages used in the Illinois (Lakin) inventory settlement agreement. I performed the same calculations including the 30 (Non-Malignant) cases reported on a separate list by Ness, Motley in a recalculated historical average. The percentage differences are indicated below, with a notation whether the inventory average is lower or higher than the historical average. The percentage in

brackets reflects calculations including the 30 additional Non-Malignant cases:

(1) Mesothelioma: 3.3% higher

(2) Lung Cancer: 27.1% lower

(3) Other Cancer: 66.2% lower

(4) Non-Malignant: 11.8% lower [2.7% higher]

It should be noted that Mesothelioma cases represent 3% of the total cases covered by the Illinois (Lakin) inventory settlement agreement. Lung Cancer cases account for 7.3%, Other Cancer cases for 5.4%, and Non-Malignant cases for 84.3%.

Finally, both Ness, Motley and CCR have provided me with accounts of the reasons for differences between their Illinois (Lakin) historical averages, as they perceive them, and the averages agreed to in the inventory settlement agreement. I do not believe, however, that there is need to summarize their accounts in this report.

/s/ STEPHEN B. BURBANK
Special Master

February 11, 1994

* * * *

REPORT OF THE SPECIAL MASTER ON INVENTORY SETTLEMENTS IIIB: ILLINOIS (BONO)

I. INTRODUCTION

I have been asked as Special Master to analyze confidential information for the purpose of assisting the Court in evaluating the so-called inventory settlements reached by class counsel with the Center for Claims Resolution in 1993. Specifically, I have been asked to compare the inventory settlements with the settlements reached by class counsel and CCR during the period 1988-92.

As a representative sample of the inventory settlements, I chose the agreements covering the home states of the Ness, Motley and Greitzer & Locks firms, South Carolina and Pennsylvania respectively. In addition, I asked Mr. Baron and Mr. Pyle, counsel for certain objectors, to designate two additional jurisdictions.

They chose Illinois for Ness, Motley and New Jersey for Greitzer & Locks.

In this report, I discuss the work performed, and the conclusions reached, with respect to settlements between Ness, Motley/the Bono firm (hereinafter Ness, Motley) and CCR in Illinois. In a separate report of this date, I discuss settlements between Ness, Motley/the Lakin firm and CCR in Illinois. Reports on the South Carolina and Pennsylvania settlements were submitted on February 1, 1994. A report on the New Jersey settlements will be submitted next week.

II. CONCLUSION

The conclusion of my analysis and comparison of the settlement data for Illinois (Bono) involving Ness, Motley and CCR is that the inventory settlement averages were higher than the Ness, Motley/CCR historical settlement averages in two categories (Mesothelioma and Non-Malignant) and lower in one category (Cancer). In the remainder of this report I describe how I arrived at historical settlement averages and provide more detail concerning the results of comparing the historical averages with the inventory averages.

III. DISCUSSION

I received from Ness, Motley and from CCR historical data on settlements between Ness, Motley and CCR in Illinois during the period 1988-92. One of the lists provided included 403 cases and the other 335 cases. One was broken down into four disease categories (Mesothelioma, Lung Cancer, Other Cancer, and Non-Malignant) and the other into three categories (Mesothelioma, Cancer, and Non-Malignant). Because the inventory settlement agreement employs only three disease categories, I combined Lung Cancer cases and Other Cancer cases for the providing entity making that distinction. The lists also included the amount attributed to the settlement of each case by the providing entity, as well as total amounts and cases by category. The Ness, Motley list separately listed amounts paid by GAF before it became a member of CCR, because that was deemed relevant by Ness, Motley in the negotiation of the inventory settlement agreement. I did not include GAF dollars in my calculations, but I show what their impact

would have been on the comparison of historical and inventory averages if included.

I compared the lists provided to determine (1) discrepancies as to cases listed, (2) discrepancies as to disease categories, and (3) discrepancies as to amounts. I determined that 328 cases were included under the same disease categories in both lists. One list included 68 cases not found on the other, which in turn included 0 cases not found on the first. 64 of the 68 cases not common to both lists were classified as Non-Malignant. I also determined that the difference in total dollars attributed to all settlements on the lists provided was 14.3% of the highest total so attributed by either providing entity.

I initiated inquiries by telephone to Mr. Rice of Ness, Motley, and Mr. Hanlon, representing CCR, asking each to verify the cases he had listed but that were not included on the other's list and to determine why cases listed by the other were not included on his list. I also asked each of them to verify the disease categories of the 5 cases differently listed by Ness, Motley and CCR.

These inquiries revealed that CCR had erroneously failed to include 58 cases because the initial attribution to other counsel was incorrect and had erroneously classified 2 cases by disease category, while Ness, Motley had erroneously classified 1 case by disease category. It was also determined that 10 cases listed by Ness, Motley had been excluded from CCR's data as "no pay" settlements. Finally in this aspect, 1 case erroneously excluded by CCR was initially, and it remained after my inquiries, differently classified by disease category.

At the end of this process of reconciliation, the lists included 388 cases under the same disease categories. The difference in total dollars attributed to these settlements was 2.6% of the highest total so attributed by either of the providing entities. I compared the 388 cases, by category, in order to calculate historical averages. I first totaled the amounts attributed by each providing entity to cases in a disease category and calculated the dollar and percentage differences (as a percentage of the highest total amount). The dollar differences were a net figure of individual case differences going both ways, and the percentage differences also went both ways, depending on disease category. Those calculations yielded

the following percentage differences: (1) Mesothelioma - 16.6%; (2) Cancer 24.4%; (3) Non-Malignant - 13.6%.

Responses to my inquiries to counsel and my experience as a result of serving as a special master in MDL 875 suggest that these differences in settlement dollars attributed to the same cases are due primarily to varying practices in the allocation of group settlements.

Because Ness, Motley and CCR attributed different total dollars, and hence different averages, to disease categories in the reconciled historical data, it was necessary to devise a method for imputing a single historical average to each disease category. For the purpose of computing such historical averages to compare to the averages under the Illinois (Bono) inventory settlement agreement, I used an amount reflecting one half the difference in the total amounts allocated to the cases in a disease category. Thus, for example, if Ness, Motley attributed $1,000 to the 10 cases in a disease category and CCR attributed $1,400 to the same 10 cases, the average ($120) would be based on $1,200, the midpoint between $1,400 and $1,000.

Proceeding in this way, I then calculated the dollar and percentage differences (as a percentage of the highest average) between the Ness, Motley/CCR Illinois historical averages and the averages used in the Illinois (Bono) inventory settlement agreement. I performed the same calculations including the GAF settlement dollars reported by Ness, Motley in recalculated historical averages. The percentage differences are indicated below, with a notation whether the inventory average is lower or higher than the historical average. The percentages in brackets reflect calculations that include the GAF dollars:

(1) Mesothelioma: 8% [7.4%] higher

(2) Cancer: 5.3% [6.5%] lower

(3) Non-Malignant: 18.3% [10.9%] higher

It should be noted that Mesothelioma cases represent 1.1% of the total cases covered by the Illinois (Bono) inventory settlement agreement. Cancer cases account for 7.1%, and Non-Malignant cases for 91.8%.

Finally, both Ness, Motley and CCR have provided me with accounts of the reasons for differences between their Illinois (Bono)

historical averages, as they perceive them, and the averages agreed to in the inventory settlement agreement. I do not believe, however, that there is need to summarize their accounts in this report.

/s/ STEPHEN B. BURBANK
Special Master

February 11, 1994

DEPOSITION OF LAWRENCE FITZPATRICK

* * * *

[Tr. 341] Q. All right. As best you can do.

A. All right.

Many of these agreements use the language as found in paragraph 5, "Law firms will not file any future asbestos personal injury claims."

Q. Okay.

A. After many of these agreements were signed, there was an ABA advisory ethical opinion that arguably had some bearing on these agreements; I think people could differ as to whether it had any bearing at all.

But when that opinion came out, out of an overabundance of caution, we decided to make a change from the language that said, "will not file" to basically language that said, "will recommend."

We didn't view it as significant, because we really didn't view these kinds of provisions as legally binding documents, if you will. They were more of a commitment, a good faith commitment as to how these people were going to deal with us in the future.

Q. Why did you not view these [Tr. 342] documents as legally binding?

A. I don't see how you can sue on a document like this to enforce it.

The remedy, if somebody wants to breach an agreement like this, is to deal differently with them in the future, and is not to sue.

Q. If they weren't enforceable agreements, why did somebody go through the trouble of having everybody sign one?

A. We wanted to memorialize in writing their commitment to the future. It was moral commitment, if you will.

Q. Did you expect them to abide by that moral commitment?

A. Sure. And if they did not, we would have dealt with them differently in the future.

Q. In what way?

A. We would not have trusted them and would have been less reluctant to deal with them.

MR. MOTLEY: You mean more reluctant?

THE WITNESS: I'm sorry. More

* * * *

DEPOSITION OF KATHERINE KINSELLA

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[Tr. 19] A. It absolutely was not in '92. I know it was late January or early February, and I think it was February, that I first learned of it, because I learned of it and then there was a meeting very quickly. It wasn't anything that was protracted.

Q. Can you describe for me what Mr. Kamber told you about this particular case?

A. He basically said that there is going to be a class action notice campaign and that I should go over and talk to Shea & Gardner and set up an appointment and go and see and talk to them.

Q. Did he describe to you who the appointment and go and client was?

A. No.

Q. Did you work out a financial arrangement with him before you went to Shea & Gardner?

A. No, I did not.

Q. Was this part of your retainer work that you were doing for him?

A. I guess it could be construed as part of that. It was a new business [Tr. 20] development that would be obviously something that I would handle, because I have the expertise to do this notice.

Q. Have you ever handled notice in a class action before?

A. No, not in a class action.

Q. To your knowledge, has the Kamber Group ever handled notice in a class action before?

A. No.

Q. To your knowledge, has there anyone at Kamber who had had prior experience doing a notice campaign in a class action before?

A. No, there was not.

Q. So Mr. Kamber told you sometime in February that you were to go meet with someone at Shea & Gardner; is that right?

A. That's correct.

Q. Did he explain to you that Mr. Motley was involved in this particular case?

A. He mentioned that Mr. Motley was involved.

Q. Had you talked to Mr. Motley [Tr. 21] about this project before Mr. Kamber talked to you?

A. No, I don't believe I did.

Q. Do you know Mr. Locks?

A. Yes, I do.

Q. Had you talked to him before?

A. No, I did not.

Q. What about Mr. Rice?

A. No.

Q. Who did you meet with at Shea & Gardner?

A. I met with John Aldock, Betsy Geise, and I believe there was one other woman present whose name I don't recall.

Q. What did they tell you?

A. They explained the nature of the assignment, what they were looking for; a brief overview of what the class action was about and the settlement; and we discussed what we might be able to do in terms of providing notice.

Q. I take it you learned that the name of the case was Carlough versus Amchem, did you not?

A. Yes, I did.

* * * *

[Tr. 23] Q. Did you read materials on how to handle a class action notice campaign?

A. I had done the notice for the Manville Trust, which, in fact, I believe, from a technical point of view, as far as what I put together and how I approached it and how I thought it through, is very much similar to this.

I'm not sure whether it's notice in terms of whom I'm buying and the media I'm looking at and who I'm targeting, it would be very much the same kind of situation.

Q. Well, the Manville —

A. I don't really understand the distinction that you are making between the class action.

Q. The Manville Trust was a bankruptcy situation, was it not?

A. That's correct.

Q. And notice was issued in bankruptcy?

A. Notice was issued — yes, that's correct.

Q. But you had never before worked on a class action case?

[Tr. 24] A. That's correct.

Q. And you didn't consult with anyone who ever had?

A. I didn't consult with anybody that ever had.

I read extensively what was available, to see what other people had done in terms of notice.

Q. Would it be fair to say that the Kamber Group specializes in representing organized labor?

A. That has been one of its specialties.

Q. That has been its primary field, has it not?

A. It's been its primary field for some time, although it's expanded rapidly into other fields.

Q. By the way, does Kamber represent Mr. Georgine's insurance company?

A. I don't believe they currently are working with Union Labor Life Insurance Company.

Q. Had they in the past?

A. Yes, they had in the past.

* * * *

[Tr. 26] BY MR. BARON:

Q. Ms. Kinsella, what did you understand your task to be in this case in terms of the notice campaign?

A. I believe that my understanding was that I should develop a campaign that would provide proper notice to all people who could be potential claimants, potential members of the class, and to

provide them with information through whatever means I could ascertain relating to the class action and the settlement.

Q. Did that include personal notice wherever possible?

A. Absolutely.

Q. Did you understand from talking to the people that you talked to that personal notice was the preferable notice?

A. Yes, I did.

Q. Were you given any information about how many people might be in this class?

A. I don't believe I was given any [Tr. 27] specific number.

Q. Did you have a ballpark estimate in your own mind as to how many people might have been occupationally exposed to asbestos in the United States?

A. In terms of these twenty defendants or in general?

Q. First of all, in general.

MS. GEISE: Only if you know.

THE WITNESS: I really don't know.

BY MR. BARON:

Q. Did you have some ballpark of an estimate?

A. I didn't have an estimate. I knew it was substantial.

Q. What about in terms of these twenty companies; were you given information about how many people might be class members?

A. No, I was not.

Q. Did you understand that it might be more than twenty million people in the United States?

A. I didn't understand that it was larger or smaller than any number.

[Tr. 28] I knew, in my own mind, with twenty defendants and the products and what I knew in general about asbestos, having been involved in the asbestos issue for some time, I realized that it could be quite large.

Q. So you never put a handle on how many people you were trying to contact?

MS. GEISE: Objection. Asked and answered.

BY MR. BARON:

Q. Correct? You never had a targeted number?

A. No, I had a target demographic, an individual — or series of individuals that I thought — that I knew would potentially be members of this class.

The number of them was not relevant to me, because my job was to do as thorough notice as I possibly could to as many people as possible.

Q. With the understanding that individual notice was the preferable notice; correct?

A. That's correct.

* * * *

[Tr. 38] Is that right?

A. They asked me to design a campaign that would give proper notice to as many individuals as could be identified through a variety of mechanisms.

Q. The objective was to get personal notice to as many people as possible?

A. That's correct. What I would call individual notice.

Q. Do you know whether CCR made any effort to contact anyone at these hundreds of job sites, or perhaps thousands of job sites, where large numbers of claims had come in?

A. I do not know that.

Q. You certainly didn't do it?

A. No, I did not.

Q. No one under your direction did it?

A. That's correct.

Q. By the way, what cases do you remember reading on the issue of notice?

A. I didn't read the cases. I think I've made that clear.

I said I read some summaries of what the notice plans were that were related to [Tr. 39] cases.

I looked at Dalkon Shield, I looked at Agent Orange, I looked at Pfizer heart valve, and I relooked at the notice that I put together for the Manville Trust.

I think those are the ones I can remember off the top of my head.

Q. How long did you spend on this project?

A. In terms of total hours? Is that what you want? Or months?

Q. When did you begin your work?

A. I began my work after the meeting with Shea & Gardner, putting together a plan, and I worked on it extensively for several months, and then worked on it to a lesser degree for several months, and then I worked on it very heavily again.

Q. Did you do this by yourself or did you use other people?

A. I had a team of people at the Kamber Group that I supervised.

* * * *

[Tr. 65] copies for some of their members?

A. Correct.

Q. Let's talk about what other individual notice would have gone out.

The primary exercise here was to notify people who had been members of labor unions; is that correct?

A. That was not the primary. That was one of the targeted — we felt we could really target the notice to.

In fact, it wasn't — I would put it equal in weight with the paid media.

Q. Were you told which labor unions represented the most people that were exposed to asbestos?

A. No, I was not specifically told what labor unions had the most membership that were exposed.

Q. How did you gain that information?

A. I would say that the fact that I have been involved in the asbestos issue since the mid '80s, I have gained a certain amount of knowledge.

Because the Kamber Group also [Tr. 66] works with labor organizations, I have a good working knowledge of the labor organizations.

In addition, we called every single union that appeared to be somewhat relevant, or could be relevant, and spoke to usually the Health and Safety Director there, or if not, to somebody else who would be in a position to give us the information.

Sometimes that was General Counsel.

Q. So this was something that you did, as opposed to having somebody instruct you to do it, in terms of the labor unions?

A. That's correct.

Q. Class counsel didn't go to you and say, "Listen, these are the labor unions we should target"? You made that decision yourself?

A. Yes, I did.

Q. I take it class counsel had no input in that; is that right?

A. I don't believe so.

Q. Did you ever meet with class counsel on this case about the notice campaign? Ever?

[Tr. 67] You are hesitating. You can't think?

A. No, I'm not hesitating. I'm trying to remember.

I do not believe so.

I have had a conversation with Ron Motley, but I believe it was about another issue.

Q. So during this entire period, from February of 1993 until today, you cannot recall ever having any conversation regarding this particular case, the Carlough/Georgine case, with any of the class counsel?

A. You are somewhat confusing me right now. We were talking about labor.

Was the thrust of your question did I have a discussion with them about the labor? Did I discuss in general this setting?

Q. Let's do one at a time. What about regarding labor?

A. I don't believe so.

Q. What about generally?

A. In general, I had some conversation with Mr. Motley, but I don't recall what specifically it was.

[Tr. 68] I was also talking to him about a lot of other things.

Q. So it wasn't a meeting set up to deal with notice?

A. I don't believe so.

Q. Did you ever meet formally with class counsel to hear their input as to how the notice should go out?

A. Let me amend that. There was one brief meeting here, and I don't remember what date it was, in which Mr. Motley was present, and I believe we did discuss some labor unions, I think.

I don't really remember that completely.

Q. At any time during your work, did you meet Mr. Locks?

A. I'd met him previously. I didn't during this.

Q. Did Mr. Locks ever give you any instructions on how to notify people?

A. No, he did not.

Q. Did anyone from his office?

A. No.

Q. Did Mr. Rice ever give you [Tr. 69] instructions on how to notify people about this class action?

A. I never had a conversation about this class action with Mr. Rice.

Q. With Mr. Motley, you said you think you met with him once, but it was about other matters?

A. Most—I had a discussion with him about other matters, but I do recall that there was one meeting that we had here at Shea Gardner in which we talked about labor.

Q. Would it be fair to say that the notice campaign was being handled, as far as you were concerned, by Shea & Gardner?

A. I worked — I reported directly to Shea & Gardner.

Q. Were you paid by Shea & Gardner, to your knowledge?

A. No, I don't believe I was paid by Shea & Gardner.

Q. Who paid you?

A. The Center for Claims Resolution.

Q. Did you ever meet anyone from the Center for Claims Resolution?

[Tr. 70] A. I met Mr. Fitzpatrick.

Q. Anyone else?

A. I don't believe I have met anybody else.

Q. Did class counsel ever give you lists of groups to contact to issue notice to?

A. No, sir.

Q. Did class counsel ever give you specified job sites where they thought that you ought to go out and try to find people?

A. No, they did not.

Q. Did class counsel ever give you any ideas about how the media campaign itself should run?

A. No.

Q. To make a long story short: Did you receive any input from class counsel at all in terms of how the notification program should proceed?

A. I never had any conversations with Mr. Locks about that.

As I said, I believe we had a conversation about labor unions with Mr. Motley in one meeting.

But in terms of them giving me [Tr. 71] direction, no.

(Recess.)

BY MR. BARON:

Q. Other than the notice that was sent to people who are members of the labor unions, the final type of notice that went to the public generally was the television ads and the newspaper ads and the request that people call the 800 number?

A. That's correct.

In addition, we did a press release to about 2,000 outlets, media outlets.

Q. How many people from the United States population generally—which is, what, 250 million people?—called the 800 number?

A. 347,146.

Q. Who staffed the 800 number?

A. It was a professional service called Matrix Media.

Q. Of those 374,146 people who called the 800 number as a result of your media campaign, how many of them requested copies of the Stipulation of Settlement?

* * * *

[Tr. 73] Q. How much money was spent on this notice campaign?

A. A little over $7 million.

Q. That's about $17,000 per settlement stipulation, is it not?

A. I don't know what the math is. If that's what you say it is.

Q. Having done this, in hindsight, do you think there could have been a more efficient way to get that settlement stipulation out to the 4,223 people that requested it?

A. To those same individuals?

Q. Yes.

A. No.

Q. So you would have had to spend 6 or 7 million bucks to get out the 4,223 settlement stipulations?

A. I think — yeah.

Q. Is that right?

A. Yes.

Q. In addition to the 4,223 settlement stipulations that went out, there were notice packages that were sent out as well?

* * * *

[Tr. 77] Q. Let's go back, then.

Of the 347,146 calls that were received by the 800 number, 320,854 calls were requests for notice packages; right?

A. Yes, sir.

Q. Was that all the way up to January the 24th?

A. Yes.

Q. Now, I called the 800 number and they told me that it would be between five and ten business days before they could send out a package.

Was that your experience with them?

A. Yes, sir.

Q. How many calls went to the 800 number before January 1st?

A. I don't have that in my records, to answer that question.

Q. Were people told, who called after January 1st, that there was at least some likelihood that they wouldn't get the package until after the opt-out date?

MS. GEISE: I object. That's misleading. Ten days after January 1st is

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[Tr. 79] took 5 to 10 business days before the package was mailed out; correct?

A. That we would mail it within that time period; correct.

Q. Now, how much good would that do somebody who called in on January 15th to be able to get the package before January 24th to mail back?

A. Well, it depends on how long it would take to get there.

Q. If it took five to ten days before it got mailed out, the likelihood was it wouldn't get there by January 24th, would it?

A. No.

MS. GEISE: Is that a question?

MR. BARON: That's a question.

BY MR. BARON:

Q. It would not, would it?

A. It depends. Once again, if we are dropping mail from Washington, D.C., and the person is in Washington, D.C., it's high likely he would have got it in a day or two.

Q. Why did it take five to ten business days before you could send out a package?

[Tr. 80] Why does it take that long?

A. That was the length of time that we guaranteed that we would send it out by.

We would develop our labels, and the labels would be transmitted, and we would send them out as soon as we received them.

Most of the packages, I believe, went out in about three days to four days of the receipt of the phone call.

Q. Do you have any information that would verify that one way or the other?

A. I would have to check in my office.

I had my assistant handling the mailing operation. It was an interface between the 800 number and the mailing house.

Q. How many people were actually employed to send out these notice packages?

MS. GEISE: By who?

BY MR. BARON:

Q. By anyone.

A. I couldn't give you an exact number, but I do know that when you are mailing — our mailings were prepared — we worked on weekends — the mail house worked on weekends [Tr. 81] and hired, I believe, twenty-some odd individuals to assist over a period of time to — particularly in the initial stages, after we went to print, we had the names to send out, and then when we reprinted again.

Q. If you had hired forty people to do that job, you could have got them out faster, right?

Is that right?

A. Yes, that's correct.

Q. Did anyone tell you that you were on a limited budget for that particular task?

A. Absolutely not.

Q. So that was just a decision on your part?

A. I — no. We worked with a mail house that is a vendor, who has their own staff, and would supplement their current staff by additional people that were required to fulfill the task.

Q. You filed an interim report. Do you remember the interim report?

Do you have a copy of it?

A. Mm-hmm.

* * * *

[Tr. 84] timely?

A. No. We had a court-approved script that we were using at the 800 number, and we did not want deviation for fear somebody might give advice over the telephone.

Q. So people were told that they might receive their opt-out package after the opt-out date; is that right?

A. No, sir. We stayed right with the court-approved script.

Q. I think you meant "yes, sir" on that one.

A. Yes, sir.

Q. Do you have any way of knowing how many of those 300-some thousand mail-outs were received after January 24th?

A. I would say a small number compared to the overall packages, and I say that based on the fact that when I did an analysis of what the effect was of the print campaign and the television, that about 53 percent of all the requests came in right immediately around the week of the television and the first round of print work, which were running together in early December.

[Tr. 85] That's the only thing I can really give you in terms of exact numbers.

Q. Well, we know that there were 347,146 calls, of which 320,854 were requests for packages.

As of December the 2nd, we know that there were 79,107 calls and 68,409 requests for packages, so about 300,000 of the 374,000 calls that were made to the 800 number came after December the 2nd; right?

A. Correct.

Q. And we know that about 260,000 of the requests for packages came after December the 2nd?

A. That's correct.

Q. In terms of business days after December the 2nd and before, say, January the 15th, we are talking about probably less than thirty business days, are we not?

A. I would assume that that's roughly right.

Q. So the majority of the people, then, or the overwhelming majority of the people called in within a few weeks of the opt-out period?

[Tr. 86] A. No, I don't agree with that.

Q. Where am I mistaken here?

A. Because I think I just said to you that I believed that about 53 percent of the calls received were around the week of December 6th.

There was a little window between December 6th and probably — I would have to look at my calendar; maybe an eight-day period there, where we received 53 percent of our requests.

So if you take 53 percent of 320 and add the 68 or 69, and I would assume that — I know in fact that these were mailed out prior — prior to Christmas, so in fact it wasn't near the opt-out period.

Q. Do you know how long it takes to mail something from Washington, D.C. to, say, Tyler, Texas over Christmas?

Have you ever done a survey to find out how long it takes?

A. No, that's not my line.

Q. About ten days?

A. I have no knowledge of that.

MS. GEISE: Objection. She said

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[Tr. 98] Q. So in the original filing, you said that you were going to communicate with 56 unions that had a membership of millions and millions of workers — and I can't remember what the number was.

Do you recall?

A. I think it was — hold on. I have it in here.

9 million.

Q. There were 56 unions with 9 million workers, and you were planning to send out individual notice packages to as many of the 9 million as you could send out?

A. That's correct.

Q. But it turned out you only sent out a little less than 400,000 packages?

A. Mm-hmm.

Q. Why was it such a failure?

A. I don't believe it was a failure.

As I said before, I had been working with the Kamber Group, which works in the labor area, and this is the first time, to my knowledge, that an outside organization or outside requester requested and got labor [Tr. 99] mailing lists. I was not able to achieve that in the Manville Trust notice that I did, so think this is quite extraordinary.

They have a lot of issues on their agenda, and sometimes they are not — for political reasons as well as other reasons, are not willing to provide notice.

Q. Why didn't you tell that to the court when you made the proposal to send out 6.9 million packages, or however many it was?

MS. GEISE: objection. That's a mischaracterization of her initial affidavit.

BY MR. BARON:

Q. Did you know all along that less than 5 percent of the people of the union membership would actually get these notices?

MS. GEISE: I object on the grounds that you are not including the clip art, which was individually delivered.

MR. BARON: I'm talking about the notice package.

MS. GEISE: It's a misleading question.

THE WITNESS: My job was to do everything possible to convince them to do

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[Tr. 106] Q. Was it ever reported to you that in fact some of these in fact some of these were turned down because they were not pleased with the settlement?

A. I had no information — conversations about that.

Q. You never heard anything of that sort?

A. I know that there are people who are not happy with the settlement, but I don't know if any of the unions that did not run the clip art were the ones that were unhappy about it.

I have no personal knowledge about that.

Q. None of your staff reported that to you in any way?

A. No.

Q. Now, the clip art itself does not contain an exclusion form, does it?

A. No, it does not.

Q. Did you ever consider whether, as part of the clip art, a version of the exclusion form could be included?

A. No.

Q. You never gave that any [Tr. 107] consideration whatsoever?

A. No.

The unions, if you look at some of the materials that we got back from them, sometimes ran — allocated very little space to this, and my feeling on that was, every piece on that clip art contained the 800 number where an individual could get a notice packet and an exclusion form.

Q. I'm not sure that answered my question.

Did you give any consideration to whether you could provide camera-ready materials in the form of an exclusion form?

A. No, I did not.

Q. That was technologically feasible, was it not?

A. I believe so.

Q. Correct me if I'm wrong, but one of the things you mentioned to Mr. Baron was that the unions — some of the unions had a problem with divulging their membership lists?

A. That's correct.

Q. Did you make it absolutely clear to those unions that you would give them the [Tr. 108] materials, and that they could send it to their membership, and that you would pay for it?

A. Yes, sir. In writing.

Q. And they refused that as well, all but a handful, as I understand it?

A. Yeah, and it was for varying reasons.

We had discussions all the way through December with some unions that were still trying to make up their mind what they were going to do.

We were told by ACTWU that they would send us this list from — I guess it must have been November, and the response, after many, many, many, many phone calls to the individual, was, "I'm a one-man kayak," or canoe; "I've got to get to my other stuff, but when I get to this, I will."

MR. BARON: When you say ACTWU —

THE WITNESS: Amalgamated Clothing & Textile workers Union.

BY MR. WOLFMAN:

Q. You made it clear that you would pay the costs?

[Tr. 109] A. Yes.

Q. Did you make it clear that you would provide the staff assistance, if necessary?

A. Any way they wanted to assist us in getting individual notice, we would do it.

We would send the packets to their mailing house, so that nobody would ever see their mailing list.

I also furnished confidentiality — guaranteed confidentiality in writing to the unions that their lists, if they were given to our vendors for mailing, that no one else would see them.

Q. As I understand it, it looks like about five or six unions made mailings to individuals; is that correct?

A. Yes.

Q. Did Mr. Kirkland or anyone on his staff explain why they didn't send this to all the affiliated unions? His letter, I mean.

MS. GEISE: Objection. That's confusing.

MR. WOLFMAN: Strike that one.

* * * *

[Tr. 128] notification campaign, notice was individually delivered to approximately 6.8 million individuals."

Do you see that?

A. Yes, sir.

Q. You can't sit here today and tell us that 6.8 million individuals received notice of this class action, can you?

MS. GEISE: I object.

THE WITNESS: I believe so. In terms of — if you're discussing the union clip art, if you are talking about the packages that were sent out, those circulations, yeah, I do. I think that's correct.

BY MR. BARON:

Q. Of those 6.8 million people who supposedly received notice, a large percentage of those people would not be class members, to your knowledge, is that right?

A. I have no knowledge about that.

Q. For instance, UAW workers and people from unions that don't have heavy asbestos exposure would not be class members, would they, to your knowledge?

MS. GEISE: Objection.

* * * *

[Tr. 130] .8 or so would have been told that they had to opt out if they didn't want to participate in the class, and the other 6 million would not have that information?

A. I don't believe that's true.

MS. GEISE: I object. That's misleading.

BY MR. BARON:

Q. What information in the clip art would tell somebody that they had to opt out of the class if they didn't want to participate?

A. The purpose of the clip art and the purpose of the television spot was to refer people to the 800 number.

Q. That's not what I'm asking you.

Was there anything in the clip art —

MS GEISE: Let's get it out, Mr. Baron, so it's not misleading.

BY MR. BARON:

Q. Was there anything in any of the television advertisements that explained to people that they had the duty to exclude themselves from the class if they did not want to be part of it?

[Tr. 131] A. No, not in the 30-second spot.

Q. Was there anything in any of the newspaper advertisements that explained to people that they had to exclude themselves if they wanted to not be a member of the class?

A. Absolutely.

Q. And in order to do that, they had to call the 800 number to get an exclusion form?

A. That's correct.

Q. What about in the clip art? Was there anything in there that explained to people that they had to call the 800 number to get the information to exclude themselves?

A. Let me just look at that.

MS. GEISE: Do you know what exhibit it is, Mr. Baron?

MR. BARON: I wasn't referring to one. I thought you people put it together.

MS. GEISE: When you are talking about clip art, what exhibit is it?

THE WITNESS: I think it's under E.

MS. GEISE: Yes, it's E.

THE WITNESS: Yes, the article

* * * *

[Tr. 133] A. At this point?

Q. Less than 15 percent?

A. Probably around 13; 12, 13.

Q. If you moved to Texas, where I live, you would find that number to be much, much less than that; is that correct?

A. I would assume so.

Q. I have a large number of clients in San Antonio, Texas who work with asbestos products. How would they have been notified of this class action; that are non-union people working in San Antonio, Texas?

MS. GEISE: You mean other than through you?

MR. BARON: Well, unfortunately, they don't come to me until they have a disease, and the people that have diseases, by and large, are not going to be members of this class.

BY MR. BARON:

Q. How would somebody in San Antonio, Texas become aware of this particular class?

A. If they were not a union member?

Q. If they were not a union member.

[Tr. 134] A. I don't know.

Q. Did you advertise in the San Antonio newspaper?

A. Let me see.

No. We advertised in those areas where we had a history of court cases and work sites.

Q. So if an individual lived in San Antonio, Texas, and was not a member of a union, and was exposed to asbestos occupationally, would it be fair to say that if they missed the television spot that ran for a day or so, they would have had no notice of this class?

A. No, I don't think that's true.

I don't have my records with me, but we also purchased Parade magazine, which goes into, I believe, 300-some odd media markets, and I believe it may very well be carried in San Antonio.

I don't know that for a fact, but that —

Q. Which newspaper in San Antonio carries Parade? Tell me.

A. I don't know. I would have to [Tr. 135] look that up.

Q. Do you know that any of them do?

A. I can't tell you that without looking it up.

Q. Well, let's assume that one of the newspapers in San Antonio carries Parade magazine.

If an individual who is not a union member, who lived in San Antonio, who was heavily exposed to asbestos, who didn't read that Sunday paper that had Parade magazine in it, assuming that there is one, how would that individual have known of the existence of this class action?

A. I don't know.

Q. You sure wouldn't have notified them, would you?

You sure didn't notify them, did you?

A. Did I notify them? No, I did not.

Q. Would it be fair to say if you had had more time, you could have notified more people?

A. No. I was satisfied that the [Tr. 136] notice plan for this was thorough.

Q. Well, you are still getting people calling in on the 800 number, aren't you?

A. I think you could have notice going on for ten years and people would still be calling in.

Q. Well, the notice that went out to most of the union members through this clip art didn't go out in the union magazines until sometime in December?

A. In December. That's correct.

Q. Right. And do you know how long it takes bulk rate mail to be delivered?

A. It could take two weeks.

Q. So if a union sent out their magazine perhaps in the middle of December, as most of them apparently did, it wouldn't have been received in the household until maybe the first week or so in January?

A. I don't have any specific knowledge about that, because I don't know exactly how — what class these publications go out.

Q. Would you say mail is slow [Tr. 137] around Christmas?

A. Yes, I think you could say that. Is specific mail slow around Christmas? Who has any way of knowing that?

Q. What about bulk mail?

A. It could be slow. I don't have any specific knowledge as to whether this was slow or fast.

Q. Well, let's be specific here for a minute. Let's look at your affidavit, and let's take a look at the unions that sent out notice with the clip art.

Let's look at the International Association of Machinists, which is one of the largest of the unions, right?

The publication —

MS. GEISE: What number is it?

MR. BARON: Exhibit 2, number 10.

BY MR. BARON:

Q. Exhibit 2, number 10, shows that the International Association of Machinists sent out their Machinists publication, which is their normal magazine, on December 16th to 700,000 people, and you are aware, are you not, [Tr. 138] that they use bulk rate mail?

A. I assume they probably do use bulk rate.

Q. Bulk rate mailing from December 16th would take no less than two weeks, would it not?

A. I would assume that's correct.

Q. So that would mean that the 700,000 members of the Machinists union would have received that publication, perhaps if they were lucky, the first week of January or so, right?

A. I would assume that's correct.

Q. So that would mean that the 700,000 members of the Machinists union would have received that publication, perhaps if they were lucky, the first week of January or so, right?

MS. GEISE: Objection.

BY MR. BARON:

Q. Is that right?

A. I can't say whether they received it or not.

Q. The likelihood is that's about when they would have received it.

MS. GEISE: Objection.

BY MR. BARON:

Q. Right.

A. I don't know.

Q. If they received it the first [Tr. 139] week of January, and they picked it up the next week and called the 800 number, they wouldn't have gotten their opt-out form until about the 20th or so of January; right?

A. Faced with a choice of a union whose publication date I have no control over, running it on December 16th versus not at all — and I made the correct decision in encouraging them to run it in that particular issue, so it certainly wasn't encouragement to run it in January.

Q. If these unions had sent it out in November or in October for a January opt-out date, a lot more people would have had the ability to opt out; right?

A. I would think — publication dates vary, and when the judge says go, you go.

For a November publication, or even a December publication, you've already missed the deadlines. They are already out.

Q. I'm not blaming you. I'm just asking you:

If the notice period had been a little longer, maybe another month, you would have gotten a lot more notices to a lot more

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

SETTLING PARTIES' FINAL REPORT ON IMPLEMENTATION OF THE NOTICE

In its opinion and order dated October 27, 1993, this Court directed that the settling parties file a final report concerning implementation of the notice plan approved by the Court. In particular, the Court's decision directed that the final report include (under seal) "a list of the names and addresses of all potential class members to whom individual notice packets were mailed," and, like the interim notice report filed on December 6, set forth "(1) the number of individuals actually notified, (2) the categories of individuals notified, and (3) a description of precisely what efforts the various 'volunteer' organizations and persons have made to notify potential class members." Oct. 27 Dec. at 24-25.[1]

The attached Declaration of Katherine Kinsella, the settling parties' notice consultant, explains in detail the steps taken to implement the notice plan approved by the Court. Ms. Kinsella's Declaration shows that the notice plan was implemented wholly in accord with the Court's decision. With respect to calls to and mailings from Class Counsel, attached are affidavits from Lynette Martinez and Jack Draper (for the Ness, Motley firm), and a Declaration from Gene Locks (for Greitzer and Locks). The answers to the Court's specific questions are as follows.

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[1] The Court's opinion defined such "volunteer" organizations as "unions, plaintiffs' attorneys, other organizations whose members may be in the class, and trade, industrial, and legal publications." October 27, 1993 Dec. at 24 n.25.

1. Concerning efforts by unions and others to notify class members, Ms. Kinsella's Declaration explains that AFL-CIO President Lane Kirkland wrote to 48 AFL-CIO unions on October 29 to request their cooperation in the notice effort. Kinsella Decl. ¶ 4. Ms. Kinsella's firm, The Kamber Group, began follow-up phone calls to these unions during the first week in November, and the court-approved letter (Exhibit P to the notice materials) asking that the unions cooperate in the notice effort was sent out shortly thereafter. Id. As a result of these efforts, 35 national or international unions agreed to run some version of the Court-approved "clip art" (Exhibit E to the notice materials) in union publications delivered individually to approximately 6 million union members and retirees during the notice and opt-out period, and 9 national or international unions agreed to mail or to have mailed notice materials to almost 400,000 union members and retirees. Id. ¶ 5. All in all, then, these union efforts resulted in notice materials being delivered individually through the mail to approximately 6.4 million union members and retirees.

In addition, as Ms. Kinsella's Declaration relates (¶ 7), 36 plaintiffs' attorneys contacted her and asked for individual notice packets, either for mailing themselves or for mailing by Ms. Kinsella. In total, 17,494 individual notice packets were furnished to or mailed for these 36 plaintiffs' attorneys. Id.[2]

Finally, 1,960 individual notice packets were provided to the White Lung Association, and 1,980 packets were mailed to the members of the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA), in response to requests from those organizations. Kinsella Decl. ¶ 11.

2. With respect to "categories of individuals notified," in addition to notice to union members and retirees, notice packets requested by plaintiffs' attorneys, and the packets sent to the White Lung Association and to the membership of SMACNA, discussed

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[2] One of these attorneys requested 11,816 packets, or 68% of the packets requested by plaintiffs' attorneys. The other requests were much smaller. Kinsella Decl. ¶ 7.

above, various sets of notice materials were mailed to 1) approximately 26,000 plaintiffs (through their counsel) who served lawsuits on one or more CCR defendants between January 15, 1993 and January 10, 1994 (Kinsella Decl. ¶ 3); 2) almost 4,000 plaintiffs (through their counsel) who filed lawsuits or asserted claims against one or more CCR defendants during this same time period, but who have not yet served a CCR defendant with a lawsuit (id.); 3) over 1,000 plaintiffs attorneys who have, in the past twenty years, filed claims against one or more CCR defendants (id. ¶ 7); 4) over 325,000 individuals who called the 800-number to obtain a notice packet or a Stipulation of Settlement (id. ¶ 8); 5) over 2,000 individuals who contacted Class Counsel to obtain notice packets (Affidavit of Lynette Martinez ¶ 5; Declaration of Gene Locks ¶ 2); 6) over 200 individuals who contacted Ms. Kinsella seeking a notice packet (Kinsella Decl. ¶ 9); 7) over 8,000 officials of national or international unions, at the national, state, or local levels (id. ¶ 10); 8) 81 trade or other organizations, or trade, industrial or legal publications (id. ¶ 11); 9) over 2,000 national radio stations and wire services, and print, radio, and televisions outlets (id. ¶ 13); and 9) approximately 1,100 state and federal courts (id. ¶ 14).

3. Finally, with respect to the number of individuals notified, the mailings described above — apart from the calls to the 800-number — total notice to almost 6.5 million individuals. With respect to calls to the 800-number, between early November 1993, and January 24, 1994, there were 374,146 calls to the special 800-number, of which 320,854 calls were requests for notice packets, and 4,223 were requests for a copy of the Stipulation of Settlement. Kinsella Decl. ¶ 8. Class counsel also received thousands of calls, sent out over 2,000 notice packets, and directed numerous other callers to the main 800-number to obtain notice packets. See attached Affidavits of Lynette Martinez, Jack Draper, and the attached Declaration of Gene Locks. In total, these efforts mean that, during this notification campaign, notice was individually delivered to approximately 6.8 million individuals.

In addition to these mailings, the $4 million paid media campaign was conducted as described in Ms. Kinsella's August 1993 Declaration. Kinsella Decl. ¶ 12. As Paragraphs 35-36 of the August 1993 Declaration explains, the circulation of the

newspapers in which the first round of print advertising was carried (on December 5, 1993) is 46 million, and the circulation of the newspapers in which the second round of print advertising was carried (on December 19, 1993) is 28 million. As also explained in Ms. Kinsella's August 1993 Declaration (¶ 37), *Parade* magazine, in which the full-page ad was carried on December 19, has a circulation of 36 million and a readership of 73 million. The paid television advertising — which ran the week of November 29 — reached between 73.8% and 85.6% of the TV households within the targeted media markets, and generated over 279 million target impressions among adults 35 years or older. Kinsella Decl. ¶ 12. Moreover, the mailings of press releases or newscast scripts to numerous media markets throughout the United States resulted in 118 publications in 28 states (and the District of Columbia) carrying 125 announcements concerning the class action; the circulation reached by these 125 announcements was just over 13 million. Kinsella Decl. ¶ 13. Twenty-nine radio stations also made announcements concerning the class action in November and December, for a total of 203,200 gross radio impressions. Id.

* * * *

In short, the notice plan was implemented entirely in accord with the Court's October 27, 1993 decision. Over 6.8 million individuals received individually delivered notice materials, and millions more were notified through media efforts. The notice campaign in this class action lived up to its promise to be the most extensive ever attempted. Notice to the class in this class action has been far more than adequate to satisfy both Rule 23 and the Due Process Clause.

Respectfully submitted,

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Attorneys for the Settling Parties

DATED: February 16, 1994

DECLARATION OF KATHERINE KINSELLA

1. My name is Katherine Kinsella. I am Senior Vice - President and Senior Consultant to The Kamber Group, the largest independently-owned communications company in Washington, D.C. I am responsible for the design and implementation of the notice to the class in *Carlough et al.* v. *Amchem Products, Inc. et al.*, C.A. 93-CV-0215 (E.D. Pa.). I submitted a Declaration to this Court on August 16, 1993, which described the notice plan proposed by the settling parties. In the October 27, 1993 decision and order largely approving this plan, the Court directed that the settling parties file both an interim and a final report describing implementation of the notice plan. Accordingly, an interim report, which was accompanied by my Declaration, was filed on December 6, 1993. The purpose of this Declaration is to describe the implementation of the notice for purposes of the final report. All facts stated in this Declaration are based upon my personal knowledge or information supplied to me by trusted subordinates in the regular course of business.

2. On November 1, 1993, the settling parties filed with the Court a set of final notice materials. For simplicity, the various notice materials will be described in this Declaration by their exhibit numbers in the November 1 filing. Moreover, the description of the implementation of the notice will follow the same order as the description of the notice plan in my Declaration filed on August 16, 1993 with the settling parties' joint motion for approval of the notice.

INDIVIDUAL NOTICE

3. In Paragraph 21 of my August 1993 Declaration, I stated that complete individual notice packets, including the full Notice (Exhibit A), the Questions and Answers (Exhibit B), and an appropriate cover letter (Exhibit I), would be sent to counsel for all plaintiffs (or to the plaintiffs directly, if unrepresented by counsel) who have filed lawsuits against one or more CCR defendants from January 15, 1993 until two weeks prior to the close of the notice and opt-out period. Accordingly, on or about November 13, 1993, individual notice packets were mailed to 253 counsel for the 20,814 plaintiffs who served lawsuits on one or more CCR defendants from January 15, 1993 through October 31, 1993. Similarly, on

or about December 23, 1993, notice packets were mailed to 97 counsel for the 2,307 plaintiffs who served lawsuits on one or more CCR defendants from November 1, 1993 through November 30, 1993. Also, on or about December, 15, 1993, notice packets were sent to three counsel representing almost 4,000 plaintiffs who had filed suit or asserted claims against, but who had not yet served, one or more CCR defendants since January 15, 1993. Finally, a mailing was sent on or about January 13, 1994, to the 97 counsel for the 3,118 plaintiffs who served lawsuits on one or more CCR defendants from December 1, 1993 through January 10, 1994. (All of these plaintiffs were represented by counsel.) Lists of all these plaintiffs (organized by plaintiffs' counsel) are submitted (under seal) as Exhibit 1-A (November mailings), 1-B (December mailings) and 1-C (January mailings) to this Declaration. The cover memoranda that accompanied these mailings to plaintiffs' counsel are also included in Exhibits 1-A to 1-C.

4. Paragraph 22 of my August 1993 Declaration described the efforts that we would make to obtain help from the 56 national or international unions (listed in Exhibit O to my August 1993 Declaration) to provide notice to their current or retired members. These efforts were aided immeasurably by the commitment of the national AFL-CIO, in its September 24, 1993 *amicus* brief endorsing the settlement, to help in the notice campaign. Accordingly, on October 29, 1993, President Lane Kirkland of the AFL-CIO, wrote to the 48 AFL-CIO unions on the list in Exhibit O, urging each of them to cooperate in the notice effort. We began follow-up calls to all 56 unions listed in Exhibit O during the first week in November, and, shortly thereafter, sent out the letter to these unions prescribed in the notice plan (Exhibit P to the notice materials).

5. As a result of these efforts, 35 national or international unions agreed to run some form of the "clip art" (Exhibit E to the notice materials) in the publications that they mailed during the notice and opt-out period to the homes of their members and retirees, and 9 agreed to mail or to have mailed notice materials to certain current and retired members of their unions. Exhibit 2 to this Declaration sets forth the unions who published "clip art" in their individually-delivered publications, and the mailing dates and

circulation figures for these publications.[1] Exhibit 3, in turn, sets forth the unions who agreed to mail or to have mailed notice materials to their members and retirees, and the number of these mailings. All in all, these union efforts resulted in the "clip art" being run in publications that were delivered individually to almost 6 million union members and retirees, and the mailing of notice materials to almost 400,000 union members and retirees.

6. I do not have complete lists of all the union members and retirees to whom these almost 400,000 individual mailings were sent, since several of the unions chose to do these mailings themselves, and did not give to us the names and addresses. I do have, however, a list of over 200,000 union members and retirees to whom notice materials were mailed, and that list is submitted (under seal) as Exhibit 4 to this Declaration.

7. Paragraph 24 of my August 1993 Declaration stated that an information and notification packet (consisting of Exhibits J, A, B, C, E, and F) would be mailed to the 1,000-plus attorneys who represented plaintiffs who filed claims against one or more CCR defendants. These mailings were sent out on or about November 13. Pursuant to the cover letter accompanying these packets (Exhibit J), 36 attorneys contacted me and requested 17,494 individual notice packets. (One of these attorneys requested 11,816 packets, or 68% of the packets requested by attorneys. The other requests were much smaller.) The attorneys either mailed these packets themselves, or furnished labels and we mailed the packets for them. The list of 1,000-plus attorneys to whom the initial mailing was sent it [sic] attached as Exhibit 5, and the list of 36 attorneys who requested additional packets, and the number requested by each, is attached as Exhibit 6.

8. Paragraph 25 of my August 1993 Declaration explained that every notice document would refer potential class members to a special 1-800 telephone number, from which potential class members could obtain a complete individual notice packet (Exhibits

[1] The Interim Report on the notice listed 36 unions that had agreed to publish "clip art" notice materials in their publications. The United Mine Workers, however, did not publish such "clip art," reducing the number of unions in Exhibit 2 to 35.

I, A and B). The 800-number was operational from November 5 (at least one week in advance of the first mailings under the notice plan) through midnight on January 24, 1994.[2] As of midnight on January 24, the 800-number had received 374,146 calls, of which 320,854 calls were requests for notice packets, and 4,223 were requests for the full Stipulation of Settlement. The list of individuals to whom notice packets or the full Stipulation of Settlement were mailed is attached (under seal) as Exhibit 7 to this Declaration.

9. I also received many letters and a few calls from potential class members requesting notice packets. The list of the 210 individuals to whom I mailed packets is attached (under seal) as Exhibit 8 to this Declaration.

NOTIFICATION THROUGH UNIONS AND OTHER LABOR BODIES

10. Paragraphs 27 and 28 of my August 1993 Declaration described mailings that would be made (consisting of Exhibits K, A, B, C, E and F) to various officers in 56 national and international unions, in five trade and industrial departments of the AFL-CIO, the AFL-CIO State Federations, AFL-CIO Central Labor Councils, State Building Trades Councils, the Local Building Trades Councils, and over 6,000 local labor unions affiliated with the 56 national or international unions listed in Exhibit P.[3] These mailings, which totaled over 8,000 packets, were sent out on or about November 13. The list of individuals to whom this mailing was sent is submitted (under seal) as Exhibit 9 to this Declaration.

[2] As of February 1, 1994, pursuant to an order of this Court, the 800-number has carried a recording notifying individuals who call of the deadline for submitting objections to the settlement, and of the schedule for the fairness hearing.

[3] My August 1993 Declaration estimated the number of these local unions to be 10,000-15,000. The actual number (obtained from the Department of Labor) is 6,403.

NOTIFICATION THROUGH TRADE OR OTHER ORGANIZATIONS AND THROUGH TRADE, INDUSTRIAL, AND LEGAL PUBLICATIONS

11. Paragraphs 30 and 31 of my August 1993 Declaration described mailings that would be sent (consisting of Exhibits M, A, B, C, E and F) to 81 trade or other organizations, or trade, industrial or legal publications (which were listed in Exhibits Q and R to my August 1993 Declaration). These mailings were sent out on or about November 13. In addition, two of these organizations requested packets for mailing to their membership. Thus, 1,960 individual notice packets were provided to the White Lung Association on or about November 17, 1993, and 1,980 packets were sent to members of the Sheet Metal and Air Conditioning Contractors' National Association on or about December 15.

NOTIFICATION THROUGH PAID MEDIA

12. Paragraphs 32-42 of my August 1993 Declaration described the paid television and print advertising components of the notice plan. Under the notice plan, a 30-second television ad (Exhibit D) was run in the 80 media markets described in Exhibit U to my August 1993 Declaration during the week of November 29. The paid television advertising reached between 73.8% and 85.6% of the TV households within the targeted media markets, and generated over 279 million target impressions among adults 35 years or older.[4] This was followed by print advertising (Exhibit C) on Sunday, December 5, in the 292 newspapers (136 media markets) described in Exhibit S of my August 1993 Declaration. A second round of print advertising was run two weeks later (on Sunday, December 19) in the 114 newspapers (59 media markets)

[4] We have not been notified that any of the television spots we purchased did not run, and, under the general industry practice, we would have been notified by now if any of the purchased ads did not run. In addition, the media buyer for the Kamber Group, SMY, Inc., is in the process of obtaining and analyzing affidavits from the various television stations to ensure that our entire media buy was aired.

described in Exhibit T of my August 1993 Declaration, and in *Parade* magazine.[5]

PUBLIC SERVICE MEDIA STRATEGY

13. Paragraph 43 of my August 1993 Declaration explained that a cover letter and press release or newscast script (Exhibits M and G) would be sent to all national radio stations and wire services, and to all major print, radio, and television outlets in the 136 media markets where paid print advertising was run. These mailings, which totaled over 2,000 packets, were sent out on or about November 13. In response, a clipping service my firm hired showed that 118 publications in 28 states (and the District of Columbia) carried 125 announcements concerning the class action during the notice period; the circulation reached by these 125 announcements was just over 13 million. In addition, we have verified that 29 radio stations made announcements concerning the class action in November and December 1993, for a total of 203,200 gross radio impressions.

NOTIFICATION TO STATE AND FEDERAL COURTS

14. Finally, Paragraph 44 of my August 1993 Declaration states that complete information and notification packets (consisting of Exhibits N, A, B, C, E and F) would be sent to over 1,000 state and federal courts that have handled asbestos personal injury claims (either at trial or on appeal) against one or more CCR defendants. The mailings to these courts, which totaled approximately 1,100 packets, were sent out on or about November 13.

TIMING

15. Paragraph 45 of my August 1993 Declaration set forth the schedule for the notice campaign. The campaign was precisely on or ahead of the schedule set forth in Paragraph 45.

[5] We have verified that all of this advertising was run. The only deviation from the notice plan was that the *Detroit Free Press* did not run the half-page ad a second time on December 19, but then corrected its mistake by running the ad on January 16, 1994.

COST

16. The total cost of the notification campaign, which was paid by the CCR defendants, was slightly over $7 million. The cost of the campaign exceeded the estimate of $5 to $6 million in Paragraph 48 of my August 1993 Declaration chiefly because of the larger than expected number of calls to the 1-800 number.

CONCLUSION

17. In sum, I believe that implementation of the notice campaign in this class action was in full compliance with the Court's October 27, 1993 decision.

* * * *

I declare under penalties of perjury that the foregoing is true and correct.

February 15, 1994 /s/ KATHERINE KINSELLA

* * * *

Exhibit 2

Unions That Ran "Clip Art" (Exhibit E) in Union Publications

Union Name	Publication Mailing Date	Approximate Circulation
1. Allied Industrial Workers	Nov. 30	66,500
2. American Flint Glass Workers	Dec. 10	16,000[1]
3. Association of Western Pulp and Paper Workers	Nov. 29	18,000
4. Brotherhood of Locomotive Engineers	First week in Dec.	21,000
5. Brotherhood of Maintenance of Way Employees	Dec. 10	56,000
6. Brotherhood of Railroad Signalmen	mid-Dec.	8,000
7. Glass Molders, Pottery, Plastics and Allied Workers International Union	Dec. 1	100,000

[1] This union also put the "clip art" in a circular that was mailed on November 25 to approximately 1,000 officers of local unions.

Union Name	Publication Mailing Date	Approximate Circulation
8. International Association of Bridge, Structural & Ornamental Iron Workers	First week in Dec.	125,000
9. International Association of Firefighters	Nov. 22	195,000
10. International Association of Machinists	Dec. 16	700,000
11. International Brotherhood of Electrical Workers	Dec. 6	781,500
12. International Brotherhood of Firemen & Oilers	Dec. 1	30,000
13. International Chemical Workers	Dec. 10	65,000
14. International Organization of Masters, Mates & Pilots	First week in Dec.	20,000[2]
15. International Plate Printers, Die Stampers & Engravers	Nov. 20 (members) Nov. 23 (retirees)	4,000[3]

[2] This union also had notice packets mailed to 20-25 ports.

[3] This union also prepared a special bulletin from the clip art to send

Union Name	Publication Mailing Date	Approximate Circulation
16. International Union of Bricklayers and Allied Craftsmen	Dec. 10	105,000
17. International Union of Elevator Constructors	Nov. 23	30,000[4]
18. International Union of Operating Engineers	First week in Dec.	360,000
19. International Union of Petroleum & Industrial Workers	First week in Dec.	5,000
20. International Woodworkers of America	Dec. 15	22,000[5]
21. Laborers' International Union	Dec. 15	400,000
22. National Marine Engineers' Benefit Association	Dec. 20	15,000
23. Operative Plasterers and Cement Masons International Association	Dec. 20	40,000

to 4,000 members and retirees.

[4] This union also had notice packets mailed to 90 local unions.

[5] This union also mailed notice materials to approximately 10,000 retirees. See Exhibit 3.

Union Name	Publication Mailing Date	Approximate Circulation
24. Pacific Coast, Marine Firemen, Oilers, Watertenders and Wipers	Dec. 19	800
25. Sheet Metal Workers	Nov. 29	130,000[6]
26. Stove, Furnace and Allied Appliance Workers International Union	Jan. 1	7,000
27. Transport Workers Union	Nov. 23	100,000
28. Transportation Communications International Union	Nov. 22	135,000
29. U.A. Plumbers & Pipe Fitting Industry	Dec. 1	330,000
30. United Automobile, Aerospace, Agricultural Workers	Dec. 2	1 million
31. United Brotherhood of Carpenters and Joiners	Nov. 19	550,000
32. United Paperworkers International Union	Dec. 10	250,000

[6] This union also ran an article on the *Georgine* class action and proposed settlement, which discussed the opt-out procedures and gave the 800-number, in the September/October/November issue of its publication *Focus on Funds*. This union also had notice materials mailed to approximately 85,000 members and retirees. See Exhibit 3.

Union Name	Publication Mailing Date	Approximate Circulation
33. United Textile Workers	First or second week in Dec.	15,000[7]
34. United Union of Roofers, Waterproofers & Allied Workers	Dec. 10	25,000
35. Utility Workers' Union	Dec. 6	66,000
TOTAL CIRCULATION:		**5,791,800**

[7] This union's publication is sent to the offices of the local unions, where it is handled out to members and retirees.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 93-0215

ROBERT A. GEORGINE, et al., PLAINTIFFS,

v.

AMCHEM PRODUCTS, INC., et al., DEFENDANTS and
THIRD PARTY PLAINTIFFS,

v.

ADMIRAL INSURANCE COMPANY, et al.,
THIRD PARTY DEFENDANTS.

ORDER

AND NOW, this 16th day of February, 1994, in accordance with this Court's Order of January 29, 1993 appointing Professor Stephen Burbank as Special Master pursuant to Fed. R. Civ. P. 53 and the Court's inherent power, to assist the Court in its consideration of the proposed settlement submitted by the parties, Special Master Burbank having received and reviewed sensitive, confidential and privileged data from the settling parties, it is hereby ORDERED that the Clerk of the Court shall docket and file of record the attached reports of Special Master Burbank on the inventory settlements of class counsel in New Jersey and shall distribute copies of the reports to all counsel of record.

/s/ LOWELL A. REED, JR., J.

REPORT OF THE SPECIAL MASTER ON INVENTORY SETTLEMENTS IV: NEW JERSEY

I. INTRODUCTION

I have been asked as Special Master to analyze confidential information for the purpose of assisting the Court in evaluating the so-called inventory settlements reached by class counsel with the Center for Claims Resolution in 1993. Specifically, I have been asked to compare the inventory settlements with the settlements reached by class counsel and CCR during the period 1988-92.

As a representative sample of the inventory settlements, I chose the agreements covering the home states of the Ness, Motley and Greitzer & Locks firms, South Carolina and Pennsylvania respectively. In addition, I asked Mr. Baron and Mr. Pyle, counsel for certain objectors, to designate two additional jurisdictions. They chose Illinois for Ness, Motley and New Jersey for Greitzer & Locks.

In this report, I discuss the work performed, and the conclusions reached, with respect to settlements between Greitzer & Locks and CCR in New Jersey. Because, according to the settling parties, the New Jersey inventory settlement agreement was negotiated in a broader historical context that included settlements in Kentucky, toward the end of this report I include results from Kentucky for purposes of comparison. Reports on the South Carolina and Pennsylvania settlements were submitted on February 1, 1994; those on the Illinois settlements were submitted on February 11, 1994.

II. CONCLUSION

The conclusion of my analysis and comparison of the settlement data for New Jersey involving Greitzer & Locks and CCR is that the inventory settlement averages were lower than the Greitzer & Locks/CCR historical settlement averages in three categories (Lung Cancer, Other Cancer, and Non-Malignant) and higher in one category (Mesothelioma). In the remainder of this report I describe how I arrived at historical settlement averages and provide more detail concerning the results of comparing the historical averages with the inventory averages.

III. DISCUSSION

I received from Greitzer & Locks and from CCR historical data on settlements between Greitzer & Locks and CCR in New Jersey during the period 1988-92. One of the lists provided included 125 cases and the other 120 cases. Both were broken down into four disease categories (Mesothelioma, Lung Cancer, Other Cancer, and Non-Malignant). The lists also included the amount attributed to the settlement of each case by the providing entity, as well as total amounts and cases by category. I also received comparable historical data on settlements between Greitzer & Locks and CCR in Kentucky during the same period. In the following paragraphs I discuss the details of my analysis of the New Jersey data, and I report only the conclusions of my analysis of the Kentucky data for purposes of comparison.

I compared the lists provided to determine (1) discrepancies as to cases listed, (2) discrepancies as to disease categories, and (3) discrepancies as to amounts. I determined that 114 cases were included under the same disease categories in both lists. An additional 2 cases were included in both but under different disease categories. One list included 9 cases not found on the other, which in turn included 4 cases not found on the first. 11 of 13 cases not common to both lists were classified as Non-Malignant. I also determined that the difference in total dollars attributed to all settlements on the lists provided was 6.9% of the highest total so attributed by either providing entity.

I initiated inquiries by telephone to Mr. Locks and Mr. Pettit of Greitzer & Locks and Mr. Hanlon, representing CCR, asking each to verify the cases he had listed but that were not included on the other's list and to determine why cases listed by the other were not included on his list. I also asked each of them to verify the disease categories of the 2 cases differently listed by Greitzer & Locks and CCR.

These inquiries revealed that CCR had erroneously excluded 9 cases as settled by other firms, while Greitzer & Locks had erroneously and inadvertently excluded 1 case. In addition, CCR had erroneously classified 1 case by disease category.

At the end of this process of reconciliation, the lists included 125 cases under the same disease categories. The difference in

total dollars attributed to these settlements was 2.4% of the highest total so attributed by either of the providing entities. I compared the 125 cases, by category, in order to calculate historical averages. I first totaled the amounts attributed by each providing entity to cases in a disease category and calculated the dollar and percentage differences (as a percentage of the highest total amount). The dollar differences were a net figure of individual case differences going both ways, and the percentage differences also went both ways, depending on disease category. Those calculations yielded the following percentage differences: (1) Mesothelioma - 2.1%; (2) Lung Cancer - 2.4%; (3) Other Cancer - 29.8%; (4) Non-Malignant - 6.4%.

Responses to my inquiries to counsel and my experience as a result of serving as a special master in MDL 875 suggest that these differences in settlement dollars attributed to the same cases are due primarily to varying practices in the allocation of group settlements.

Because Greitzer & Locks and CCR attributed different total dollars, and hence different averages, to disease categories in the reconciled historical data, it was necessary to devise a method for imputing a single historical average to each disease category. For the purpose of computing such historical averages to compare to the averages under the New Jersey inventory settlement agreement, I used an amount reflecting one half the difference in the total amounts allocated to the cases in a disease category. Thus, for example, if Greitzer & Locks attributed $1,000 to the 10 cases in a disease category and CCR attributed $1,400 to the same 10 cases, the average ($120) would be based on $1200, the midpoint between $1400 and $1000.

Proceeding in this way, I then calculated the dollar and percentage differences (as a percentage of the highest average) between the Greitzer & Locks/CCR New Jersey historical averages and the averages used in the New Jersey inventory settlement agreement. I performed the same calculations on the historical averages from Kentucky, which were computed as above and the averages used in the Kentucky inventory settlement agreement. The percentage differences are indicated below, with a notation whether the inventory average is lower or higher than the historical average. The comparable percentages and notations for Kentucky appear in the adjacent column:

	NEW JERSEY	KENTUCKY
(1) Mesothelioma:	30% higher	32.3% lower
(2) Lung Cancer:	10.3% lower	3.3% higher
(3) Other Cancer:	22.7% lower	20.6% lower
(4) Non-Malignant:	2% lower	13.1% lower

It should be noted that Mesothelioma cases represent 5.1% of the total cases covered by the New Jersey inventory settlement agreement. Lung Cancer cases account for 6.5%, Other Cancer cases for 1.7%, and Non-Malignant cases for 86.7%.

Finally, both Greitzer & Locks and CCR have provided me with accounts of the reasons for differences between their New Jersey historical averages, as they perceive them, and the averages agreed to in the inventory settlement agreement. I do not believe, however, that there is need to summarize their accounts in this report.

DATED: February 15, 1994

/s/ STEPHEN B. BURBANK
Special Master

SETTLING PARTIES' EXHIBIT SP-302A

CCR SETTLEMENT AGREEMENT

AND NOW, in confirmation of an agreement in principle made between the parties listed below on or about the 11th day of November, 1992, the following Agreement is executed by and between the Center for Claims Resolution ("CCR"), on behalf of its members as of the date of this Agreement, and Joseph F. Rice, Esquire, of the law firm of Ness, Motley, Loadholt, Richardson & Poole ("Ness, Motley"), as agents for and on behalf of the plaintiffs/claimants ("plaintiffs") represented by them jointly or separately in the asbestos personal injury litigation in the State of South Carolina, this 14th day of January, 1993. Further, the law firm of Ness, Motley, Loadholt, Richardson & Poole shall be bound by the terms and conditions of this Agreement to the extent that they are co-counsel to any of the plaintiffs herein.

1. The cases that are subject to this Agreement consist of the following disease mix:

Disease	No. of Cases
Mesothelioma	31
Lung Cancer	64
Other Cancer	4
Non-Malignant	351
Total	450

2. Attachment "A" is a list of all plaintiffs whose cases/claims are being settled under the terms of this Agreement. Attachment "A" identifies the injured party's name, social security number and spouse's name, the court in which the case is filed or would have been filed, the docket number, the alleged disease and, if applicable, the estate representative's name and capacity. Ness, Motley agrees to recommend to each plaintiff/claimant identified on Attachment "A" the acceptance of the settlement amount allocated to each such plaintiff's case.

3. The settlement of these cases is based upon each plaintiff's current alleged asbestos-related disease is predicated on the assumption that all the cases qualify for payment under the terms of this Agreement. However, if a case does not qualify for payment or if the case qualifies but the plaintiff refuses to accept the settlement amount, then the total settlement figure will be reduced by the agreed-to allocated amount set forth below for the alleged disease and that case will be removed from the settlement and all rights of that plaintiff will be preserved in accordance with the provisions of this Agreement as if this Agreement did not exist.

Assuming that all plaintiffs qualify and accept as indicated above, the total amount of this settlement is . Should an individual plaintiff reject the recommendations of plaintiff's counsel to settle with the CCR, then the total settlement fund shall be reduced based on the following disease values:

Living Mesothelioma
Deceased Mesothelioma
Lung Cancer
Other Cancer
Non-Malignant

4. It is agreed between the CCR and Ness, Motley that all accepting plaintiffs' cases shall be settled in accordance with the procedures outlined below:

a. Within fifteen (15) days of the date of this Agreement, Ness, Motley will provide to the CCR Attachment "A".

b. No case will be eligible for payment until Ness, Motley provides, as to that case, the following:

(1) Evidence that the plaintiff was exposed to materials containing asbestos manufactured, sold, marketed or distributed by a member of the CCR. For the purposes of satisfying this requirement, the CCR and Ness,

Motley agree that any jobsite that has been accepted by CCR in the past as a jobsite on which asbestos-containing products were manufactured, sold, marketed or distributed by a member of CCR will be accepted in these cases, provided that the plaintiff demonstrates presence at that jobsite at the appropriate time. A list of the agreed jobsites and exposure periods will be attached to this Agreement as Attachment "B". In the absence of an agreement, plaintiff must provide an affidavit of the plaintiff, deposition testimony or co-worker affidavit, or other evidence acceptable to CCR to demonstrate exposure.

(2) For each case submitted, Ness, Motley shall immediately make available to the CCR appropriate medical verification from a licensed physician upon whom Ness, Motley relies, to demonstrate that the plaintiff has contracted the asbestos-related disease claimed in Attachment "A". For the purpose of meeting this requirement, a medical record or report from a licensed physician providing a diagnosis of an asbestos-related injury as alleged by the plaintiff shall be sufficient. A record establishing the existence of a primary lung cancer or a mesothelioma shall be sufficient in and of itself.

(3) The information required by this paragraph 4.b will be submitted to the CCR for each plaintiff not later than one hundred twenty (120) days prior to the date of the scheduled payment for the plaintiff, except that the information will be provided within ninety (90) days as to each plaintiff whose scheduled payment occurs on or before June 1, 1993. An Attachment "C", which is a CCR processing form that will be supplied to Ness, Motley by the CCR, must also be submitted for each plaintiff in addition to the information required above.

(4) The CCR and Ness, Motley agree that if appropriate documentation is not provided for a case at the appropriate time then that case will be removed from the settlement and the total settlement amount will be reduced by the amount which would then have been allocated to that case, according to the amounts listed in paragraph 3, above, except that Ness, Motley can substitute for any non-qualifying case any other qualifying case on Attachment "A".

c. Provided that a plaintiff has submitted all the required information and documentation listed herein, the CCR will generate and forward a Release for that plaintiff which fully releases the CCR members from all future liability for asbestos personal injury claims to the claimant and any persons claiming by or

through the plaintiff or for plaintiff's alleged injuries, within sixty (60) days before the scheduled payment date, except that the releases will be provided within thirty (30) days before the scheduled payment date for any plaintiff who is scheduled for payment on or before June 1, 1993. Attachment "D" to this Agreement is the release form which will be executed by each of the plaintiffs.

d. It is agreed that payments will be made in the following amounts on the following dates:

June 1, 1993	25%
November 1, 1993	25%
June 1, 1994	25%
October 1, 1994	25%

Should an individual with a non-malignant claim develop an asbestos-related cancer prior to the time that the plaintiff is due to receive settlement from the CCR, then that claimant shall be entitled to be compensated at the rate for the asbestos-related cancer rather than any lower rate. Should such an increase in payment result in the total settlement fund's being increased, the increase shall be in an amount equal to the amount for the particular cancer as set forth in paragraph 3, above, less the amount that was already allocated to the plaintiff for the disease originally claimed.

5. Ness, Motley agrees further that his law firm will not file any future asbestos personal injury claims in any court in the State

of South Carolina or in any other state for a case which would be properly venued in South Carolina against the CCR or any of its current members, so long as the current member remains a member of the CCR, unless the medical evidence supports one of the following asbestos-related diagnoses:

a. An asbestos-related malignancy; or

b. Non-malignant asbestos-related changes with a chest x-ray of 1/0 and pulmonary function abnormalities as shown by either (a) FVC less than 80% of predicted with an FEV-1/FVC ratio (actual) greater than or equal to 75%; or (b) TLC less than 80% of predicted with a DLC less than or equal to 76% of predicted; or (c) TLC less than 80% of predicted with bilateral basilar crackles which are stated by a licensed physician to be the result of the underlying lung disease; or

c. Non-malignant asbestos-related changes with a chest x-ray of 1/1 and pulmonary function abnormalities as shown by either (a) FVC less than 80% of predicted with FEV-1/FVC ratio greater than or equal to 72% (actual); or (b) TLV less than 80% of predicted; or

d. A diagnosis by a licensed pathologist of asbestosis based on the CAF-NIOSH 1982 criteria: or

e. Non-malignant asbestos-related changes with a chest x-ray showing bilateral pleural changes of extent C2 accompanied by the same pulmonary function testing requirements as set forth in paragraph 5.c., above, or bilateral pleural changes of extent B2 accompanied by the same pulmonary function testing requirements as set forth in paragraph 5.b. above.

Ness, Motley shall also not present any case for payment that is placed on a pleural registry as to any other defendant on or after the date of this Agreement.

6. It is understood that the scope of this settlement includes any and all companion or related actions filed in any jurisdiction by the plaintiffs identified in Attachment "A". Any payment made under this Agreement shall include all claims, if any, for loss of support, services, consortium, companionship, society and other valuable services rendered by a spouse, family member or close companion however such claims are denominated, including without limitation, wrongful death or survival actions. Spouses, heirs, representative or other individuals with such claims shall be bound by this Agreement and shall execute all necessary settlement documentation to effectuate its terms. However, the parties do not intend to discharge any claim which the spouse or children of an exposed plaintiff may have in the future for any asbestos-related illness which they may develop.

7. The parties to this Agreement will make good faith efforts to resolve any disputes which may arise while carrying out the terms and conditions of this Agreement. If the parties are unable to resolve a disputed as to interpretation of any of the terms of this Agreement, the issues shall be referred to a mutually agreeable mediator for binding arbitration. The losing party shall be responsible for payment of the costs associated with arbitration.

AGREED TO AN ACCEPTED THIS DAY OF , 1993.

Michael F. Rooney, Chief Operating Officer
Center for Claims Resolution

Joseph F. Rice, Esquire
Ness, Motley, Loadholt, Richardson & Poole

SETTLING PARTIES' EXHIBIT SP-302B

Redacted copies of the settlement agreements between the CCR and the law firms affiliated with Ness, Motley in West Virginia, providing for the settlement of 7,839 present claimants represented by those firms in the State of West Virginia, and for the possibility of an alternative dispute resolution procedure with respect to future claims.

CCR SETTLEMENT AGREEMENT

AND NOW, in confirmation of an agreement in principle made between the parties listed below on or about the 11th day of November, 1992, the following Agreement is executed by and between the Center For Claims Resolution ("CCR"), on behalf of its members as of the date of this Agreement, and James F. Humphreys, of the law firm of James F. Humphreys (hereinafter referred to as Plaintiff Counsel), as agents for and on behalf of the plaintiffs/claimants ("plaintiffs") represented by them jointly or separately in the asbestos personal injury litigation in the State of West Virginia. Further, the law firm of Ness, Motley, Loadholt, Richardson & Poole shall be bound by the terms and conditions of this Agreement to the extent that they are co-counsel to any plaintiffs herein. This Agreement supersedes all prior agreements by and between these parties which relate to the settlement of pending claims, specifically including the agreement of April 27, 1993.

1. The terms of this Agreement shall remain confidential between the parties, their principals, and their counsel unless mutually agreed otherwise by the CCR and Plaintiff Counsel, or when necessary to comply with court orders, or in an action to enforce the terms and conditions of this settlement Agreement itself.

2. The cases that are subject to this Agreement consist of the following disease mix:

Disease	No. of Cases
Mesothelioma	9
Lung Cancer	28
Other Cancer	22
Non-Malignant	3,564

Non-Malignant (Premises)	268
Total	3,891

3. Attachment "A" is a list of all plaintiffs whose cases/claims are being settled under the terms of this Agreement. Attachment "A" identifies the injured party's name, social security number and spouse's name, the court in which the case is filed or would have been filed, the docket number, the alleged disease and, if applicable, the estate representative's name and capacity. Plaintiff Counsel agrees to recommend to each plaintiff/claimant identified on Attachment "A" the acceptance of the settlement amount allocated to each such plaintiffs case.

4. The settlement of these cases is based upon each plaintiffs current alleged asbestos-related disease and is predicated on the assumption that all the cases qualify for payment under the terms of this Agreement. However, if a case does not qualify for payment or if the case qualifies but the plaintiff refuses to accept the settlement amount, then the total settlement figure will be reduced by the agreed-to allocated amount set forth below for the alleged disease and that case will be removed from the settlement and all rights of that plaintiff will be preserved in accordance with the provisions of this Agreement as if this Agreement did not exist.

Assuming that all plaintiffs qualify and accept as indicated above, the total amount of this settlement is . Should an individual plaintiff reject the recommendations of plaintiff's counsel to settle with the CCR, then the total settlement fund shall be reduced based on the following disease values:

Mesothelioma
Lung Cancer
Other Cancer
Non-Malignant
Non-Malignant (Premises)

5. It is agreed between the CCR and Plaintiff Counsel that all accepting plaintiffs' cases shall be settled in accordance with the procedures outlined below:

a. Within fifteen (15) days of the date of this Agreement, Plaintiff Counsel will provide to the CCR Attachment "A".

b. No case will be eligible for payment until Plaintiff Counsel provides, as to that case, the following:

(1) Evidence that the plaintiff was exposed to materials containing asbestos manufactured, sold, marketed or distributed by a member of the CCR. For the purposes of satisfying this requirement, the CCR and Plaintiff Counsel agree that any jobsite that has been accepted by CCR in the past as a jobsite on which asbestos-containing products were manufactured, sold, marketed or distributed by a member of CCR will be accepted in these cases, provided that the plaintiff demonstrates presence at that jobsite at the appropriate time.

A list of the agreed jobsites and exposure periods will be attached to this Agreement as Attachment "B". In the absence of an agreement, plaintiff must provide an affidavit of the plaintiff, deposition testimony or co-worker affidavit, or other evidence acceptable to CCR to demonstrate exposure.

(2) For each case submitted, Plaintiff Counsel shall immediately make available to the CCR appropriate medical verification from a licensed physician upon whom Plaintiff Counsel relies, to demonstrate that the plaintiff has contracted the asbestos-related disease claimed in Attachment "A". For the purpose of meeting this requirement, a medical record or report from a licensed physician providing a diagnosis of an asbestos-related injury as alleged by the plaintiff shall be sufficient. A record establishing the existence of a primary lung cancer or a mesothelioma shall be sufficient in and of itself.

(3) The information required by this paragraph 5.b. will be submitted to the CCR for each plaintiff not later than one hundred twenty (120) days

prior to the date of the scheduled payment for the plaintiff, except that the information will be provided within ninety (90) days as to each plaintiff whose scheduled payment occurs on or before June 1, 1993. An Attachment "C", which is a CCR processing form that will be supplied to Plaintiff Counsel by the CCR, must also be submitted for each plaintiff in addition to the information required above.

(4) The CCR and Plaintiff Counsel agree that if appropriate documentation is not provided for a case at the appropriate time then that case will be removed from the settlement (until such time as proper documentation is received) and the total settlement amount will be reduced by the amount which would then have been allocated to that case, according to the amounts listed in paragraph 4, above, except that Plaintiff Counsel can substitute for any non-qualifying case any other qualifying case on Attachment "A".

c. Provided that a plaintiff has submitted all the required information and documentation listed herein, the CCR will generate and forward a Release for that plaintiff which fully releases the CCR members from all future liability for asbestos personal injury claims to the claimant and any persons claiming by or through the plaintiff or for plaintiff's alleged injuries, within sixty (60) days before the scheduled payment date, except that the releases will be provided within thirty (30) days before the scheduled payment date for any plaintiff who is scheduled for payment on or before June 1, 1993. Attachment "D" to this Agreement is the release form which will be executed by each of the plaintiffs.

d. It is agreed that payments will be made in the following amounts on the following dates:

15 May 93
15 Oct 93
15 May 94
15 Sep 94
15 May 95
15 May 96
15 Apr 97

Should an individual with a non-malignant claim develop an asbestos-related cancer prior to the time that the plaintiff is due to receive settlement from the CCR, then that claimant shall be entitled to be compensated at the rate for the asbestos-related cancer rather than any lower rate. Should such an increase in payment result in the total settlement fund's being increased, the increase shall be in an amount equal to the amount for the particular cancer as set forth in paragraph 4, above, less the amount that as [sic] already allocated to the plaintiff for the disease originally claimed.

6. It is understood that the scope of this settlement includes any and all companion or related actions filed in any jurisdiction by the plaintiffs identified in Attachment "A". Any payment made under this Agreement shall include all claims, if any, for loss of support, services, consortium, companionship, society and other valuable services rendered by a spouse, family member or close companion however such claims are denominated, including without limitation, wrongful death or survival actions. Spouses, heirs, representative or other individuals with such claims shall be bound by this Agreement and shall execute all necessary settlement documentation to effectuate its terms. However, the parties do not intend to discharge any claim which the spouse or children of an exposed plaintiff may have in the future for any asbestos-related illness which they may develop.

7. It is further agreed that the parties will make good faith efforts to resolve any disputes which may arise while carrying out the terms and conditions of this settlement agreement. If the parties are unable to resolve a dispute, the issue shall be referred to a mutually agreeable mediator or arbiter for binding resolution. If the parties are unable to mutually agree upon an arbiter, then each

party shall select its' [sic] arbiter and the two arbiters so selected shall select a third arbiter. The losing party shall be responsible for payment of the costs associated with arbitration. Any disputes concerning the interpretation or performance under this agreement shall be resolved in accordance with the laws of the state of the residence of the plaintiff's counsel to the agreement. The law applicable to the individual's claim shall be the law of the jurisdiction where the claim has been filed against other co-defendants. In the event the plaintiff has not filed a lawsuit against any defendant, applicable law shall be based on plaintiff's state of residence.

AGREED TO AND ACCEPTED THIS 11TH DAY OF JUNE, 1993.

/s/ MICHAEL F. ROONEY, Chief Operating Officer
Center for Claims Resolution

/s/ JAMES F. HUMPHREYS

/s/ JOSEPH F. RICE*
Ness, Motley, Loadholt, Richardson & Poole

*Further, the law firm of Ness, Motley, Loadholt, Richardson & Poole shall be bound by the terms and conditions of this Agreement to the extent that they are co-counsel to any of the plaintiffs herein.

* * * *

SETTLEMENT AGREEMENT

This Agreement is executed by and between the Center For Claims Resolution ("CCR") as sole agent for its members and James F. Humphreys of the law firm of James F. Humphreys (hereinafter referred to as Plaintiff Counsel) individually and as agents for and on behalf of Plaintiff Counsel. This Agreement supersedes all prior agreements by and between these parties which relate to procedures for handling future claims, specifically including the agreement of April 27, 1993.

1. CCR agrees to offer to all future clients of Plaintiff Counsel, alleging a claim for non-malignant asbestos-related disease that is not included within the categories listed in paragraph 5, and which claim is not barred by the statute of limitations of the applicable jurisdiction, the right to participate in alternative dispute

resolution with CCR under which the client may forego or defer filing and litigating a claim against CCR and its current members, and the statute of limitations will be tolled as against CCR members.

2. Plaintiff Counsel believes that the criteria set forth in paragraph 5 is [sic] fair and reasonable criteria and acceptance of CCR's offer will be in the interest of its future clients who do not have a medical condition described in paragraph 5, in that it protects such clients from being forced prematurely to litigate, or settle and release their claims for asbestos injury. Plaintiff Counsel therefore agrees, unless in the exercise of its independent professional judgment, given some unforeseen circumstances, it determines otherwise, to recommend that its clients seriously consider, and accordingly will use its best efforts to encourage, each client to accept this alternative dispute resolution procedure. With respect to all clients who accept this alternative dispute resolution procedure, Plaintiff Counsel agrees to defer filing any asbestos-related personal injury claims against CCR or any of its current members until such time, if ever, as the claimant develops one of the asbestos-related diseases described in paragraph 5.

3. In the event a potential or future Plaintiff Counsel client chooses not to accept CCR's offer and so notifies CCR, and Plaintiff Counsel determines that it wishes to continue representation, the statute of limitations shall be tolled for a period not to exceed sixty days after notification, whereupon the complaint may be filed and served.

4. Similarly, in the event a potential or future client chooses not to accept CCR's offer and so notifies CCR, and Plaintiff Counsel determines that it wishes to decline or cease representation, the statute of limitations as to said individual's existing claim shall be tolled for a period not to exceed one hundred twenty (120) days after notification while the individual seeks new counsel.

5. CCR's alternative dispute resolution offer, as described above, pertains to individuals who retain Plaintiff Counsel and who do not have one of the following asbestos-related diagnoses:

a. An asbestos-related malignancy; or

b. Non-malignant asbestos-related changes with a chest x-ray of 1/0 and pulmonary function abnormalities as shown by either (a) FVC less than 80% of predicted with an FEV-1/FVC ratio (actual) greater than or equal to 75%; or (b) TLC less than 80% of predicted with a DLCO less than or equal to 75% of predicted; or (c) TLC less than 80% of predicted with bilateral basilar crackles which are stated by a licensed physician to be the result of the underlying lung disease; or

c. Non-malignant asbestos-related changes with a chest x-ray of 1/1 or greater and pulmonary function abnormalities as shown by either (a) FVC less than 80% of predicted with FEV-1/FVC ratio greater than or equal to 72% (actual); or (b) TLC less than 80% of predicted; or

d. A diagnosis by a licensed pathologist of asbestosis based on the CAP-NIOSH 1982 criteria; or

e. Non-malignant asbestos-related changes with a chest x-ray showing bilateral pleural changes of extent C2 accompanied by the same pulmonary function testing requirements as set forth in paragraph 5.c. above, or bilateral pleural changes of extent B2 accompanied by the same pulmonary function testing requirements as set forth in paragraph 5.b. above.

6. Any Plaintiff Counsel future client who accepts the offer herein described shall not be deemed to have settled any claim with CCR, and in the event an accepting client brings suit against any other entity for an asbestos related condition, the acceptance of the offer shall not in any respect (a) preclude any other entity or defendant from impleading CCR members for contribution or indemnity or (b) preclude the CCR or its members from defending an action for contribution or indemnity.

7. As to any future client who accepts this alternative dispute resolution offer, if that client obtains a judgment in the tort system for an asbestos-related personal injury claim, against a defendant that is not a CCR member, such judgment shall not affect in any way the client's right of action against a CCR member pursuant to this Agreement; provided however, that any damage award recovered or settlement received for that claim shall be treated as a prior settlement under applicable law, and, accordingly, shall be entitled to any set-offs, credits, or other reductions in any verdict

or award against a CCR member on account of such prior damage award or settlement as prescribed by the applicable law.

8. Subject to paragraph 11 below, this agreement shall remain in full force and effect unless and until the Stipulation of Settlement in *Carlough* v. *Amchem Products, Inc.*, C.A. No. 93-0215 (E.D. Pa.) is finally approved by the Court, with all appeals, if any, exhausted. Upon final approval of the *Carlough* settlement, which includes medical criteria substantially comparable to the criteria of paragraph 5, this Agreement shall be superseded by *Carlough*, except for those who have chosen to opt out in accordance with the orders of the Court.

9. The terms of this Agreement shall remain confidential between the parties, their principals and their counsel unless mutually agreed otherwise by the CCR and Plaintiff Counsel, or when necessary to comply with court orders, or in an action to enforce the terms and conditions of this Agreement itself.

10. If the validity or enforcement of any provision in this agreement is challenged in any legal proceeding, Plaintiff Counsel agrees to notify CCR of such challenge so that appropriate steps can be taken to respond to the challenge. If final judgement is rendered, by an appropriate court, with all appeals exhausted, holding the provision unethical or unlawful, then the provision so interpreted shall be deemed null and void and severable from the remaining portion of the Agreement. The balance of the Agreement shall remain in full force and effect.

11. This Agreement constitutes the entire understanding between the parties concerning the subject matter contained herein. No modification of any provision of this Agreement shall be valid and the same may not be terminated or abandoned except by a writing signed by the parties to this Agreement.

AGREED TO AND ACCEPTED THIS 11TH DAY OF JUNE, 1993.

/s/ JAMES F. HUMPHREYS
Law Firm of James F. Humphreys

/s/ MICHAEL F. ROONEY, Chief Operating Officer
Center for Claims Resolution

/s/JOSEPH F. RICE*
Ness, Motley, Loadholt, Richardson & Poole

*Further, the law firm of Ness, Motley, Loadholt, Richardson & Poole shall be bound by the terms and conditions of this Agreement to the extent that they are co-counsel to any of the plaintiffs herein.

6/10/93

* * * *

CCR SETTLEMENT AGREEMENT

AND NOW, in confirmation of an agreement in principle made between the parties listed below on or about the 11th day of November, 1992, the following Agreement is executed by and between the Center For Claims Resolution ("CCR"), on behalf of its members as of the date of this Agreement, and David L. Meade, of the law firm of Shinaberry, Meade & Venezia (hereinafter referred to as Plaintiff Counsel), as agents for and on behalf of the plaintiffs/claimants ("plaintiffs") represented by them jointly or separately in the asbestos personal injury litigation in the State of West Virginia. Further, the law firm of Ness, Motley, Loadholt, Richardson & Poole shall be bound by the terms and conditions of this Agreement to the extent that they are co-counsel to any plaintiffs herein. This Agreement supersedes all prior agreements by and between these parties which relate to the settlement of pending claims, specifically including the agreement of May 14, 1993.

1. The terms of this Agreement shall remain confidential between the parties, their principals, and their counsel unless mutually agreed otherwise by the CCR and Plaintiff Counsel, or when necessary to comply with court orders, or in an action to enforce the terms and conditions of this settlement Agreement itself.

2. The cases that are subject to this Agreement consist of the following disease mix:

Disease	No. of Cases
Mesothelioma	10
Lung Cancer	51
Other Cancer	18
Non-Malignant	1,442
Total	1,521

3. Attachment "A" is a list of all plaintiffs whose cases/claims are being settled under the terms of this Agreement. Attachment "A" identifies the injured party's name, social security number and spouse's name, the court in which the case is filed or would have been filed, the docket number, the alleged disease and, if applicable, the estate representative's name and capacity. Plaintiff Counsel agrees to recommend to each plaintiff/claimant identified on Attachment "A" the acceptance of the settlement amount allocated to each such plaintiff's case.

4. The settlement of these cases is based upon each plaintiff's current alleged asbestos-related disease and is predicated on the assumption that all the cases qualify for payment under the terms of this Agreement. However, if a case does not qualify for payment or if the case qualifies but the plaintiff refuses to accept the settlement amount, then the total settlement figure will be reduced by the agreed-to allocated amount set forth below for the alleged disease and that case will be removed from the settlement and all rights of that plaintiff will be preserved in accordance with the provisions of this Agreement as if this Agreement did not exist.

Assuming that all plaintiffs qualify and accept as indicated above, the total amount of this settlement is . Should an individual plaintiff reject the recommendations of plaintiff's counsel to settle with the CCR, then the total settlement fund shall be reduced based on the following disease values:

Mesothelioma
Lung Cancer
Other Cancer
Non-Malignant
Non-Malignant (Premises)

5. It is agreed between the CCR and Plaintiff Counsel that all accepting plaintiffs' cases shall be settled in accordance with the procedures outlined below:

a. Within fifteen (15) days of the date of this Agreement, Plaintiff Counsel will provide to the CCR Attachment "A".

b. No case will be eligible for payment until Plaintiff Counsel provides, as to that case, the following:

(1) Evidence that the plaintiff was exposed to materials containing asbestos manufactured, sold, marketed or distributed by a member of the CCR. For the purposes of satisfying this requirement, the CCR and Plaintiff Counsel agree that any jobsite that has been accepted by CCR in the past as a jobsite on which asbestos-containing products were manufactured, sold, marketed or distributed by a member of CCR will be accepted in these cases, provided that the plaintiff demonstrates presence at that jobsite at the appropriate time. A list of the agreed Jobsites and exposure periods will be attached to this Agreement as Attachment "B". In the absence of an agreement, plaintiff must provide an affidavit of the plaintiff, deposition testimony or co-worker affidavit, or other evidence acceptable to CCR to demonstrate exposure.

(2) For each case submitted, Plaintiff Counsel shall immediately make available to the CCR appropriate medical verification from a licensed physician upon whom Plaintiff Counsel relies, to demonstrate that the plaintiff has contracted the asbestos-related disease claimed in Attachment "A". For the purpose of meeting this requirement, a medical record or report from a licensed physician providing a diagnosis of an asbestos-related injury as alleged by the plaintiff shall be sufficient. A record

establishing the existence of a primary lung cancer or a mesothelioma shall be sufficient in and of itself.

(3) The information required by this paragraph 5.b. will be submitted to the CCR for each plaintiff not later than one hundred twenty (120) days prior to the date of the scheduled payment for the plaintiff, except that the information will be provided within ninety (90) days as to each plaintiff whose scheduled payment occurs on or before June 1, 1993. An Attachment "C", which is a CCR processing form that will be supplied to Plaintiff Counsel by the CCR, must also be submitted for each plaintiff in addition to the information required above.

(4) The CCR and Plaintiff Counsel agree that if appropriate documentation is not provided for a case at the appropriate time then that case will be removed from the settlement (until such time as proper documentation is received) and the total settlement amount will be reduced by the amount which would then have been allocated to that case, according to the amounts listed in paragraph 4, above, except that Plaintiff Counsel can substitute for any non-qualifying case any other qualifying case on Attachment "A".

c. Provided that a plaintiff has submitted all the required information and documentation listed herein, the CCR will generate and forward a Release for that plaintiff which fully releases the CCR members from all future liability for asbestos personal injury claims to the claimant and any persons claiming by or through the plaintiff or for plaintiff's alleged injuries, within sixty (60) days before the scheduled payment date, except that the releases will be provided within thirty (30) days before the scheduled payment date for any plaintiff who is scheduled for payment on or before June 1,

1993. Attachment "D" to this Agreement is the release form which will be executed by each of the plaintiffs.

d. It is agreed that payments will be made in the following amounts on the following dates:

15 May 93
15 Oct 93
15 May 94
15 Sep 94
15 May 95

Should an individual with a non-malignant claim develop an asbestos-related cancer prior to the time that the plaintiff is due to receive settlement from the CCR, then that claimant shall be entitled to be compensated at the rate for the asbestos-related cancer rather than any lower rate. Should such an increase in payment result in the total settlement fund's being increased, the increase shall be in an amount equal to the amount for the particular cancer as set forth in paragraph 4, above, less the amount that as [sic] already allocated to the plaintiff for the disease originally claimed.

6. It is understood that the scope of this settlement includes any and all companion or related actions filed in any jurisdiction by the plaintiffs identified in Attachment "A". Any payment made under this Agreement shall include all claims, if any, for loss of support, services, consortium, companionship, society and other valuable services rendered by a spouse, family member or close companion however such claims are denominated, including without limitation, wrongful death or survival actions. Spouses, heirs, representative or other individuals with such claims shall be bound by this Agreement and shall execute all necessary settlement documentation to effectuate its terms. However, the parties do not intend to discharge any claim which the spouse or children of an exposed plaintiff may have in the future for any asbestos-related illness which they may develop.

7. It is further agreed that the parties will make good faith efforts to resolve any disputes which may arise while carrying out

the terms and conditions of this settlement agreement. If the parties are unable to resolve a dispute, the issue shall be referred to a mutually agreeable mediator or arbiter for binding resolution. If the parties are unable to mutually agree upon an arbiter, then each party shall select its' [sic] arbiter and the two arbiters so selected shall select a third arbiter. The losing party shall be responsible for payment of the costs associated with arbitration. Any disputes concerning the interpretation or performance under this agreement shall be resolved in accordance with the laws of the state of the residence of the plaintiff's counsel to the agreement. The law applicable to the individual's claim shall be the law of the jurisdiction where the claim has been filed against other co-defendants. In the event the plaintiff has not filed a lawsuit against any defendant, applicable law shall be based on plaintiffs state of residence.

AGREED TO AND ACCEPTED THIS 11TH DAY OF JUNE, 1993.

/s/ MICHAEL F. ROONEY, Chief Operating Officer
Center for Claims Resolution

/s/ DAVID L. MEADE
Shinaberry, Meade & Venezia

/s/ JOSEPH F. RICE* for Ness, Motley, et al.

*Further, the law firm of Ness, Motley, Loadholt, Richardson & Poole shall be bound by the terms and conditions of this Agreement to the extent that they are co-counsel to any of the plaintiffs herein.

6/10/93

* * * *

SETTLEMENT AGREEMENT

This Agreement is executed by and between the Center For Claims Resolution ("CCR") as sole agent for its members and David L. Meade, of the law firm of Shinaberry, Meade & Venezia (hereinafter referred to as Plaintiff Counsel) individually and as agents for and on behalf of Plaintiff Counsel. This Agreement supersedes all prior agreements by and between these parties which

relate to procedures for handling future claims, specifically including the agreement of May 14, 1993.

1. CCR agrees to offer to all future clients of Plaintiff Counsel, alleging a claim for non-malignant asbestos-related disease that is not included within the categories listed in paragraph 5, and which claim is not barred by the statute of limitations of the applicable jurisdiction, the right to participate in alternative dispute resolution with CCR under which the client may forego or defer filing and litigating a claim against CCR and its current members, and the statute of limitations will be tolled as against CCR members.

2. Plaintiff Counsel believes that the criteria set forth in paragraph 5 is [sic] fair and reasonable criteria and acceptance of CCR's offer will be in the interest of its future clients who do not have a medical condition described in paragraph 5, in that it protects such clients from being forced prematurely to litigate, or settle and release their claims for asbestos injury. Plaintiff Counsel therefore agrees, unless in the exercise of its independent professional judgment, given some unforeseen circumstances, it determines otherwise, to recommend that its clients seriously consider, and accordingly will use its best efforts to encourage, each client to accept this alternative dispute resolution procedure. With respect to all clients who accept this alternative dispute resolution procedure, Plaintiff Counsel agrees to defer filing any asbestos-related personal injury claims against CCR or any of its current members until such time, if ever, as the claimant develops one of the asbestos-related diseases described in paragraph 5.

3. In the event a potential or future Plaintiff Counsel client chooses not to accept CCR's offer and so notifies CCR, and Plaintiff Counsel determines that it wishes to continue representation, the statute of limitations shall be tolled for a period not to exceed sixty days after notification, whereupon the complaint may be filed and served.

4. Similarly, in the event a potential or future client chooses not to accept CCR's offer and so notifies CCR, and Plaintiff Counsel determines that it wishes to decline or cease representation, the statute of limitations as to said individual's existing claim shall

be tolled for a period not to exceed one hundred twenty (120) days after notification while the individual seeks new counsel.

5. CCR's alternative dispute resolution offer, as described above, pertains to individuals who retain Plaintiff Counsel and who do not have one of the following asbestos-related diagnoses:

a. An asbestos-related malignancy; or

b. Non-malignant asbestos-related changes with a chest x-ray of 1/0 and pulmonary function abnormalities as shown by either (a) FVC less than 80% of predicted with an FEV-1/FVC ratio (actual) greater than or equal to 75%; or (b) TLC less than 80% of predicted with a DLCO less than or equal to 75% of predicted; or (c) TLC less than 80% of predicted with bilateral basilar crackles which are stated by a licensed physician to be the result of the underlying lung disease; or

c. Non-malignant asbestos-related changes with a chest x-ray of 1/1 or greater and pulmonary function abnormalities as shown by either (a) FVC less than 80% of predicted with FEV-1/FVC ratio greater than or equal to 72% (actual); or (b) TLC less than 80% of predicted; or

d. A diagnosis by a licensed pathologist of asbestosis based on the CAP-NIOSH 1982 criteria; or

e. Non-malignant asbestos-related changes with a chest x-ray showing bilateral pleural changes of extent C2 accompanied by the same pulmonary function testing requirements as set forth in paragraph 5.c. above, or bilateral pleural changes of extent B2 accompanied by the same pulmonary function testing requirements as set forth in paragraph 5.b. above.

6. Any Plaintiff Counsel future client who accepts the offer herein described shall not be deemed to have settled any claim with CCR, and in the event an accepting client brings suit against any other entity for an asbestos-related condition, the acceptance of the offer shall not in any respect (a) preclude any other entity or defendant from impleading CCR members for contribution or

indemnity or (b) preclude the CCR or its members from defending an action for contribution or indemnity.

7. As to any future client who accepts this alternative dispute resolution offer, if that client obtains a judgment in the tort system for an asbestos-related personal injury claim, against a defendant that is not a CCR member, such judgment shall not affect in any way the client's right of action against a CCR member pursuant to this Agreement; provided however, that any damage award recovered or settlement received for that claim shall be treated as a prior settlement under applicable law, and, accordingly, shall be entitled to any set-offs, credits, or other reductions in any verdict or award against a CCR member on account of such prior damage award or settlement as prescribed by the applicable law.

8. Subject to paragraph 11 below, this agreement shall remain in full force and effect unless and until the Stipulation of Settlement in *Carlough* v. *Amchem Products, Inc.*, C.A. No. 93-0215 (E.D. Pa.) is finally approved by the Court, with all appeals, if any, exhausted. Upon final approval of the *Carlough* settlement, which includes medical criteria substantially comparable to the criteria of paragraph 5, this Agreement shall be superseded by *Carlough*, except for those who have chosen to opt out in accordance with the orders of the Court.

9. The terms of this Agreement shall remain confidential between the parties, their principals and their counsel unless mutually agreed otherwise by the CCR and Plaintiff Counsel, or when necessary to comply with court orders, or in an action to enforce the terms and conditions of this Agreement itself.

10. If the validity or enforcement of any provision in this agreement is challenged in any legal proceeding, Plaintiff Counsel agrees to notify CCR of such challenge so that appropriate steps can be taken to respond to the challenge. If final judgement is rendered, by an appropriate court, with all appeals exhausted, holding the provision unethical or unlawful, then the provision so interpreted shall be deemed null and void and severable from the remaining portion of the Agreement. The balance of the Agreement shall remain in full force and effect.

11. This Agreement constitutes the entire understanding between the parties concerning the subject matter contained herein.

No modification of any provision of this Agreement shall be valid and the same may not be terminated or abandoned except by a writing signed by the parties to this Agreement.

AGREED TO AND ACCEPTED THIS 11TH DAY OF JUNE, 1993.

/s/ DAVID L. MEADE
Shinaberry, Meade & Venezia

/s/ MICHAEL F. ROONEY, Chief Operating Officer
Center for Claims Resolution

/s/ JOSEPH F. RICE*
Ness, Motley, Loadholt, Richardson & Poole

*Further, the law firm of Ness, Motley, Loadholt, Richardson & Poole shall be bound by the terms and conditions of this Agreement to the extent that they are co-counsel to any of the plaintiffs herein.

6/10/93

SETTLING PARTIES' EXHIBIT SP-302C

Redacted copies of the settlement agreements between the CCR and the law firm of Greitzer and Locks, providing for the settlement of 2,602 present claimants represented by that firm in the State of Pennsylvania, and for the possibility of an alternative dispute resolution procedure with respect to future claims.

* * * *

October 26, 1992

Mr. Kevin Guers
Center for Claims Resolution
CN 5319
116-300 Village Boulevard
Princeton, NJ 08540

Re: Greitzer and Locks Pennsylvania Case Settlements with Center for Claims Resolution

Dear Kevin:

This will confirm that we have settled the entire present inventory of Greitzer and Locks cases, consisting of 2,602 Pennsylvania cases for a total of The disease breakdown for this settlement is as follows:

79 mesothelioma
173 lung cancers
30 other cancers
2,320 non-malignant asbestos conditions

Total: 2,602 total cases

It is understood and agreed that should any client reject this settlement, this settlement would be reduced, depending upon the disease as follows:

for mesothelioma
for lung cancers
for other cancers
for non-malignant asbestos conditions

It is further understood and agreed that should the total case count either exceed or be lower than the disease breakdowns as indicated in this letter, the settlement will be subject to adjustment by agreement (either upward or downward) in accordance with the above agreed upon values by disease.

The terms of the payment for the above-settlement will be mutually agreed upon and will commence no sooner than the end of the first quarter 1993 and will end no later than the end of the fourth quarter of 1996.

It is further understood that in the future Greitzer and Locks will not handle or process claims against the CCR defendants unless they meet certain mutually agreeable disease criteria.

Very truly yours,

/s/ LEE B. BALEFSKY

LBB: eh
cc: Gene Locks, Esquire

* * * *

December 11, 1992

Kevin Guers, Esquire
Center For Claims Resolution
116-300 Village Boulevard
CN5319
Princeton, NJ 08540

Re: Greitzer and Locks Pennsylvania Case Settlements with Center for Claims Resolution

Dear Kevin:

This letter will confirm that the payment schedule for the 2,602 Pennsylvania cases our office settled on October 26, 1992, will be paid in full by December 31, 1996. The payment schedule will be as follows:

First Quarter 1993
Second Quarter 1993
Third Quarter 1993

Fourth Quarter 1993
First Quarter 1994
Second Quarter 1994
Third Quarter 1994
Fourth Quarter 1994
First Quarter 1995
Second Quarter 1995
Third Quarter 1995
Fourth Quarter 1995
First Quarter 1996
Second Quarter 1996
Third Quarter 1996
Fourth Quarter 1996

TOTAL

Very truly yours

/s/ GENE LOCKS

* * * *

July 9, 1993

Michael Rooney, Esquire
Center for Claims Resolution
CN 5319
116-300 Village Boulevard
Princeton, NJ 08540

Re: Greitzer and Locks Settlements of Present Cases

Dear Mike:

This letter is to confirm and memorialize our prior understanding concerning the agreement between Greitzer and Locks and CCR companies concerning future claimants.

At the time we negotiated the settlements for our present clients, we agreed that if ever mutually acceptable medical disease criteria were to be agreed to in a class action, we would adopt those criteria for each of our settlements for future claimants. We, of course, never intended that Greitzer and Locks nor CCR would enter into any settlement which would be a violation of any canon of ethics or the model code of professional responsibility.

To clarify what we always agreed to and what was always our understanding, we stated that our firm would use its best efforts to encourage and would recommend that our future clients defer litigation against the CCR defendants until that claimant's medical condition satisfied the mutually acceptable medical criteria set forth in *Carlough*. We will make this recommendation in exchange for a tolling of the statute of limitations and in exchange for future nonmalignant and malignant "insurance policies" because this is advisable and in the best interests of our future clients, unless in the exercise of our independent professional judgment, given some unforeseen circumstance, we conclude otherwise for a particular client.

Michael Rooney, Esquire
June 21, 1993
Page 2

As you also know, we made this agreement because we believe this alternative procedure is better than and more valuable than the existing system for any of our future clients who do not meet the medical criteria. Most important, it protects them from being compelled to prematurely litigate, settle, or release their claims against the CCR defendants.

Despite our recommendation that we believe our future clients should accept the fair and reasonable medical criteria we agreed to in *Carlough*, and as we always indicated and agreed, in the event a potential future client of our firm should not wish to accept our recommendation, we would notify the CCR. In addition, it was always understood and agreed that we could and would, if we chose, represent that client against the CCR as well as all other defendants.

Regards

/s/ GENE LOCKS

GL:jlm

SETTLING PARTIES' EXHIBIT SP-303

TOTAL SETTLEMENT AMOUNTS PAYABLE TO NESS, MOTLEY AND AFFILIATED COUNSEL AND TO GREITZER AND LOCKS

Ness, Motley, Loadholt, Richardson & Poole and their Affiliated Counsel:	$138,077,100
Greitzer and Locks:	77,417,000

SETTLING PARTIES' EXHIBIT SP-502

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT
ALL CCR CANCER CLAIMS BY STATE, SETTLEMENT DATE AND DISEASE
EXCLUDES ZERO DOLLAR PAYMENTS
SASFILE CCR92315

	DISEASE														
	1. MESOTHELIOMA			2. LUNG CANCER			3. OTHER CANCER			4. NON-MALIGNANT			TOTAL		
STATE	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG
AK	2	105,200	52,600	0	0	0	0	0	0	0	0	0	2	105,200	52,600
AL	7	180,223	25,746	25	515,561	20,622	6	72,256	12,043	177	1,459,491	8,246	215	2,227,531	10,361
AR	11	396,232	36,021	28	626,623	22,379	2	10,500	5,250	354	3,384,867	9,562	395	4,418,223	11,185
AZ	3	221,280	73,760	3	47,318	15,773	0	0	0	34	363,847	10,701	40	632,445	15,811
CA	340	17,817,652	52,405	564	7,932,561	14,065	88	506,609	5,757	4,481	22,667,480	5,059	5,473	48,924,302	8,939
CO	8	733,729	91,716	9	159,079	17,675	1	13,659	13,659	103	854,797	8,299	121	1,761,263	14,556
CT	24	1,384,207	57,675	55	1,043,202	18,967	14	105,090	7,506	161	1,323,721	8,222	254	3,856,220	15,182
DC	6	833,756	138,959	13	404,133	31,087	2	35,000	17,500	122	1,486,658	12,186	143	2,759,547	19,298
DE	16	1,088,314	68,020	20	695,595	34,780	7	120,000	17,143	187	2,162,860	11,566	230	4,066,770	17,682
FL	105	6,254,535	59,567	151	4,225,756	27,985	43	711,869	16,555	1,422	12,293,412	8,645	1,721	23,485,572	13,646
GA	12	1,113,317	92,776	56	1,217,282	21,737	5	27,659	5,532	793	6,501,043	8,198	866	8,859,301	10,230
GU	0	0	0	10	22,000	2,200	0	0	0	332	730,400	2,200	342	752,400	2,200
HI	23	876,402	38,104	31	473,329	15,269	4	21,438	5,359	317	753,452	2,377	375	2,124,620	5,666

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT
ALL CCR CANCER CLAIMS BY STATE, SETTLEMENT DATE AND DISEASE

EXCLUDES ZERO DOLLAR PAYMENTS
SASFILE CCR92315

	DISEASE														
	1. MESOTHELIOMA			2. LUNG CANCER			3. OTHER CANCER			4. NON-MALIGNANT			TOTAL		
STATE	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG
IA	7	301,500	43,071	25	534,017	21,361	2	10,844	5,422	1,001	1,855,222	1,853	1,035	2,701,582	2,610
ID	3	104,241	34,747	1	12,581	12,581	0	0	0	2	17,973	8,986	6	134,794	22,466
IL	59	2,957,193	50,122	167	3,067,618	18,369	46	426,382	9,269	1,939	8,406,426	4,335	2,211	14,857,620	6,720
IN	7	242,662	34,666	2	18,750	9,375	1	38,750	38,750	16	132,250	8,266	26	432,412	16,631
KS	0	0	0	1	3,235	3,235	0	0	0	20	343,475	17,174	21	346,710	16,510
KY	2	373,235	186,618	13	268,729	20,671	2	33,235	16,618	147	1,414,239	9,621	164	2,089,438	12,740
LA	29	924,363	31,875	52	558,665	10,744	12	105,163	8,764	309	2,656,692	8,598	402	4,244,883	10,559
MA	177	2,640,061	14,916	339	2,663,212	7,856	168	756,787	4,505	3,702	7,136,369	1,928	4,386	13,196,430	3,009
MD	32	3,721,653	116,302	108	7,024,964	65,046	24	491,438	20,477	1,182	14,471,561	12,243	1,346	25,709,617	19,101
ME	20	232,735	11,637	6	53,500	8,917	1	4,000	4,000	56	78,318	1,399	83	368,553	4,440
MI	81	6,241,134	77,051	95	3,675,779	38,692	27	400,170	14,821	873	9,600,157	10,997	1,076	19,917,239	18,510
MN	19	2,749,189	144,694	23	719,837	31,297	3	101,250	33,750	129	3,889,576	30,152	174	7,459,852	42,873
MO	18	1,471,180	81,732	28	1,040,576	37,163	1	11,500	11,500	155	1,673,104	10,794	202	4,196,360	20,774
MS	83	1,959,617	23,610	225	2,664,223	11,841	7	119,499	17,071	5,183	21,336,050	4,117	5,498	26,079,390	4,743

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT
ALL CCR CANCER CLAIMS BY STATE, SETTLEMENT DATE AND DISEASE
EXCLUDES ZERO DOLLAR PAYMENTS
SASFILE CCR92315

	DISEASE														
	1. MESOTHELIOMA			2. LUNG CANCER			3. OTHER CANCER			4. NON-MALIGNANT			TOTAL		
STATE	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG
MT	3	142,544	47,515	4	6,758	1,689	1	108	108	61	103,888	1,703	69	253,298	3,671
NC	20	1,509,874	75,494	38	1,032,338	27,167	1	25,000	25,000	178	1,706,659	9,588	237	4,273,871	18,033
ND	2	35,945	17,973	0	0	0	0	0	0	11	100,473	9,134	13	136,418	10,494
NE	1	28,756	28,756	0	0	0	0	0	0	6	58,231	9,705	7	86,987	12,427
NH	6	222,225	37,038	8	87,701	10,963	2	8,000	4,000	75	232,015	3,094	91	549,941	6,043
NJ	116	7,209,684	62,152	121	3,341,686	27,617	20	266,739	13,337	1,513	15,852,848	10,478	1,770	26,670,957	15,068
NM	2	61,107	30,553	7	96,466	13,781	0	0	0	58	395,961	6,827	67	553,533	8,262
NY	217	20,572,042	94,802	374	19,774,393	52,873	77	1,668,985	21,675	1,973	29,386,343	14,894	2,641	71,401,763	27,036
OH	50	2,097,610	41,952	74	1,820,366	24,600	19	210,208	11,064	2,482	10,035,123	4,043	2,625	14,163,306	5,396
OK	9	794,565	88,285	11	234,555	21,323	0	0	0	458	552,665	1,207	478	1,581,786	3,309
OR	39	1,178,107	30,208	5	74,998	15,000	0	0	0	68	269,173	3,958	112	1,522,278	13,592
PA	173	10,479,728	60,576	478	15,877,520	33,217	112	1,597,823	14,266	5,850	51,678,973	8,834	6,613	79,634,045	12,042
RI	12	607,309	50,609	9	368,348	40,928	4	26,959	6,740	23	246,144	10,702	48	1,248,760	26,016
SC	13	1,024,713	78,824	30	1,064,820	35,494	0	0	0	107	1,709,742	15,979	150	3,799,275	25,328

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT
ALL CCR CANCER CLAIMS BY STATE, SETTLEMENT DATE AND DISEASE
EXCLUDES ZERO DOLLAR PAYMENTS
SASFILE CCR92315

	DISEASE														
	1. MESOTHELIOMA			2. LUNG CANCER			3. OTHER CANCER			4. NON-MALIGNANT			TOTAL		
STATE	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG
SD	2	334,289	167,144	0	0	0	0	0	0	0	0	0	2	334,289	167,144
TN	23	1,029,278	44,751	43	802,986	18,674	1	71,890	71,890	840	1,626,912	1,937	907	3,531,065	3,893
TX	121	12,627,397	104,359	396	8,340,665	21,062	87	1,340,210	15,405	5,082	52,794,238	10,388	5,686	75,102,509	13,208
UT	0	0	0	1	55,000	55,000	0	0	0	24	258,115	10,755	25	313,115	12,525
VA	68	5,075,964	74,647	51	1,642,577	32,207	8	96,063	12,008	545	5,091,611	9,342	672	11,906,215	17,718
VI	0	0	0	0	0	0	0	0	0	4	169,660	42,415	4	169,660	42,415
VT	0	0	0	0	0	0	0	0	0	9	11,500	1,278	9	11,500	1,278
WA	109	2,552,200	23,415	113	1,518,088	13,434	2	19,231	9,615	863	5,206,346	6,033	1,087	9,295,865	8,552
WI	13	506,283	38,945	4	61,980	15,495	1	12,500	12,500	27	259,397	9,607	45	840,160	18,670
WV	42	1,544,074	36,764	130	3,783,793	29,106	14	203,768	14,555	2,507	19,843,057	7,915	2,693	25,374,691	9,422
WY	3	59,309	19,770	1	3,595	3,595	0	0	0	2	3,595	1,797	6	66,498	11,083
ALL STATES	2,138	124,616,610	58,287	3,948	99,656,756	25,242	815	9,670,581	11,866	45,963	324,586,110	7,062	52,864	558,530,057	10,565

CENTER FOR CLAIMS RESOLUTION
ALL FILINGS BY CALENDAR YEAR
BY DISEASE

As of July 5, 1992

	CALENDAR YEAR							
	1989		1990		1991		ALL YEARS	
DISEASE	#	%	#	%	#	%	#	%
MESOTHELIOMA	736	3.43%	749	3.11%	683	2.99%	2,168	3.17%
LUNG CANCER	1,325	6.17%	1,102	4.58%	860	3.77%	3,287	4.81%
OTHER CANCER	332	1.55%	360	1.50%	231	1.01%	923	1.35%
SUBTOTAL MALIGNANT	2,393	11.14%	2,211	9.19%	1,774	7.78%	6,378	9.33%
NON-MALIGNANT	19,093	88.86%	21,838	90.91%	21,039	92.22%	61,970	90.67%
ALL DISEASES	21,486	100.00%	24,049	100.00%	22,813	100.00%	68,348	100.00%

SETTLING PARTIES' EXHIBIT SP-504

CENTER FOR CLAIMS RESOLUTION
PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT
ALL DOLLAR SETTLEMENTS (EXCLUDES ZERO DOLLAR DISPOSITIONS)
10/3/88 (INCEPTION) - 1/15/93

	1. MESOTHELIOMA			2. LUNG CANCER			3. OTHER CANCER			4. NON-MALIGNANT		
STATE	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG
AK	2	105,200	52,600	0	0	0	0	0	0	0	0	0
AL	15	1,901,218	126,748	39	1,058,821	27,149	7	101,906	14,558	298	3,504,845	11,761
AR	11	421,560	38,324	28	646,790	23,100	2	10,500	5,250	363	3,443,202	9,485
AZ	3	233,607	77,869	3	47,934	15,978	0	0	0	34	377,157	11,093
CA	422	28,543,167	67,638	632	10,491,620	16,601	98	679,872	6,937	5,029	25,376,910	5,046
CO	9	798,260	88,696	10	190,117	19,012	1	13,817	13,817	105	854,022	8,134
CT	47	2,443,856	51,997	90	1,755,427	19,505	27	213,438	7,905	584	3,351,585	5,739
DC	6	833,956	138,993	15	1,842,986	122,866	3	1,379,000	459,667	170	2,431,683	14,304
DE	21	2,159,576	102,837	27	908,913	33,663	11	199,500	18,136	223	2,613,186	11,718
FL	162	9,775,578	60,343	232	6,835,559	29,464	61	1,034,972	16,967	2,127	18,066,796	8,494
GA	27	3,498,026	129,557	66	1,547,422	23,446	5	26,261	5,252	1,207	9,317,620	7,720
GU	0	0	0	10	22,000	2,200	0	0	0	332	730,400	2,200

CENTER FOR CLAIMS RESOLUTION
PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT
ALL DOLLAR SETTLEMENTS (EXCLUDES ZERO DOLLAR DISPOSITIONS)
10/3/88 (INCEPTION) - 1/15/93

	1. MESOTHELIOMA			2. LUNG CANCER			3. OTHER CANCER			4. NON-MALIGNANT		
STATE	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG
HI	29	1,211,728	41,784	57	1,212,041	21,264	5	21,977	4,395	363	1,093,351	3,012
IA	12	512,375	42,698	27	608,475	22,536	2	10,011	5,006	1,010	1,914,322	1,895
ID	3	123,744	41,248	2	23,791	11,896	1	2,500	2,500	2	7,865	3,933
IL	87	6,900,201	79,313	290	8,648,691	29,823	81	984,327	12,152	3,739	38,799,340	10,377
IN	9	390,565	43,396	2	18,750	9,375	1	38,750	38,750	18	156,250	8,681
KS	0	0	0	1	3,650	3,650	0	0	0	20	349,155	17,458
KY	25	2,780,150	111,206	26	949,325	36,513	3	58,650	19,550	342	4,471,164	13,074
LA	81	2,126,896	26,258	147	2,021,322	13,750	34	342,420	10,017	763	5,589,954	7,326
MA	317	4,725,172	14,906	546	4,645,762	8,509	246	1,214,436	4,937	4,610	9,506,541	1,973
MD	120	13,807,799	115,065	944	41,139,045	43,579	559	11,208,253	20,051	9,520	115,857,645	12,170
ME	20	232,766	11,638	6	53,500	8,917	1	4,000	4,000	61	92,833	1,522
MI	114	9,052,443	79,407	152	6,098,628	40,123	45	716,836	15,930	1,382	15,880,294	11,491
MN	33	4,827,561	146,290	39	1,432,786	36,738	13	533,750	41,058	593	14,222,714	23,984
MO	19	1,538,269	80,962	35	1,295,550	37,016	1	11,500	11,500	197	2,054,394	10,428

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CENTER FOR CLAIMS RESOLUTION
PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT
ALL DOLLAR SETTLEMENTS (EXCLUDES ZERO DOLLAR DISPOSITIONS)
10/3/88 (INCEPTION) - 1/15/93

	1. MESOTHELIOMA			2. LUNG CANCER			3. OTHER CANCER			4. NON-MALIGNANT		
STATE	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG
MS	228	9,078,922	39,820	727	17,772,743	24,447	36	622,161	17,282	11,292	89,318,038	7,910
MT	4	164,605	41,151	4	7,903	1,976	1	83	83	61	99,119	1,625
NC	21	1,727,032	82,240	41	1,157,453	28,231	1	25,000	25,000	178	1,668,149	9,372
ND	3	124,640	41,547	1	23,000	23,000	0	0	0	11	104,563	9,506
NE	1	26,536	26,536	1	1,500	1,500	0	0	0	6	65,041	10,840
NH	7	267,842	38,263	8	79,908	9,988	2	8,000	4,000	75	221,041	2,947
NJ	183	12,086,179	66,045	215	7,299,746	33,952	43	858,306	19,961	2,636	31,452,160	11,932
NM	2	66,810	33,405	7	97,223	13,889	0	0	0	58	391,374	6,748
NY	298	30,381,286	101,951	451	25,390,574	56,298	94	2,132,872	22,690	2,374	38,983,510	16,421
OH	150	5,649,240	37,662	217	5,225,238	24,079	34	458,811	13,494	4,853	17,767,222	3,661
OK	9	913,167	101,463	11	232,513	21,138	0	0	0	458	555,535	1,213
OR	40	1,260,037	31,501	6	87,489	14,582	0	0	0	78	291,935	3,743
PA	357	25,498,051	71,423	988	38,734,897	39,205	255	5,254,720	20,607	11,368	112,885,956	9,930
RI	21	1,060,065	50,479	16	618,265	38,642	4	27,984	6,996	97	652,002	6,722

CENTER FOR CLAIMS RESOLUTION
PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT
ALL DOLLAR SETTLEMENTS (EXCLUDES ZERO DOLLAR DISPOSITIONS)
10/3/88 (INCEPTION) - 1/15/93

	1. MESOTHELIOMA			2. LUNG CANCER			3. OTHER CANCER			4. NON-MALIGNANT		
STATE	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG	#	CCR $	CCR AVG
SC	52	6,230,467	119,817	97	4,161,929	42,906	7	183,700	26,243	467	8,558,637	18,327
SD	2	396,081	198,041	0	0	0	0	0	0	0	0	0
TN	25	1,288,068	51,523	48	901,495	18,781	2	90,900	45,450	890	2,103,264	2,363
TX	225	31,245,079	138,867	639	16,441,318	25,730	227	3,789,862	16,695	9,665	84,918,728	8,786
UT	0	0	0	1	55,000	55,000	0	0	0	24	255,965	10,665
VA	115	10,515,401	91,438	93	3,875,883	41,676	18	462,693	25,705	1,174	15,870,581	13,518
VI	0	0	0	0	0	0	0	0	0	4	157,350	39,338
VT	0	0	0	0	0	0	0	0	0	9	11,500	1,278
WA	125	2,934,929	23,479	131	1,779,283	13,582	2	19,145	9,573	908	5,493,775	6,050
WI	18	729,252	40,514	5	58,379	11,676	1	12,500	12,500	47	439,767	9,357
WV	83	4,190,125	50,483	306	9,997,137	32,670	97	1,649,186	17,002	11,589	113,027,700	9,753
WY	3	54,738	18,246	1	3,295	3,295	0	0	0	2	3,295	1,648
ALL STATES	3,566	244,832,222	68,657	7,440	227,501,077	30,578	2,031	34,402,601	16,939	91,416	805,359,361	8,810

CENTER FOR CLAIMS RESOLUTION
ALL FILINGS BY CALENDAR YEAR
BY DISEASE
AS OF 12/31/93

	CALENDAR YEAR			
	1992[1]		1993[2]	
DISEASE	#	%	#	%
MESOTHELIOMA	734	2.47%	490	2.30%
LUNG CANCER	1,071	3.60%	841	3.95%
OTHER CANCER	360	1.21%	239	1.12%
SUBTOTAL MALIGNANT	2,165	7.28%	1,570	7.37%
NON-MALIGNANT	27,576	92.72%	19,741	92.63%
ALL DISEASES	29,741	100.00%	21,311	100.00%

NOTES: [1] 1992 filings include 6,449 West Virginia state court filings, related to a scheduled state court mass consolidated trial.

[2] 1993 filings exclude six multiplaintiff actions filed by the Jaques' Maritime Asbestos Clinic on behalf of a total of some 6,000 putative plaintiffs against a total of almost 100 different defendants, including several CCR Defendants; most of these actions have been refused docketing or dismissed, in some cases with prejudice, for failure to meet basic federal pleading requirements.

SETTLING PARTIES' EXHIBIT SP-509

SUMMARY OF CLASS ACTION SETTLEMENT BETWEEN THE CLASS OF CLAIMANTS AND DEFENDANTS REPRESENTED BY THE CENTER FOR CLAIMS RESOLUTION

Georgine v. *Amchem Products, Inc.* et al.,
C.A. No. 93-0215 (E.D. Pa.)

February 22, 1994

Class Action Settlement

* * * *

SECTION X: ALTERNATIVE COMPENSATION METHODS

- Qualifying Claimants who are not satisfied with the offers they receive will have a limited right to reject that offer and have their compensation determined in the tort system or through binding arbitration.

- The maximum number of Qualifying Claimants in each Compensable Medical Category that can resort to the tort system or binding arbitration each year will be capped at a percentage of the total number of payable Qualifying Claims: (mesothelioma - 2%; lung cancer - 2%; other cancer - 1%; non-malignant - .5%). This percentage limitation is consistent with the CCR Defendants' experience that more than 99% of the cases against them settle.

- Resort to the tort system or arbitration will be subject to a fairly common "issues trade," under which the only issues to be adjudicated will be (i) presence of asbestos-related injury, (ii) substantial contributing factor, and (iii) the amount of compensatory damages, if any.

- There is no limit on the amount of damages that may be awarded to a Claimant who proceeds

under this section. To the extent, however, that the damages award exceeds 150% of the CCR's last settlement offer, the excess will be paid over five years.

SETTLING PARTIES' EXHIBIT SP-824

International Association of Heat
and Frost Insulators & Asbestos Workers
Local No. 11 8050-B Philadelphia Road
Baltimore, Maryland 21237

December 13, 1993

Dear Sisters and Brothers:

Please find enclosed a copy of correspondence from General President William Bernard concerning a class action lawsuit filed on behalf of all persons exposed to asbestos, but have not yet filed a lawsuit against the 20 defendant companies.

You must carefully read the enclosed letter and decide whether you wish to participate in this class action suit.

To help in the decision making process, law firms who have handled prior asbestos related litigation have expressed a willingness to answer any questions you may have. I suggest you contact at least one of the firms listed below, or contact an attorney of your choosing.

Peter G. Angelos	Peiffer & Fabian
Union Park Center	Suite 100
5905 Harford Road	326 St. Paul Place
Baltimore, Md. 21214	Baltimore, Md. 21202
Phone 426-3200	Phone 576-0080
James Good	John Peiffer

Remember, time is of the essence and all decisions must be made no later than January 24, 1994.

Fraternally yours

/s/ A. KEITH WAGNER
Business Manager

AKW/pmcc
Enc.

* * * *

International Association of Heat and Frost
Insulators and Asbestos Workers
Suite 301 1776 Massachusetts Ave., N.W.
Washington, D.C. 20036-1989

December 7, 1993

To all Local Union Business Managers
in the United States

Dear Sisters and Brothers:

During the last several weeks you may have received a package of material from the United States District Court in Philadelphia about a case called Carlough v. Amchem Products Inc. You may also have seen advertisements in the newspaper or on television about this case. Information about this lawsuit will also appear in the next issue of the Asbestos Workers Journal.

I am writing this letter to provide you with certain additional information that you may find helpful in responding to questions that you may receive from your members and from retirees. First, what is this case about? This case is a class action lawsuit, filed against 20 asbestos manufacturers, on behalf of *future claimants* — those who have been occupationally exposed to asbestos, but who have not yet filed a lawsuit against any of the 20 defendant companies. The suit was filed in order to obtain a court-approved settlement that would establish a mandatory procedure for resolving future claims against the 20 defendant companies. The judge in the case has made a preliminary determination that the settlement is fair and has ordered the parties to notify those who would be affected by the settlement, which is why you and your members have been receiving information and seeing notices about this case.

Second, what does the settlement agreement say? As you might imagine, the actual settlement agreement is a long and complicated document. In essence, it says that those who 1) worked with asbestos containing products manufactured by at least one of the defendant companies and who were exposed on a regular basis over an extended period of time; and 2) have contracted mesothelioma, lung cancer, certain other cancers, or certain non-cancerous conditions, such as asbestosis, can file a claim and receive compensation. The settlement also says that those who can file a

claim under the terms of the settlement agreement cannot file a lawsuit against any of the defendant companies. In other words, the procedure created by the settlement agreement is the only way for those covered by the settlement agreement to pursue claims against any of the defendant companies. You, or any of your members, can obtain a complete copy of the settlement agreement by calling 1-800-847-2727.

Third, who will be affected by the settlement? All members of "the class" will be governed by the settlement. Class members are those who have been occupationally exposed to asbestos (and those who were exposed to asbestos because a member of the household was occupationally exposed) but who had not filed a lawsuit against any of the 20 defendant companies as of January 15, 1993 and who have not asked to be excluded from the class. Note that the class includes people who have been occupationally exposed to asbestos, regardless of whether they are currently suffering from an asbestos related disease.

A person who falls within the class will be governed by the settlement agreement, unless he or she asks to be excluded from the class. Those who have been occupationally exposed to asbestos must decide in the next few weeks whether they want to be included or excluded. A person who is *included* will be able to participate in the settlement agreement, but will not be able to file a lawsuit against the defendant companies if and when he or she contracts an asbestos-related disease as a result of exposure to their products. A person who asks to be *excluded* will not be able to file a claim under the settlement agreement, but will be able to file a lawsuit against the defendants. A person who wants to be included, and participate in the settlement agreement, need not do anything. **THOSE WHO WANT TO BE EXCLUDED MUST MAIL AN EXCLUSION REQUEST TO THE FEDERAL COURT IN PHILADELPHIA POSTMARKED NO LATER THAN JANUARY 24, 1994.** The address is on the exclusion request form, which you can obtain by calling 1-800-847-2727.

Those who participate in the settlement agreement and who have, or later develop, a disabling asbestos-related medical condition would be well-advised to file a claim as soon as it is permissible to do so. The settlement agreement establishes a maximum number of claims in each medical category that can be paid each year.

Claims that qualify but are not paid in one year receive priority in the next year. So those who file first, get paid first.

Whether this settlement agreement is a fair and reasonable way of resolving future asbestos claims is a controversial issue. The AFL-CIO has endorsed the settlement, but support for it is not unanimous. This union has not taken a position either on the settlement or whether a member should or should not ask to be excluded from the class. I would advise you also to remain neutral on these issues and to allow each individual to make his or her own decision, perhaps aided by his or her lawyer or physician.

It is my belief that this matter is of the utmost importance to those of our membership who have worked with asbestos. It is not only important to those members, it is extremely important to our retired members and widows.

I strongly recommend that each local union take the steps necessary to setup a committee, possibly their Executive Board, and all full time officers to telephone and personally contact every retired member and widow of our membership to make sure that they are aware of what is involved.

I am also pointing out that time is of the essence. These decisions must be made no later than January 24, 1994.

If you or any of your members have any specific questions about the settlement that are not answered by the notice that will appear in the Journal or by any of the other material that you have received, you should direct those questions to the attorneys who represent the class, whose name, address, and telephone and fax numbers appear below:

Gene Locks, Esq.
Greitzer and Locks
1500 Walnut Street, 22nd Floor
Philadelphia, PA 19102
(215) 893-0100 Fax (215) 985-2960

Ronald Motley, Esq.
Joseph F. Rice, Esq.
Ness, Motley, Loadholt, Richardson
& Poole
151 Meeting Street, Suite 600
P.O. Box 1137
Charleston, SC 29402
(800) 666-7503 Fax (803) 577-7513

With best regards and Greetings of the Seasons, I am

Sincerely and fraternally yours,

/s/ WILLIAM G. BERNARD
General President

WGB/sjf
cc: International Vice President and Organizers

* * * *

ATTENTION

If you have been exposed occupationally, or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products supplied or manufactured by one of the following companies (or for which these companies may otherwise bear legal liability), and you had not filed a personal injury lawsuit based on that exposure as of January 15, 1993, your rights may be affected by the settlement of a class action lawsuit pending in the United States District Court for the Eastern District of Pennsylvania. The rights of family members or legal representatives may also be affected.

Amchem Products, Inc.
A.P. Green Industries, Inc.
Armstrong World Industries, Inc.
CertainTeed Corporation
C.E. Thurston and Sons, Incorporated
Dana Corporation
Ferodo America, Inc.
Flexitallic, Inc.
GAF Corporation
I.U. North America, Inc.

Maremont Corporation
Asbestos Claims Management Corporation
(formerly known as
National Gypsum Company)
National Services Industries, Inc.
Nosroc Corporation
Pfizer Inc.
Quigley Company, Inc.
Shook & Fletcher Insulation Co.
T&N plc
Union Carbide Chemicals and
Plastics Company Inc.
(formerly known as Union
Carbide Corporation)
United States Gypsum Company

Examples of the types of products which the 20 CCR defendants manufactured or supplied (or for which they may otherwise bear legal liability) and which, at various times, contained (or may have contained) asbestos, include, *but are not limited to*, the following types of products:

- acoustical products, including spray and tile
- adhesives and cements
- asbestos blankets
- asbestos cloth or textiles
- asbestos fiber or pellets (raw or processed)
- asbestos linings
- asbestos paint
- asbestos paper
- asbestos protective clothing
- asbestos rope, braided tubing and wick
- asbestos-containing sprays
- asbestos tape or thread
- asphalt products, including tile and sundries
- automotive, truck, off-highway vehicular, and marine products (brake linings, pads

and shoes, brake blocks, clutch materials, transmission components, gasket materials, shock absorbers)
- ceiling panels, tiles, and related sundries
- cement products (cement or mortar, board, flooring, panels, pipe, flat and corrugated sheet, siding, shingles, stucco)
- ceramic or paint fillers
- commercial and industrial machines or components (brake linings, clutch facings, thermal insulation, transmission components, gaskets)

TESTIMONY OF LAWRENCE FITZPATRICK

* * * *

[Tr. 63] DIRECT EXAMINATION

BY MR. ALDOCK:

Q. Mr. Fitzpatrick, would you state for the record again your name and your current place of employment?

A. Lawrence Fitzpatrick. Center for Claims Resolution.

Q. What is your title and what are the duties of that title?

A. President and chief executive officer. My duties include ultimate responsibility for all CCR matters and all CCR departments.

Q. How long have you been with the CCR?

A. Since it was formed in October of 1988.

Q. What was your previous employment?

A. From February of 1986 until October of 1988, I was employed by the Asbestos Claims Facility. My title at the Asbestos Claims Facility was vice president of law.

Q. And prior to that?

A. From 1980 through 1986, I was employed by a company called Owens Illinois located in Toledo, Ohio. My official [Tr. 64] job title was legal counsel. While at Owens Illinois, I performed a variety of asbestos-related defense tasks including personal injury work, asbestos property damage claims and asbestos insurance coverage litigation.

Q. Mr. Fitzpatrick, I'm going to ask you a series of questions going back to the days of the Asbestos Claims Facility when you were there. When was the Asbestos Claims Facility created?

A. It was basically created by the signing of the so-called Wellington Agreement named after Dean Harry Wellington on June 19th, 1985.

Q. Very briefly, how was it formed and what was its purpose?

A. I'll be as brief as I can. Prior to 1985, there were literally dozens and dozens of insurance coverage actions involving asbestos pending all over the United States of America involving the issues

of who would be responsible for insurance coverage for asbestos claims.

The Wellington Agreement resolved all those insurance disputes between the signatories to the agreement, both producers and insurers and set up a facility to handle the asbestos personal injury claims against those who signed the Wellington Agreement.

Dean Wellington acted as a facilitator during the period of time that the Wellington Agreement was negotiated.

Q. What was its claims-handling function?

[Tr. 65] A. Its function was to handle the asbestos personal injury claims against the approximately 35 producers who had signed the Wellington Agreement.

Q. Mr. Fitzpatrick, would you look at Exhibit 100. Do we have the book? Bear with us.

(Pause in proceedings.)

THE COURT: Mr. Aldock, if you're going to have — simply feeding information to the witness, you ought to do it all at one time, if you could, please, instead of having to walk books back and forth. Are you going to use this book for —

MR. ALDOCK: Well, I think, your Honor —

THE COURT: — quite a while.

MR. ALDOCK: — that everything is going to be in that book except for one exhibit.

THE COURT: Fine. Okay.

(Pause in proceedings.)

MR. ALDOCK: Mr. Baron has the documents we're going to use.

MR. BARON: Okay.

(Pause in proceedings.)

BY MR. ALDOCK:

Q. Mr. Fitzpatrick, would you look at Exhibit 100 and tell us what that is?

A. Right. Exhibit 100 is entitled, The Agreement Concerning [Tr. 66] Asbestos-Related Claims. It's dated June 19th, 1985.

And it is the so-called Wellington Agreement which shows how all the pending insurance coverage disputes were resolved through the negotiation process and outlines what the Asbestos Claims Facility should look like and how we should handle claims.

Q. And was that the operable document throughout its history?

A. It was.

Q. Would you look at 102, please?

A. Yes, sir.

Q. What's that?

A. It's a document entitled, Producer Agreement Concerning Center for Claims Resolution. It's dated September 28, 1988. And I guess I must explain that the Asbestos Claims Facility operated until September or October of 1988 and was dissolved by the membership at that point in time.

At the same time, we formed the Center for Claims Resolution in October of 1988. So this is the basic charter document or constitution, if you will, of the Center for Claims Resolution.

Q. Let me back up. I put that up out of order, Mr. Fitzpatrick. I apologize.

Look at 101.

A. Yes, sir.

(Pause in proceedings.)

[Tr. 67] A. I have 101.

Q. What's that?

A. Exhibit 101 is a list of the ACF members, the producer members who belong to the facility and also a list of the insurance companies that signed the Wellington Agreement and were members of the facility.

Q. With respect to those ACF members listed there, Mr. Fitzpatrick, are there companies that are no longer in business or in Chapter 11?

A. Yes, sir.

Q. Could you tell us which ones are?

A. Yes. Let me go down the list then. Carey Canada is no longer in business. It is in bankruptcy.

Celotex is no longer in business. It is in bankruptcy.

Eagle Pitcher is in bankruptcy.

H. K. Porter is in bankruptcy.

Keen is in bankruptcy.

National Gypsum has gone through bankruptcy proceedings but emerged and is represented by the Center.

(Pause in proceedings.)

A. I believe that concludes the list.

Q. Mr. Fitzpatrick, when did the Asbestos Claims Facility breakup?

THE COURT: He already said September of '88, I [Tr. 68] thought.

THE WITNESS: That's correct.

BY MR. ALDOCK:

Q. Could you give us the reasons why?

A. I think there were several reasons. Some of the producer members simply began to feel that they no longer had the resources to fund their share of the settlements. They saw their insurance coverage and other assets dwindling. There was also a philosophical split among the membership on asbestos claims-handling philosophy. Some of the members favored what I viewed as a liberal claims-handling philosophy. Others were much more restrictive and basically wanted to try many many cases.

There were also governance problems with the facility. It had been set up as a one-company, one-vote sort of an operation and so in the opinion of some of the larger members, the smaller members, because of that governance structure, were able to outvote them on governance questions.

And then, finally, there was a perception on behalf of at least some of the larger facility members that the facility's sharing formula, the formula whereby semblance and defense costs were whacked up among the membership was not flexible enough to

account for the changing occupational mix of asbestos claims that occurred in the 1985-1986 era.

Q. What was the relationship between the Asbestos Claims [Tr. 69] Facility and its demise and the creation of the Center for Claims Resolution?

A. Well, the Center for Claims Resolution is not legally a successor to the Asbestos Claims Facility but all of the Center members previously had belonged to the Asbestos Claims Facility and all of the Center's supporting insurers had previously been signatories to the Wellington Agreement and supporters of the facility.

Q. Approximately how many companies that were not in bankruptcy otherwise decided not to go forward with the Center for Claims Resolution and went separately into the tort system?

A. I haven't counted them. I would think somewhere between eight and 12. I'm not positive.

Q. Mr. Fitzpatrick, would you look at Exhibit 104?

A. Yes, sir.

Q. Is that a list of the members of the Center for Claims Resolution today with the exception of the United States Gypsum, which has changed its name and nomenclature for purposes of coming out of the bankruptcy?

A. Strictly for record purposes, it's not United States Gypsum that has changed its name. It is National Gypsum that went through bankruptcy —

Q. I'm sorry. I misspoke.

A. — and has changed its name to Asbestos Claims Management [Tr. 70] Corporation. With that minor correction, this is a list of the Center members.

Q. And that's because it's the trust that survived and the trust is the litigant in the tort system today?

A. Absolutely.

Q. You've identified 102 as the producer agreement for the CCR. What is 103?

A. Yeah. 103 — Exhibit 103 is nothing more than Exhibit 102 incorporating some amendments we made to the basic agreement in the first couple of years so Exhibit 103 is the Center's charter or constitution as amended through December 1st, 1991.

Q. And there have been no amendments of significance since?

A. That's correct.

Q. Would you look at 105. What's that?

A. Exhibit 105 is a list of the supporting insurers of the Center for Claims Resolution.

Q. What's a supporting insurer?

A. A supporting insurer is an insurance company that pays — rather gives coverage to the members in accordance with the terms of the Wellington Agreement and the dispute resolution items contained therein and a supporting insurer also contributes financially to the operational costs of running the Center. So they pay bills and they also help fund us.

Q. There's also on that page something called paying non- [Tr. 71] signatories. What's that?

A. Those are insurance companies that pay bills and give coverage in accordance with the Wellington Agreement terms but they don't necessarily contribute — help to defray the operating expenses of the CCR.

Q. What are the functions that the CCR performs for its members today?

A. Well, we basically are responsible for handling all asbestos personal injury claims against the 20 member companies who belong to the Center.

Q. How is it structured as a corporate and governance matter?

A. Yeah. Well, we have basically three operational branches. We have a claims department, a legal department and an administrative department. Well, we basically have a fourth branch which is a consultant called Peterson Consulting which does a lot of the share work and the billing work for us.

Our operational department, administrative department report to a Mr. Mike Rooney who's our chief operational officer. Mr.

Rooney reports to me and I in turn report to the board of directors that governs the Center.

Q. Would you look at Exhibit 106, please?

A. Yes, sir.

Q. It's entitled Benefits at the Center for Claims [Tr. 72] Resolution. What was that prepared for and what is it?

A. All right. The reason it was prepared is because we are quite frequently audited by insurance companies and reinsurers that want to make sure that we're handling asbestos claims in an efficient manner so that everything's proper under their insurance policies and coverage attaches. So it was prepared primarily to deal with insurance companies and reinsurers who frequently come in to audit us.

It basically just shows some of the benefits belonging to the Center for Claims Resolution.

Q. Mr. Fitzpatrick, I want to shift now to the period 1987 to 1992 in the tort system.

A. Yes, sir.

Q. When was the first time that you heard any consistent or frequent talk of the need for a global settlement to the asbestos crisis?

A. I think that as early as the year 1986, there began to be a widespread recognition that the asbestos litigation was spinning out of control and that a better solution needed to be derived.

Q. What were the factors that were brought to your attention or that you were aware of at that time that are subsumed in the phrase, "spinning out of control"?

A. Right. Prior to 1985 or so, new lawsuits had been filed at a relatively constant rate of about 500 per month or 6,000 [Tr. 73] per year and that had been true of not only '85, but 1984, '83, '82 and '81. I believe the backlog of asbestos cases had been in the 20,000 to 30,000 case range throughout that period with, you know, variations here or there, but that had roughly been the size of the problem.

Commencing in about 1986, the rate of new filings of asbestos claims accelerated dramatically so that instead of 500 claims a

month being filed, approximately 2,000 claims a month started being filed and that held true throughout 1986, 1987, 1988, 1989, 1990 and indeed it holds true today. So by 1986, at least, there was a growing awareness that the backlog was growing and that the new filings were way up.

There had been studies done in the early '80s about transactional costs, how much went to lawyers in the asbestos litigation and there was a growing realization that the majority of the dollars being spent on asbestos were not in fact going anywhere near the victims but were instead going to the lawyers.

There were legions of examples of erratic verdicts in the tort system. Mesothelioma victims getting nothing. People with no impairment getting six and sometimes seven-figure verdicts.

So for a lot of reasons beginning in the mid-'80 period. Academics, think tanks, Congress and I think judges began to realize that the asbestos problem was something that [Tr. 74] was spinning out of control, to use my phraseology.

Q. Were there bankruptcies during this period of the '80s?

A. Sure. The original major bankruptcy occurred on August 26th, 1982 when the then called Johns-Manville Corporation filed for bankruptcy. Manville was frequently termed the General Motors of the asbestos industry, had supplied huge [sic] amount of the products and indeed had basically controlled the asbestos litigation until such time as it went bankrupt.

MR. BARON: Your Honor, I'm going to have to insert an objection on relevancy. We're judging this settlement. We're not judging what the history of asbestos has been.

MR. ALDOCK: If I might —

THE COURT: The objection's overruled.

THE WITNESS: Other bankruptcies in this early '80 period included a company called Unarco (ph), which was a fairly substantial defendant prior to the time that it went into bankruptcy.

There have been others but in the early to mid-'80s, I think Unarco and Manville are the ones that stick in my mind.

Q. Was the phenomena of what we call screening something that accelerated during this period?

A. Yes. And I probably should explain what screenings mean.

Q. Please.

A. Let me start out by saying screenings per se are not [Tr. 75] necessarily good or bad in my view. Screenings are examinations of large numbers of workers from a given industry, in my context, to see if they have asbestos-related health problems. Involves, you know, many times a van or something like that. Workers are X-rayed and given tests by the hundreds per day to see if they have asbestos-related health problems.

If they're done properly, for the proper reasons by reputable doctors, I think they can be a good thing but what we saw happening in 1985, 1986 was in an attempt to get additional new claims. Some plaintiffs' attorneys were reaching out to occupations that were only secondarily exposed to asbestos, were screening these workers by the thousands, were using doctors that have subsequently been found to be of very questionable qualification and were filing hundreds and thousands of lawsuits as a result of these kinds of mass screening which I do not consider to be a good thing.

A prime example of this whole problem is what happened in the tire worker litigation and without getting into great detail, you know, what happened in the tire worker litigation was subsequently ruled to be a fraud on the Court by Judge Kelly out in Kansas and he looked at it and saw that thousands of workers had been screened. Something like 30 to 40 percent had been told they had asbestosis. NIOSH, the [Tr. 76] National Institute of Occupational Safety and Health had become alarmed by these reports, had done its own study and found virtually no asbestos-related diseases in these tire workers and ultimately it just became a complete fiasco and farce.

Q. Was in your opinion your perception of the situation as you found yourself in the '80s and these events you've described in the '80s shared by your colleagues at other companies and plaintiffs' lawyers and defense lawyers and others that you met with at the time?

A. I think it was shared by my colleagues and other companies and my colleagues in the insurance industry. It was shared by some but not all of the members of the plaintiffs' Bar that I dealt

with. Those who had been the founding fathers, if you will, of the asbestos litigation who had engaged in this business and done the initial discovery back in the — basically '60s and '70s. Many of those people who I talked to were abhorred by what happened in the mid to late '80s in terms of these mass screenings and meritless cases.

Other plaintiffs' attorneys who were newer to the business, I don't think were quite as abhorred, if you will, by what happened.

Q. Mr. Fitzpatrick, when was the first time in this period that we're talking about in the late '80s that you actually [Tr. 77] went to a meeting with the judiciary to discuss the asbestos crisis and the need for a global solution?

A. July 7, 1987.

Q. What meeting was that?

A. It was the first meeting on asbestos sponsored by the Federal Judicial Center. This particular meeting was held at the Sixth Circuit Court of Appeals courthouse in Cincinnati, Ohio. It involved judges from all over the country with significant asbestos dockets.

I was asked to come to this meeting and talk to the judges as were plaintiffs' attorneys, Mr. Levy from New York, Stan Levy and Mr. Robert Sweeney from Ohio. There may have been other plaintiffs' attorneys at this meeting, but those are the two I recall.

Q. What was the tenor of the discussion at that conference that you attended?

A. I think among the judges present, there were a lot of things discussed. The growing backlog was a concern of theirs. The fact that settlements were not keeping pace with new filings. The fact that transactional costs were — continued to eat up an enormous amount of the claims dollar, and the bankruptcies that had taken place were also a topic of discussion.

Q. Did you have a perception that the problems you described in your testimony earlier, were problems that others were [Tr. 78] experiencing in the same terms?

A. Oh, absolutely.

Q. As a follow-up to that meeting in Cincinnati, did you have occasion to discuss any of these concerns with anybody on the plaintiffs [sic] part?

A. Certainly. Immediately after attending this conference at the Sixth Circuit, I telephonically contacted Mr. Ron Motley. Mr. Motley having the largest number of asbestos cases in the country, his cases and all of his affiliates are counted, and having also had a leadership role in various national matters pertaining to asbestos on behalf of the victims, particularly the Manville trust bankruptcy at that point in time, was the logical person for me to approach.

Q. And share with us generally the tenor of those discussions?

A. Well, I think we discussed over the telephone several times the problems with the asbestos litigation as we perceived them, the comments the judges were making about the asbestos litigation.

What were potential ways to fix what looked to be a broken system, and I think we finally got to the point in August or September of 1987 where we actually began to exchange documents about a global solution to asbestos.

Q. From late '87 through '89, were you and the people you reported to really in a position to pursue these discussions [Tr. 79] with any frequency?

A. No, sir.

Q. Why is that?

A. Well, as I indicated earlier today, the facility began to fall apart for lack of a better word in late 1987, and that process continued throughout 1988. And my energies during this period of time were solely directed at seeing the facility dissolved in a way that was not unfortunate for all concerned.

And I was able to do that, but during that period of time, it was more of a focus on dissolving the facility effectively than talking global settlement or things of that nature. Indeed as the facility was falling apart, I could not have delivered any kind of a global settlement because the membership was uncertain.

Q. In the years, from the time the Asbestos Claims Facility had its demise through say the middle of 1990, did we in the tort

system experience what came to be called a matrix defendant defense, or anything like that?

A. Actually I think that matrix defendant approach, and I probably should explain what that is, it's a given company and often it's a company that perceives itself to be in financial difficulty or is in financial difficulty with [sic] adopt an approach of offering a certain set dollar figure per asbestos disease category, with no regard whatsoever to the [Tr. 80] facts of the individual case.

The fixed fees that are offered are non-negotiable, and are usually a fraction of what the company previously paid in the tort system. Those offers are made to plaintiffs attorneys and victims on a take it or leave it basis. You either take the fraction that's offered you, or you proceed to trial against that company.

The first matrix defendant probably dates from the mid-1980s when Raymark adopted such an approach, tried it for a period of time. I tried cases all over the country, it had adverse verdicts rendered against it all over the country, and ultimately went bankrupt.

During the period you asked about, the Celotex Corporation which had been a member of the facility but chose not to join the center, but wanted to go on its own, it adopted a matrix approach very similar to the approach that Raymark had adopted, although the dollars were slightly different, but not significantly.

And again, the same experience repeated itself throughout the 1988 and 1989 with Celotex. They tried cases all over the country, huge adverse verdicts, although they won some, but usually adverse verdicts were rendered against them in numerous jurisdictions, and finally Celotex also ended up filing for bankruptcy as a result of its experiences.

[Tr. 81] Q. When a defendant becomes a matrix defendant, what is the effect on a tort system itself as opposed to that company and its fisk?

A. Well, they disturbed the system to the extent it's a relatively smoothly running system in a jurisdiction, that a judge has been able to manage relatively well.

When a defendant goes to a matrix system, offers a plaintiff's attorney on a take it or leave it basis, five or ten percent of what

it used to offer, that results in repeated litigation and trials in that jurisdiction which stops up, if you will, the efficient processing of claims in the jurisdiction. And when you magnify on a national scale, then it becomes a significant problem for everybody.

Q. Did the Federal Judicial Center become involved again in the asbestos problem in roughly June of 1990?

A. Yes, they did.

Q. Would you turn to Exhibit 203, please?

A. Yes. I need to change books.

Q. Sure.

(Pause in proceedings.)

THE COURT: Mr. Aldock, while we have a momentary pause here, and all counsel should follow my instruction, if you're going to offer exhibits, they should be offered while the witness is on the stand, at some time while the witness is on the stand, rather than after the witness has left the [Tr. 82] courtroom and we have a problem putting things back together.

MR. ALDOCK: It had been my intention, your Honor, if it meets with your Honor's pleasure, to move all the exhibits identified by Mr. Fitzpatrick at the close of his testimony.

THE COURT: Fine. I don't know whether we had discussed that, I don't remember, but it's just a reminder.

BY MR. ALDOCK:

Q. Have you had a chance to look at Exhibit 203?

A. Yes, sir.

Q. What's that?

A. That is a June 20, 1990 letter from the Federal Judicial Center, signed by James Apple who was the director of the Federal Judicial Center, inviting certain individuals to an asbestos conference sponsored by the Federal Judicial Center in June of 1990.

Q. Roughly what was the size and complexion of the group that attended this conference?

A. I'm not sure of the size. It included several prominent plaintiffs lawyers, several academics, knowledgeable in this field,

several defense representatives, and finally several of the major federal judges with asbestos caseloads, and I believe at lease one, if not two, state judges with an asbestos caseload.

Q. Did you and I attend that meeting?

[Tr. 83] A. We sure did.

Q. Well, what concerns were addressed there? What was discussed during that day session?

A. Well, it was largely a discussion of the same concerns that had been discussed at the 1987 conference, but they had magnified in severity in the three years that had past.

The transactional costs were still a major problem, the new filings rate had continued unabated, the unimpaired claimant problem had become even more severe because of the screenings. Backlogs had grown, the problem, you know, was approaching I believe 70 to 80,000 cases by the time of this 1990 conference, perhaps more.

Various contingent to be inconsistent, there continued to be what the judges felt were unnecessary repetitive trials of issues, unnecessary trials. So there was a whole plethora of issues discussed at this conference.

Q. Did some of the judges in the open sessions before there was a break-up between plaintiffs, defendants and judges, actually put out for discussions vehicles for addressing this problem?

A. There were a lot of things thrown out at this conference. Class actions were discussed, a national asbestos trial day was discussed, pleural registries, which I guess I haven't defined but will, were discussed, and I think there were a host of things that were discussed by the judges.

[Tr. 84] Q. Was there discussions of the judiciary's view of what the Bar should be doing about all this?

A. Yes. I mean, they basically told the plaintiffs attorneys present and the defendants present that they had better get together and solve this problem, that the problem was out of control, and that they expected a solution.

Q. What conclusion did you reach as you left that conference?

A. I viewed it as an enormously significant event in the history of the asbestos litigation. I don't think anybody who participated in that conference could have gone away from it feeling that business as usual was going to be acceptable in the minds of the judges. And that something creative had to happen and that was my impression walking away from that conference.

Q. What, if anything, did the CCR resolve to do to follow-up on that conference?

A. We decided to follow what basically we had been told to do, and that is to together with the plaintiffs bar and see if we could come up with a solution.

Q. What, if anything, did the asbestos judges begin to do following that conference, particularly some of the federal judges?

A. Right. They did a couple of things. For the first time the asbestos judges decided to organize themselves in a [Tr. 85] group, and they formed what became known as the ad hoc committee of asbestos judges.

I believe among the judges who belonged to that group were Judge Parker from Texas, Judge Lambrose (ph) from Ohio, Judge Weinstein from New York, Judge Cifton (ph) from New York, Judge Zobel (ph) from Massachusetts, Judge Jex (ph) from Mississippi, Judge Weiner from Pennsylvania, Judge Williams from California, and Judge Wally (ph) from Iowa. Those are the ones I remember as being members of that ad hoc committee.

Q. Was there any judicial action in the form of orders that began to issue shortly after that conference?

A. There were, they were odd orders. Judge Lambrose himself first started issuing a series of orders, and then finally a major order was issued, I believe it was titled national asbestos order, or words to that effect.

That particular order basically attempted to combine the Ohio asbestos litigation and a class action that had been filed down in Texas, along with some Eagle Picture limited fund proceedings that had been filed in New York. So it was a bit of a convoluted order, but it clearly showed these asbestos judges were stretching for a solution.

That particular order lasted about ten days. A minor defendant took it up on mandamus to the Sixth Circuit, and to no surprise, the Sixth Circuit found that ad hoc [Tr. 86] committees don't have power to issue Article 3 orders. But it was an indication of how serious the judges felt at that point in time, and how far they were willing to go to find a solution.

Q. Who were the primary judges on those two orders that we in the field call the Dolly Madison orders?

A. Judge Parker from the Eastern District of Texas, and Judge Lambrose from the Northern District of Ohio.

Q. Did the plaintiff bar as a result of the June conference, begin to take action in court that was different than what they had done before?

A. Sure. They took a major action. On July 17th, I believe it was, 1990, they filed a case called Linscomb — I'm sorry, my voice — Linscomb, et all [sic] versus virtually all of the major asbestos defendants and many of the minor defendants.

That action purported to be a Rule 23(b)1(b) limited fund litigation class, filed in whatever the federal court is for Beaumont, Texas.

Q. The Eastern District?

A. The Eastern District of Texas.

Q. Who filed it?

A. As I recall, four attorneys filed it. Mr. Motley, Mr. Walter Umphrey (ph) who is an asbestos attorney down in Eastern Texas, Mr. Tom Henderson from Pittsburgh who is in court here today, and finally a gentleman named Herb Newburg, [Tr. 87] who I believe is from Philadelphia, and has some expertise or renown in class action matters.

Q. So the late Mr. Newburg of Newburg on class actions?

A. Yes, sir. Now, those are the four I remember. There may have been others, that's all I can recall.

Q. What was your impression as we proceeded to deal with that matter, that was the lead counsel in that case?

A. No question it was Ron Motley.

Q. Did they sue a dozen people, 25 people, 50 people, 100 people, what was the order of magnitude down there?

A. There was more than 50, and I believe it was more than a hundred. It was a lot of defendants that were sued in that case.

Q. What was the defendants reaction to that filing?

A. Virtually every defendant was opposed to a litigation class in Beaumont, not just of course those who were members of the CCR, but virtually all of the companies that were named as a defendant, and virtually all of them basically refused to even bargain with the plaintiffs bar with that, perceived to be sort of damocles, hanging over their head.

Q. Did the defendants organize themselves and meet in large groups during this period?

A. Sure. When we had been told to organize ourselves by the judges, we formed a steering committee of basically what I perceived to be the then solvent major asbestos defendants. [Tr. 88] We, the steering committee, then made it an effort to reach out to smaller defendants, or so-called peripheral defendants. So ultimately, we put together a group of some 60 to 75 defendant companies that we were speaking on behalf of.

Q. Were there any other significant meetings with large numbers of plaintiffs and defendants counsel that occurred during this mid-1990 period?

A. Sure. This is when we first began to discuss global settlement in earnest with the asbestos plaintiffs bar, or at least with a large group of the asbestos plaintiffs bar.

Q. Was there a meeting on July 25 in St. Louis?

A. Right. The first meeting of the steering committee, defense steering committee with the plaintiffs steering committee, took place July 25th, 1990 in St. Louis.

Q. Why was it in St. Louis?

A. It was in St. Louis because Ron Motley was on trial across the river in East St. Louis, and we just didn't perceive we could have a meaningful meeting without Mr. Motley's presence.

Q. How many people came?

A. I think 15 to 20, I'm not sure.

Q. Division between plaintiffs firms and defense representatives?

A. Right, about half and half.

[Tr. 89] Q. What happened at the meeting?

A. Well, I think the initial meeting between the defendants and the plaintiffs was a positive one. That we came away from it with the sense that people were willing to work together, to see if a global solution could be found. We didn't obviously resolve any issues at this first meeting.

Q. What was your feeling as you left the meeting? Was it going to be the first of many, or what were you going to do as a result?

A. It was certainly going to be the first of many. And in fact, we met with the plaintiffs attorney on the average of twice a month thereafter throughout 1990 in various locations all over the country.

Q. During this period, did we have the complication of yet another asbestos-related class action?

A. Yes. A company called Eagle Picture located in Cincinnati, Ohio in 1990 attempted to file a limited fund class action in New York before Judge Weinstein. Eagle Picture perceived itself to be running out of money, and filed a 23(b)l(b) class action before Judge Weinstein in New York.

Q. What happened there?

A. Well, to simplify it, I mean ultimately Judge Weinstein appointed an attorney to represent the future victims named Stan Chesley from Ohio, who I think it's fair to say is a man [Tr. 90] with some renown as a plaintiffs attorney, but has really no expertise in asbestos litigation.

That caused the asbestos plaintiffs bar to unite in vehement opposition to what Judge Weinstein was trying to do with Eagle Picture, and ultimately Eagle Picture just ended up filing for bankruptcy because the opposition from the plaintiffs bar just kept delaying things in the class action until they finally just couldn't pay their bills anymore.

Q. Mr. Chesley was nominated or appointed by Judge Weinstein as the representative of claimants, isn't that right?

A. Yes.

Q. Yes. What was the objection to Mr. Chesley that the asbestos bar mounted?

A. The asbestos plaintiffs bar?

Q. Yes.

A. I think in shorthand terms, that the man had never handled an asbestos case, and for that reason, for want of a better term, didn't know what he was doing.

Q. Would you look at Exhibit 205, please?

(Pause in proceedings.)

A. Yes, sir.

Q. And I want to particularly — I'll ask you what it is and then I want to address you to Page 14 of that exhibit.

What is that document?

A. It is a response to the firm of Baron and Budd to Judge [Tr. 91] Weinstein's order appointing Mr. Chesley (ph) as counsel and it was filed in the Eagle Pitcher proceeding.

Q. Would you turn to Page 14? The first full paragraph and the paragraph below it on that page. That's all I'm going to ask you with respect to this document.

A. Okay. Yes, I have those.

Q. What is the — what is the gist of this paragraph second and the language before it? What's the argument?

MR. BARON: Your Honor, I — sorry. Go ahead. Are you finished, John?

THE COURT: First of all, I'm trying to find the page.

MR. ALDOCK: Page 14, your Honor, of 205.

THE COURT: I have it. I thought you said Paragraph and then I noticed there weren't any.

MR. ALDOCK: Paragraph second and the other language I'm interested in ends on that page.

THE COURT: Mr. Baron?

MR. BARON: Yes, your Honor. The document speaks for itself. There was a legal pleading filed in a case and it's very lengthy legal pleading and they're taking one sentence totally out of context.

And there's no — there's no showing that this witness has any specialized knowledge in that case or has the ability to review what the plaintiffs' Bar and particularly [Tr. 92] Baron and Budd had in mind with this motion. The motion deals with numerous issues and they're just reading one sentence out of context.

MR. ALDOCK: We may be doing that, your Honor, but I'm going to move the whole thing in of course.

THE COURT: The document will be in evidence and you can cross-examine on it, Mr. Baron.

MR. BARON: Thank you.

THE COURT: Overruled.

MR. BARON: Thank you.

BY MR. ALDOCK:

Q. Mr. Fitzpatrick, what's the gist of that second paragraph and the line below it? What's the argument?

MR. BARON: Your Honor, on that one, I've got a separate objection. I don't think he can give me the gist of an argument. If he wants to read the document, that's another matter.

THE COURT: I really don't need the witness to tell me what this says. I can read it.

MR. ALDOCK: Sure.

BY MR. ALDOCK:

Q. Were those objections to Mr. Chesley unique to Baron and Budd?

A. No.

Q. Indeed, was there any support by anybody that you [Tr. 93] remember at the time in the plaintiffs' Bar for the proposition that a lawyer who was not a major asbestos lawyer could represent the class?

A. I'm not aware of any plaintiff's lawyer that appointed — that supported the appointment of Mr. Chesley as counsel in Eagle Pitcher.

Q. How would you rank that episode of the appointment of counsel among the reasons that that proceeding didn't go any further than it did?

MR. BARON: Your Honor, I object in that he has no specialized knowledge and that that proceeding went up on a writ of mandamus to the Second Circuit and then subsequently was terminated by a voluntary bankruptcy. I don't believe he's been shown to have any specialized knowledge.

THE COURT: There's a different reason, Mr. Baron. The objection's sustained. He's already commented on the effect in his testimony. This witness has already said what he thought the effect was. I understood him to say so.

BY MR. ALDOCK:

Q. Mr. Fitzpatrick, in September of '90, was there another couple of events, September and November of 1990, that resulted from the judiciary, that bore on the state of the litigation at that point in time?

A. September and November of 1990?

Q. September 27 —

[Tr. 94] A. Yes.

Q. — 1990, what happened then?

A. Right. In September of 1990, Chief Justice Rehnquist appointed a panel to study the asbestos personal injury litigation. That panel's report came out in May of 1991. So that's what occurred in September of 1990.

In November of 1990, several asbestos federal judges with significant asbestos dockets wrote to the Judicial Panel for multi-district litigation and requested a transfer of the cases under the MDL panel rules.

Q. Would you look at Exhibit 206, Mr. Fitzpatrick, and is that the letter of the judges you've just described?

(Pause in proceedings.)

A. Yes. 206, Exhibit 206 is the letter to the Judicial Panel from the judges requesting that the panel take action.

Q. After those two events, the appointing, not the conclusion of the Rehnquist Committee, and the judges' letter in November to the multi-district panel with regard to asbestos, what happened to the global settlement efforts between plaintiffs and defendants?

A. Well, I think at this time, which is the fall of 1990, the global settlement discussions which had been taking place which had been intense actually intensified even more because of these — some of these actions and heated up even more than they had been and they had not been in active [Tr. 95] negotiations.

Q. Why did it have that effect?

A. Well, I think we all felt pressure caused by the uncertainty of what Rehnquist was going to do, the Rehnquist Committee was going to do.

Q. And the MDL?

A. MDL, I honestly never saw this letter until after the Judicial Panel order in 1991. It was not a public letter.

Q. Would you turn to 207? Exhibit 207?

A. Right.

Q. What's that?

A. That is basically the January, 1991 order to show cause by the MDL panel asking for entities to show cause why all asbestos federal cases should not be transferred to a single forum.

Q. And was it — was it that time, am I right, that the letter that you previously identified then appeared in the record of those proceedings and that's when you saw it?

A. Yeah. I didn't see it until after the order to show cause was issued.

Q. What was the position of the plaintiffs' Bar on the show cause?

A. I think the vast majority of the plaintiffs' Bar supported MDL transfer of the federal cases and supported the transfer to the Eastern District of Texas.

[Tr. 96] Q. For what purpose?

A. Well, the Linscomb class action had already been filed and they wanted the Linscomb class action.

Q. What was the position of the defendants, recognizing that the defendants were not all common in this position? What were the two groups? Defendants and their positions?

A. There were two groups. I mean of the major defendants, I think Owens Illinois and I believe Pittsburgh Corning along with several peripherals defendants opposed MDL transfer.

The Center defendants along with Owens Corning Fiberglass and Fiberboard were in favor of MDL transfer at least for pretrial purposes.

Q. And the papers filed by those people, what were the purposes they were seeking out of the MDL?

A. Well, those defendants who favored the transfer under the MDL, I think did so for a number of reasons. They hoped the transfer would help to foster the global settlement discussions which had been going on for some time by that point.

They also hoped the panel would be able to deal with contingency fees, unimpaired claims, transactional costs, could coordinate with the bankruptcies and there are a whole host of reasons given for support of the transfer.

Q. Was there any common ground as this MDL argument came to be presented to the Court between the plaintiffs and [Tr. 97] defendants, indeed all the plaintiffs and the defendants on the contingency that if there was a transfer what would happen?

A. Yes. I mean the — the plaintiffs obviously favored the Eastern District of Texas which is viewed as a very pro-plaintiff forum. The defendants favored a transfer to somewhere in New England which is viewed as more a fairer jurisdiction by the defendants.

(Laughter.)

A. And I think we all agreed that if a transfer couldn't go to Texas which satisfied the plaintiffs and New England which satisfied the defendants, that the Eastern District of Pennsylvania would be a neutral — neutral as you can be — forum.

Q. After the transfer — well, look at 209. Let's just make sure we get that done. What's Exhibit 209?

A. Yes, sir. I have 209.

Q. What is it?

(Pause in proceedings.)

THE COURT: The copy of 771 Fed. Supp. Section.

Isn't it Page 415.

MR. ALDOCK: What —

THE COURT: The consolidating MDL opinion.

MR. ALDOCK: And that's July of '91.

BY MR. ALDOCK:

[Tr. 98] Q. At that point in time, when that order came down, what then happened with the global settlement discussions?

A. Yeah. I need to back up. The large group of global settlement discussions which had heated up significantly in late 1990, had more or less — I don't want to use the word "gone dormant," but they had slowed down significantly in early 1991 I think primarily because of the panel's order to show cause.

Nobody knew what was going to happen as a result of the order and the plaintiffs were waiting to see if it was going to go to Texas and we were waiting to see if it was going to go to a fairer jurisdiction and because of that uncertainty, I really think people weren't willing to commit and make further compromises in those negotiations so they had gone, if not dormant, had slowed down after the MDL's order transferring the cases to Judge Weiner in July of 1991 those global settlement discussions then once again heated up.

Q. Look at — Mr. Fitzpatrick, you're going to have to look at a different book and I apologize for how this was — we've done this, but Exhibit SP-1020 which is Pretrial Order Number 1 in the MDL and I really only want to ask you about —

A. I'm sorry, I missed the reference. Is it — what's the exhibit number?

Q. 1020. The Ness, Motley Exhibits.

[Tr. 99] A. Oh, okay.

Q. I also apologize for everyone. This is not the complete document. I only want to ask about one page. we will substitute the complete document in the record.

(Pause in proceedings.)

A. Yes, I have that in front of me.

Q. Page 7 of this order. What is — this is an order of Judge Weiner dated 9-17-91?

A. Yes, sir.

Q. Look at Page 7.

(Pause in proceedings.)

A. Yes, sir.

Q. Who was appointed by the Court as the co-lead counsel for the plaintiffs?

A. Oh, Judge Weiner appointed two co-lead counsel. He appointed Mr. Motley and Mr. Gene Locks as co-lead counsel of the plaintiffs, steering committee in connection with the MDL cases.

Q. Did Mr. Henderson have a role in this steering committee?

A. Yes, sir, he did.

Q. And just because he's a name who will appear again, did Mr. Hatton have a role on this list of people?

A. Yes, absolutely.

Q. On Page 9, I'll only ask one more question. When the defendants organized themselves, was the Center represented [Tr. 100] in the steering committee, in the negotiating committee?

A. Yes, sir.

Q. When we began to organize in this Court as plaintiffs and defendants with Judge Weiner and when he opened the proceedings early on, what was the message that you took away from those large plaintiff-defendant sessions?

A. Well, after the cases were transferred to Judge Weiner, I got the very clear message that he wanted us to solve the problem and to come to a global solution. He made it very clear about solving the problem. He didn't mean just the present cases, he wanted the

problem solved which included both the present and the future cases. I don't think anybody could have drawn a contrary conclusion from the messages he gave us.

Q. As a result, did the plaintiffs and the defendants begin to get together again on an active basis?

A. Yes.

Q. And what were the discussions — what were the major issues that were being discussed at that point in time?

A. Yeah. I think the major sticking points in the discussions at that point in time involved the present pleural cases.

Q. And what was the fight over regarding the present pleural cases?

A. The plaintiffs Bar was opposed to any global settlement [Tr. 101] that did not provide for modest payment — modest in quotes — to present pleurals. The defense group was split. Certain of the defense group were adamantly opposed to any sort of payment to present pleural cases. Other of us were in favor of a modest payment to present pleurals although I don't think our view of modest would have been the same as the plaintiffs' view of modest in dollar terms. But that was the theoretical major sticking point in the negotiations.

Q. Was there any difference of view in your opinion as between the plaintiffs we were talking to and the defendants on what would be done with future pleural claims?

A. I think we had agreed in these group negotiations that there would be a line for future cases and cases which fell below that line would not receive cash compensation under the settlement. I don't know if we ever agreed exactly where that line would be drawn. But we clearly had a consensus that there would be a deferral of at least some forms of future cases.

MR. BARON: Your Honor, I'm going to object unless he describes who he had the agreement with. It was unclear.

BY MR. ALDOCK:

Q. Who were the people that you were talking to that were participating in and out, recognizing they weren't all there all the time as representing the plaintiffs Bar?

A. Well, there were certainly Mr. Motley, Mr. Locks in his [Tr. 102] capacity as co-lead counsel, but there — a Mr. Henderson was there. There were numerous plaintiffs' counsel from all over the country at these negotiations. Mr. Sweeney was there. Mr. Gillenwater (ph) from Tennessee was there.

Q. Roughly how many of the major plaintiffs' firms participated at one time or another in these discussions that you're describing?

A. My impression was that a majority certainly of the major asbestos plaintiffs' firms were participating in — participating — I'm sorry — in these discussions.

Q. Were they the — the fact that these discussions going on a secret?

A. No. I mean there is a newspaper for asbestos litigation, a couple of them, and they were reported — the fact that they were going on was reported regularly in these newspapers. What was being discussed was not reported, obviously.

Q. And the consensus that the — scratch the word consensus — the view that you had that we had no difference of opinion with the people we were talking to on the issue of payment of future pleurals, was that one that you had heard any objection to during the discussions that we were having with the people that you've described?

A. No, sir.

Q. Was there a concept —

[Tr. 103] THE COURT: Excuse me. Excuse me, Mr. Aldock. Since you're stuck with me trying to understand what you're doing, I don't have any idea what you and he just — you gave him a leading question which of course counsel was kind enough not to object to, and you came to a conclusion with the witness that I missed somewhere along the line.

BY MR. ALDOCK:

Q. Did any one of the plaintiffs that we were talking to in these groups express a view different than the view you've expressed as the consensus on what would happen with —

A. I don't think that's going to —

Q. — pleural plaintiffs?

A. — help, Mr. Aldock.

THE COURT: I didn't hear any consensus. In fact, I heard him say there was some disagreement as to what would happen as the present pleural cases and future pleural — there was no consensus that I ever heard so I think your question —

MR. ALDOCK: What was the consensus —

THE COURT: — was not well taken.

BY MR. ALDOCK:

Q. What was the consensus on future pleurals as you understood it?

THE COURT: If there was one.

BY MR. ALDOCK:

[Tr. 104] Q. If there was one?

MR. BARON: Your Honor, first of all, it's tremendous hearsay, number one. And number one, we're still not getting as to consensus on what with whom. It's a very unclear question.

THE COURT: I find it very confusing. If you want to pursue this, and if you don't want to pursue it, then go on to another subject. If you want to, you're going to have to start over, so to speak.

MR. ALDOCK: What was —

THE COURT: And find out — I assume whether this gentleman was there and who was there and so forth.

MR. ALDOCK: Yeah.

BY MR. ALDOCK:

Q. You've described the plaintiffs' lawyers who were in attendance. Would you go over those again to make sure we've got them?

A. Well, they varied by — sometimes by meeting, but certainly the lawyers who attended from time to time included Mr. Henderson, Mr. Sweeney from Ohio, Mr. Gillenwater from Tennessee, a Mr. Steinberg from California. There were others, I just can't recall. Mr. Placitello (ph) from New Jersey came occasionally.

Q. As a result of those meetings, when you reported back to the board of the CCR as to what the position of the [Tr. 105] plaintiffs' Bar at those meetings was with respect to pleurals, what did you report?

MR. BARON: Well, can you limit that to time, Counsel. I will object because it's just too general a question.

THE COURT: I don't know the time at this point, either. If it's important, some time after MDL-875 was formed and after the first pretrial order, I don't know.

BY MR. ALDOCK:

Q. Roughly in the first year after the MDL?

A. I think we're talking the fall of 1991 here.

Q. And what did you report back was your view, having attended all these discussions of where the plaintiffs' Bar were on present pleurals and future pleurals?

A. The plaintiffs' Bar on present pleural cases, cases that had been filed up to that point in time, was insisting on a modest payment for such cases in the fall of 1991.

Q. Did they ever define modest? Did we ever get to numbers at that point?

A. No.

Q. All right. Then what was the position on futures?

A. The position of the plaintiffs' Bar on futures, future pleural cases, was that such cases would be deferred and would not receive immediate cash compensation.

Q. Until when?

[Tr. 106] (Pause in proceedings.)

A. Until such time as they actually got impaired from their asbestos exposure.

Q. And there was no agreement at that point in time on what that definition was or where that medical line would be drawn, is that right?

A. All right. The medical issues were not resolved at that point in time in 1991.

THE COURT: Mr. Aldock, I believe I understand it, but the record certainly doesn't have a definition of what present pleural cases are or what a pleural case is. I'm confident I know what it is but the record doesn't have it in there. I don't know what —

BY MR. ALDOCK:

Q. Mr. Fitzpatrick, can you — can you fix that for the record? What is the — by present cases we meant what?

A. Yeah. A present case is a case that has been filed at the point in time that you define present.

Q. Right. And a pleural is what?

A. A pleural case is a case in which the claimant shows signs of asbestos exposure, pleural plaques on his lungs but has no impairment from his exposure to asbestos.

Q. And when we talk about a future pleural, what do we mean in this context?

A. A future pleural is again a claimant who only has signs [Tr. 107] of asbestos exposure but no impairment from that exposure but his claim has not been filed at the point in time that you define future claim. It is something to be filed in the future.

THE COURT: When you talk about impairment, you talk about physical impairment?

THE WITNESS: I think that's right, your Honor. I mean a plaque is —

THE COURT: Functional impairment —

THE WITNESS: Right.

THE COURT: — or lack of volume in the lungs? What are you talking about?

THE WITNESS: I think a plaque had been described as merely a freckle on the lung.

MR. BARON: Your Honor, we object to that very strenuously. He doesn't have the qualifications to give a medical opinion.

THE COURT: We want to know what the conversations were about, that's all we're talking about. Not defining some medical condition forever and ever as a scientific matter. We're talking

about defining terms for purposes of discussions that were going on. So we don't need — I thought his answer was not responsive, but, so I don't — we've all listened to —

MR. ALDOCK: Is it fair —

[Tr. 108] THE COURT: — scores of doctors describing these things. I just want a record made of what he's talking about, that's all.

BY MR. ALDOCK:

Q. Is it fair to say, Mr. Fitzpatrick, that what is functional impairment is a matter that people describe differently and people have different views on?

A. Yes, it is.

Q. And what's your view of a functional impairment?

A. Well, again, I'm not a doctor but my view of functional impairment is an impairment that prevents you from doing something that you could have done previously before you became impaired.

Q. And it's fair to say that other people define impairment with lesser degrees of restriction than what you did and some defined it — some may define it as close to disabling and some may define it as just an impairment, some functional impairment.

MR. WOLFMAN: Your Honor.

Q. There's a difference of view on that.

MR. WOLFMAN: Your Honor, I object. I mean the leading has gotten carried away I think. I mean that was just too much.

THE COURT: Sustained.

BY MR. ALDOCK:

[Tr. 109] Q. Did the concept of traditional, historical averages come up in the course of these discussions with the plaintiffs' Bar?

A. Again, now, we're referring to the discussions with the plaintiffs' Bar that took place in the fall of 191 and involved not only the Center but many asbestos defendants and many members of the plaintiffs' Bar?

Q. That's correct.

A. Yes. The subject of historical averages did come up in those discussions.

Q. And when they talked about — in those meetings about traditional historical averages or sometimes THA, what was generally meant?

A. It was generally meant that a global deal might be possible if the defendants involved in negotiations were willing to pay for certain disease categories what they had previously paid in the tort system or their traditional historical averages.

Q. And did the plaintiffs' have a position on whether the traditional historical average had to include the jurisdiction in which the case was paid?

A. Yes. I think the plaintiffs' Bar felt that it did have to be on a jurisdictional basis.

Q. Did the plaintiffs' Bar have a view that with respect to the future cases it had to have a component of the average of [Tr. 110] the law firm involved?

A. Yes. They felt that — it was felt that they had to include both the jurisdiction and the law firm involved.

Q. Did you ever in the course of discussions in 1991 with the group you've described hear anybody say that it should be on a different basis among the plaintiffs' Bar?

MR. BARON: Your Honor, objection. I think he said —

MR. HENDERSON: It was 1991.

MR. BARON: — it was '91.

MR. HENDERSON: He was talking about.

BY MR. ALDOCK:

Q. 1991, Mr. Fitzpatrick.

THE COURT: It was the fall of 1991. The question's withdrawn. You'll ask it again, please.

BY MR. ALDOCK:

Q. Did you ever in the course of these discussions in 1991 hear anyone suggest from the plaintiffs' Bar that the traditional historical

average should be defined differently than you just stated with regard to jurisdiction and plaintiffs' firm?

A. I did not.

Q. During the settlement process in 1991, what was the role of Judge Weiner?

A. Judge Weiner attempted to encourage these global [Tr. 111] settlement discussions. He would call the defense group together as a group and talk to us. He would also call the plaintiffs' group together and would talk to them separately and then he would ask the two groups to meet.

Q. What efforts did the Judge take to foster settlements during this period that you observed from these meetings?

A. He attempted to get the parties to have a dialogue so that that would foster settlement.

Q. Were there scheduled meetings on a regular or irregular basis involving particular plaintiffs, firms and particular defendants' firms for particular blocks of cases?

A. There were.

Q. How often did that happen?

A. Very frequently.

(Pause in proceedings.)

Q. Did the defendants as a group have occasion at either joint meetings with the Judge or hearings with the Judge or defense meetings with the Judge to express their view of the litigation and where it was going?

A. Sure. I think all of the defendants involved in the MDL process expressed to Judge Weiner the view that they were not going to resolve large blocks of pending inventory which he had asked all of us to do without some sort of commitments for the future.

Q. Was the —

[Tr. 112] THE COURT: Mr. Aldock, we're going to take our noon recess, so to speak.

We'll be in recess till 2:00 o'clock. I don't have any other instructions. We'll be here together at 2:00 o'clock and we'll resume your testimony.

(Witness excused.)

(Luncheon recess taken from 12:47 o'clock p.m. to 2:08 o'clock p.m.)

* * * *

THE COURT: Good afternoon, everyone.

ALL: Good afternoon, your Honor.

THE COURT: Please be seated.

MR. ALDOCK: Your Honor, if I could, I have one preliminary scheduling matter.

THE COURT: I heard you might.

MR. ALDOCK: I'd like to accommodate Dean Kane with her testimony today so she could go back to San Francisco tonight. She'd have to leave here by 4:30.

My own view as a bad estimator, is that I would be roughly 20 minutes with her. Mr. Motley might have another ten, 15, 20 minutes, and Mr. Baron I believe is unlikely to exceed our combined total, and that that would be it.

But my thought would be that I have about 15 more minutes of Mr. Fitzpatrick. I could finish that, we could then, so we're absolutely clear where we are, take Dean Kane [Tr. 113] and then come back for Mr. Fitzpatrick for Mr. Motley's portion of it. I believe that that's acceptable to Mr. Baron.

MR. BARON: Your Honor, I'm happy to work with him. The only thing I would suggest, I didn't realize Mr. Motley was going to have direct of Mr. Fitzpatrick. Could we finish the direct of Mr. Fitzpatrick and then bring in Dean Kane, and I'll do the cross of Mr. Fitzpatrick tomorrow. Would that — just get it all out of the way.

MR. ALDOCK: My only concern is that we not then —

MR. BARON: You just told me you have 15 more minutes with Mr. Fitzpatrick. If we start Dean Kane by 3:00, we'll be out of here.

THE COURT: We'll probably want to take a recess at some point. We still ought to be finished —

MR. BARON: Still ought to be finished.

THE COURT: — by 4:30 —

MR. BARON: Yes.

THE COURT: — with Dean Kane, I would assume. Mr. Aldock, do you have a response to that?

MR. ALDOCK: No, I'm happy to do it either way. My preference would be to do Mr. Fitzpatrick and then Dean Kane so we're 100 percent sure, and then Mr. Motley's portion of Mr. Fitzpatrick. But if your Honor felt that —

THE COURT: First of all —

[Tr. 114] MR. ALDOCK: — that you wanted to have Mr. Motley follow me, that's okay.

THE COURT: Let's get yours finished, and we'll see where we go from there.

MR. ALDOCK: Thank you, your Honor.

THE COURT: You're still on direct, Mr. Fitzpatrick, you're under oath. Please proceed, Mr. Aldock.

LAWRENCE FITZPATRICK, Resumed.

DIRECT EXAMINATION (Continued)

BY MR. ALDOCK:

Q. Mr. Fitzpatrick, I want to pick back up with the negotiations between groups of plaintiffs and groups of defendants lawyers, plaintiffs lawyers and defendants lawyers in late 1991.

Did there come a point in those negotiations in late 1991 where they basically came to a head?

A. Yes. In late 1991, the defense group, the large defense group did make an offer to the group of plaintiffs attorneys. That offer was rejected for a couple of grounds. The offer had contemplated —

MR. BARON: Your Honor, the answer is not being responsive to the question, and I don't think there is a pending — I think he's

answered the pending question, and he's just now giving a speech and —

THE COURT: I think the answer technically might [Tr. 115] have been a yes or no.

MR. BARON: Yes.

THE COURT: And once he did say yes, they did come to a head, maybe you ought —

MR. ALDOCK: Okay. Would you describe —

THE COURT: — to ask another question.

BY MR. ALDOCK:

Q. Would you describe, Mr. Fitzpatrick, in general terms what the defense offer was, and in general terms what the plaintiffs response was?

A. In general terms, the defendants in the group had made a settlement offer. It was basically based on their traditional, historical averages in the tort system. That offer was rejected for basically two reasons.

Number one, it contemplated giving the plaintiffs group a large pot of money, and we were informed by the plaintiffs attorneys that they would have difficulty in determining how to divide up that pot of money.

The second reason stated for the rejection was that plaintiffs attorneys wanted to negotiate their own present cases, and would not give up control of those present cases to any other attorney.

Q. The offer that was made by the defendants was for both present and future?

A. That's correct.

[Tr. 116] Q. Cases?

A. Yes.

MR. BARON: Your Honor, again I'm going to ask him not to lead the —

THE COURT: Sustained. Try not to.

MR. BARON: Thank you.

MR. ALDOCK: They also don't want a yes or no answer. It makes it tricky, but we'll continue to do it this way.

MR. BARON: Well, it's not the answer I've got the problem, it's the question.

THE COURT: Sit down, Mr. Baron. The ruling has been made, don't talk among yourselves.

MR. BARON: Thank you.

THE COURT: Get on with it, Mr. Aldock.

BY MR. ALDOCK:

Q. Mr. Fitzpatrick, the — what was in your mind meant by the idea that with regard to presence, we would negotiate with every plaintiffs lawyer separately? What did they mean by that? How was it going to work?

A. It meant that the defendants would have to go to each and every plaintiffs firm in the United States, and separately negotiate their present claims.

Q. And what was the defendants response to that?

A. The defendants as a group felt that that approach was not [Tr. 117] practical or doable.

Q. When was this that the breakdown of those negotiations occurred?

A. It would have been in late 1991, I think November of 1991.

Q. How did the CCR respond to that breakdown of negotiations?

A. We decided that we wanted to pursue individual global settlement negotiations on behalf of the CCR after the failure of the large group negotiations.

Q. Why did we come to that view?

A. We felt that a global solution was desirable. We had participated in good faith in the larger group discussions. When they failed, we decided to go individually.

Q. How did we implement that desire?

A. We decided to approach Mr. Motley and Mr. Locks who were the co-chairpersons of the plaintiffs, MDL steering committee, and

who had played prominent roles in various national matters for asbestos victims to attempt to negotiate a settlement with them.

Q. Why did we approach Mr. Motley?

A. We approached Mr. Motley because he was one of the co-chairpersons of the MDL steering committee. He had played a prominent role in the Manville bankruptcy and many other bankruptcy proceedings. Had been active in Congress, and [Tr. 118] represented some unions.

Q. Why did we approach Mr. Locks?

A. We approached Mr. Locks because he was the — one of the co-chairpersons of the plaintiffs MDL steering committee. Also had been prominent in national matters on behalf of asbestos victims, such as the Manville bankruptcy, the Unarco bankruptcy was actually the chairman of the Unarco entity that emerged from the bankruptcy, and brought something of a different perspective to the table than Mr. Motley did.

Q. Prior to this time in approaching these people in late 1991, had Ness, Motley and Greitzer and Locks been traditional allies in the tort system in approaches to the national issues that had been the tort system?

MR. BARON: Your Honor, leading. Can we get a question that's not leading. I object —

THE COURT: Counsel, don't — I didn't tell you this. Don't argue any objection unless I ask you to.

MR. BARON: All right. Leading, your Honor.

THE COURT: If the objection is it's leading, objection sustained.

MR. BARON: Thank you.

THE COURT: The next rule of this Court is you don't thank me for making a ruling at any time, please. That applies to all counsel.

BY MR. ALDOCK:

[Tr. 119] Q. Mr. Fitzpatrick, what was the relationship, if any, between Mr. Locks' firm and Mr. Motley's firm in the litigation?

A. I know that Mr. Locks and Mr. Motley knew each other, but I'm not sure that I can answer the question as to what their relation[illegible] was.

Q. Did they approach the litigation and the national issues in the same fora and in the same way?

A. No, I think they had different perspectives.

Q. All right. What were they?

A. Well, I think — my perception was that — we perceived Mr. Locks as more perhaps of a businessman than Mr. Motley.

And Mr. Motley as perhaps more of a trial man than Mr. Locks.

Q. When did we approach Mr. Locks?

A. I did not personally do that approach. I believe it was in late 1991.

Q. How about Mr. Motley?

A. Again, it was in late 1991.

Q. Who had made those contacts?

A. I believe that initially,you and I jointly approached Mr. Motley. I believe you initially approached Mr. Locks.

Q. Who then conducted the negotiations that ensued thereafter?

A. The negotiations that ensued thereafter were conducted by — pardon me — on behalf of the CCR, those negotiations were [Tr. 120] conducted by yourself, by Mr. William Hanlon of your firm, and by Mr. Michael Rooney, the chief operating officer of the CCR.

Q. What was your role in those negotiations, if any?

A. The progress of the negotiations were reported to me in my capacity as CCR chief executive officer, and also a member of the board in the CCR. I did not take an active role in the negotiations themselves.

Q. Mr. Fitzpatrick, I now want to cover a few miscellaneous items which I believe are important, but they're not part of the history in any way that we've been covering up to now.

What's a green card?

A. A green card is a contractual agreement between a claimant and his or her counsel and a defendant to basically put a claim in a holding pattern, waive the statute of limitations as a defense, and agree that the claimant can seek compensation if and when that claimant ever gets impaired from his or her exposure to asbestos.

Q. What is the CCR's position on green cards? What has it been historically and what is it now?

A. Well, historically we thought green cards were a good thing, and we tried to dispose of claims from unimpaired people in the tort system through green cards. We were not terribly successful in our green card program.

* * * *

[Tr. 127] Q. What's the difference between a limited release, Mr. Fitzpatrick, and a full release in the litigation?

A. Right. May I start with the full release?

Q. Sure.

Q. A full release is a release of all claims in exchange for some sort of consideration, usually monetary.

A limited release in contrast, typically only releases the disease that the victim is suffering from at the time the release is entered into. For example, a claimant with asbestosis occasionally does a limited release that releases his asbestosis claim in exchange for a sum of money, but allows him to come back in the event he gets lung cancer or mesothelioma.

Q. Which kind of release does the CCR generally provides in the tort system?

A. In the tort system, 90 percent —

Q. While in the — yes, go ahead.

A. I'm sorry. Are we talking the tort system or the Georgine settlement?

A. In the tort system.

Q. All right. In the tort system, since we've been in operation, we've attained approximately 90 percent of our releases have been full releases.

* * * *

[Tr. 130] Because a claimant can go on a registry and not get compensated if he gets ill years later, and the defendant has gone bankrupt in the interim.

Q. Mr. Fitzpatrick, during the four years of the CCR, has there ever been a punitive damage judgment against a CCR company?

A. I would — I would say the CCR is more like five and a half years. But the answer to your question is, there has been no such judgment.

Q. Are there CCR companies that have never been found liable in the tort system in negligence or strict liability, while members of the CCR during that four and a half, five-year period?

A. Yes, sir. Approximately a dozen of our 20 members have never had a judicial determination that they were negligent or liable in strict liability in an asbestos case.

Q. Are you familiar, Mr. Fitzpatrick, with the CCR history of trials and verdicts in the tort system?

A. Yes, sir.

Q. Would you return to Exhibit 217, please?

A. If I may have a moment?

(Pause in proceedings.)

Q. It is the last exhibit I will show you, Mr. Fitzpatrick.

THE COURT: I don't have it. Go ahead.

It's buried in the book somewhere, and I don't want to take [Tr. 131] the time to get it. I have the books, but they're behind me. I thought somebody had gotten me all of them, but apparently I don't.

(Pause in proceedings.)

BY MR. ALDOCK:

Q. Are you familiar with that chart, Mr. Fitzpatrick?

A. I am.

Q. How was it prepared?

A. It was prepared by — at the supervision of Mr. John Gall of the CCR, who is in our legal department.

Q. And you're familiar with what it portrays?

A. Yes, sir.

Q. What is that?

A. It is a list of cases in which the CCR has gone to verdict since the time that the CCR was formed in October of 1988 through January 15th, 1993, which is the effective date of the Georgine stipulation.

Q. Is it all such verdicts?

A. It's all cases that went to verdict during that time period. It does not count cases that may have started and settled before, a verdict was entered.

Q. And would you tell us some of the highlights of what that chart says to you?

A. I think it says a couple of things. There are 197 cases on the chart, 196 of which represents verdicts, one's a [Tr. 132] mistrial in which there was no clear winner.

Of that 196 cases, we the center received defense verdicts in a majority of the cases. We prevailed 107 times, and plaintiffs's verdict were returned 89 times.

So roughly 55 percent of the time defense verdicts were obtained.

Q. Does that count cases where you prevailed for only one member and not for all?

A. No. We only count a victory if it's an outright win for all of our members. In many cases on this list, seven CCR members may have gone to verdict, six of them may have been exonerated, but one may have been found liable. In that case we would count that as a loss even though six of our members were fully exonerated.

We have to win for all for it to be a win in our system on coning.

Q. The last column says, CCR member in the case, and then it has a list of abbreviations for a few companies. Is that the people who actually went to verdict?

A. That's correct.

Q. Is that representative of the number of CCR defendants in the typical cases?

A. No, it's smaller than the average number of CCR defendants in the typical case, because normally in a given case, three or four or five of our members will be disposed

* * * *

No. 96-270

In the Supreme Court of the United States

OCTOBER TERM, 1996

Supreme Court, U.S.
FILED
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AMCHEM PRODUCTS, INC., ET AL.,
Petitioners

v.

GEORGE WINDSOR, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX - VOLUME III

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TESTIMONY OF LAWRENCE FITZPATRICK

* * * *

[Tr. 64] BY MR. MOTLEY:

Q. And you're personally familiar with that?

A. Yes. Yeah. Having read the stipulation, I am aware that they're there.

(Pause in proceedings.)

Q. Now, sir, I want to turn to a different subject matter.

You announced — excuse me — you testified yesterday that the Center for Claims Resolution adopted a policy that predates the Georgine negotiations with respect to settlement of or so-called inventory settlement of cases. Do you recall that testimony?

A. I do.

Q. For the record again, and as a foundation for my questions, will you describe again for the Court what that means?

A. I — to be — to fully explain our settlement philosophies since inception, the first two years of our operation, 1989 and 1990, we engaged in a substantial number of block or inventory settlements. After the initial two-year period, in spite of the fact that we had settled thousands and thousands of cases, we found that the backlog against our members had actually increased due to the number of new filings.

At that point, we decided to reexamine our settlement philosophy and for the next two years of our [Tr. 65] existence, did not engage in large-scale inventory settlements unless we could get pleural registries in various jurisdictions as protections for the future. So that we didn't find ourselves settling 10,000 claims in a given jurisdiction and finding ourselves with 15,000 claims anyway because of the new filings, so that became our position in the next two years of our existence.

And I think that's what I was testifying about yesterday.

Q. Would you characterize the New England, as you have described that more narrowly being Massachusetts and Connecticut and maybe some smaller pockets of cases, settlement which you've described in detail earlier this morning as an example of the type

of inventory settlement that CCR was willing to negotiate and in fact did negotiate?

A. Yes. With the caveat that the New England deal was not just the CCR. It was all the other —

Q. I understand —

A. — major defendants.

Q. — that, but I want to focus solely on the CCR.

A. Yes, sir.

Q. Since that time, sir, and I'm excluding Ness, Motley and Greitzer and Locks from this question, has these — and I'm also stating profiling of Georgine —

A. Okay.

* * * *

[Tr. 66] Q. — were other such settlements reached with law firms that met the criteria that you've described to the Court for inventory settlements?

A. The pleural registry criteria, is that what we're talking about?

Q. Yes.

A. Not that I'm aware of.

Q. Okay. Have you settled since Georgine was filed present inventories with some sort of future agreements with other law firms than Ness, Motley and Greitzer and Locks since Georgine was filed in January, 1993?

A. Yes, sir.

Q. One or two firms or how would you describe it? I don't want to put words in your mouth.

A. Well, when we became reasonably confident that Georgine would be successful, we then attempted to fulfill our commitment to settle the pending inventory over the next three to five years. And we have certainly settled many thousands of pending inventory claims since the point in time we became confident Georgine would be likely to happen.

Q. Now, sir, let me ask you a few questions about some allegations that have been made about the conduct of class counsel in this case.

Are you aware, sir, of any provisions in the Georgine settlement which address specifically using the word

* * * *

[Tr. 72] Resolution. What was that prepared for and what is it?

A. All right. The reason it was prepared is because we are quite frequently audited by insurance companies and reinsurers that want to make sure that we're handling asbestos claims in an efficient manner so that everything's proper under their insurance policies and coverage attaches. So it was prepared primarily to deal with insurance companies and reinsurers who frequently come in to audit us.

It basically just shows some of the benefits belonging to the Center for Claims Resolution.

Q. Mr. Fitzpatrick, I want to shift now to the period 1987 to 1992 in the tort system.

A. Yes, sir.

Q. When was the first time that you heard any consistent or frequent talk of the need for a global settlement to the asbestos crisis?

A. I think that as early as the year 1986, there began to be a widespread recognition that the asbestos litigation was spinning out of control and that a better solution needed to be derived.

Q. What were the factors that were brought to your attention or that you were aware of at that time that are subsumed in the phrase, "spinning out of control"?

A. Right. Prior to 1985 or so, new lawsuits had been filed at a relatively constant rate of about 500 per month or 6,000 [Tr. 73] per year and that had been true of not only '85, but 1984, '83, '82 and '81. I believe the backlog of asbestos cases had been in the 20,000 to 30,000 case range throughout that period with, you know, variations here or there, but that had roughly been the size of the problem.

Commencing in about 1986, the rate of new filings of asbestos claims accelerated dramatically so that instead of 500 claims a month being filed, approximately 2,000 claims a month started being filed and that held true throughout 1986, 1987, 1988, 1989, 1990 and indeed it holds true today. So by 1986, at least, there was a growing awareness that the backlog was growing and that the new filings were way up.

There had been studies done in the early '80s about transactional costs, how much went to lawyers in the asbestos litigation and there was a growing realization that the majority of the dollars being spent on asbestos were not in fact going anywhere near the victims but were instead going to the lawyers.

There were legions of examples of erratic verdicts in the tort system. Mesothelioma victims getting nothing. People with no impairment getting six and sometimes seven-figure verdicts.

So for a lot of reasons beginning in the mid-'80 period. Academics, think tanks, Congress and I think judges began to realize that the asbestos problem was something that [Tr. 74] was spinning out of control, to use my phraseology.

Q. Were there bankruptcies during this period of the '80s?

A. Sure. The original major bankruptcy occurred on August 26th, 1982 when the then called Johns-Manville Corporation filed for bankruptcy. Manville was frequently termed the General Motors of the asbestos industry, had supplied huge amount of the products and indeed had basically controlled the asbestos litigation until such time as it went bankrupt.

MR. BARON: Your Honor, I'm going to have to insert an objection on relevancy. We're judging this settlement. We're not judging what the history of asbestos has been.

MR. ALDOCK: If I might —

THE COURT: The objection's overruled.

THE WITNESS: Other bankruptcies in this early '80 period included a company called Unarco (ph), which was a fairly substantial defendant prior to the time that it went into bankruptcy.

There have been others but in the early to mid-'80s, I think Unarco and Manville are the ones that stick in my mind.

Q. Was the phenomena of what we call screening something that accelerated during this period?

A. Yes. And I probably should explain what screenings mean.

Q. Please.

A. Let me start out by saying screenings per se are not

* * * *

[Tr. 77] went to a meeting with the judiciary to discuss the asbestos crisis and the need for a global solution?

A. July 7, 1987.

Q. What meeting was that?

A. It was the first meeting on asbestos sponsored by the Federal Judicial Center. This particular meeting was held at the Sixth Circuit Court of Appeals courthouse in Cincinnati, Ohio. It involved judges from all over the country with significant asbestos dockets.

I was asked to come to this meeting and talk to the judges as were plaintiffs' attorneys, Mr. Levy from New York, Stan Levy and Mr. Robert Sweeney from Ohio. There may have been other plaintiffs' attorneys at this meeting, but those are the two I recall.

Q. What was the tenor of the discussion at that conference that you attended?

A. I think among the judges present, there were a lot of things discussed. The growing backlog was a concern of theirs. The fact that settlements were not keeping pace with new filings. The fact that transactional costs were — continued to eat up an enormous amount of the claims dollar, and the bankruptcies that had taken place were also a topic of discussion.

Q. Did you have a perception that the problems you described in your testimony earlier, were problems that others were [Tr. 78] experiencing in the same terms?

A. Oh, absolutely.

Q. As a follow-up to that meeting in Cincinnati, did you have occasion to discuss any of these concerns with anybody on the plaintiffs part?

A. Certainly. Immediately after attending this conference at the Sixth Circuit, I telephonically contacted Mr. Ron Motley. Mr. Motley having the largest number of asbestos cases in the country, his cases and all of his affiliates are counted, and having also had a leadership role in various national matters pertaining to asbestos on behalf of the victims, particularly the Manville trust bankruptcy at that point in time, was the logical person for me to approach.

Q. And share with us generally the tenor of those discussions?

A. Well, I think we discussed over the telephone several times the problems with the asbestos litigation as we perceived them, the comments the judges were making about the asbestos litigation.

What were potential ways to fix what looked to be a broken system, and I think we finally got to the point in August or September of 1987 where we actually began to exchange documents about a global solution to asbestos.

Q. From late '87 through '89, were you and the people you reported to really in a position to pursue these discussions

* * * *

[Tr. 82] courtroom and we have a problem putting things back together.

MR. ALDOCK: It had been my intention, your Honor, if it meets with your Honor's pleasure, to move all the exhibits identified by Mr. Fitzpatrick at the close of his testimony.

THE COURT: Fine. I don't know whether we had discussed that, I don't remember, but it's just a reminder.

BY MR. ALDOCK:

Q. Have you had a chance to look at Exhibit 203?

A. Yes, sir.

Q. What's that?

A. That is a June 20, 1990 letter from the Federal Judicial Center, signed by James Apple who was the director of the Federal Judicial Center, inviting certain individuals to an asbestos conference sponsored by the Federal Judicial Center in June of 1990.

Q. Roughly what was the size and complexion of the group that attended this conference?

A. I'm not sure of the size. It included several prominent plaintiffs lawyers, several academics, knowledgeable in this field, several defense representatives, and finally several of the major federal judges with asbestos caseloads, and I believe at lease one, if not two, state judges with an asbestos caseload.

Q. Did you and I attend that meeting? [Tr. 83]

A. We sure did.

Q. Well, what concerns were addressed there? What was discussed during that day session?

A. Well, it was largely a discussion of the same concerns that had been discussed at the 1987 conference, but they had magnified in severity in the three years that had past.

The transactional costs were still a major problem, the new filings rate had continued unabated, the unimpaired claimant problem had become even more severe because of the screenings. Backlogs had grown, the problem, you know, was approaching I believe 70 to 80,000 cases by the time of this 1990 conference, perhaps more.

Various contingent to be inconsistent, there continued to be what the judges felt were unnecessary repetitive trials of issues, unnecessary trials. So there was a whole plethora of issues discussed at this conference.

Q. Did some of the judges in the open sessions before there was a break-up between plaintiffs, defendants and judges, actually put out for discussions vehicles for addressing this problem?

A. There were a lot of things thrown out at this conference. Class actions were discussed, a national asbestos trial day was discussed, pleural registries, which I guess I haven't defined but will, were discussed, and I think there were a host of things that were discussed by the judges. [Tr. 84]

Q. Was there discussions of the judiciary's view of what the Bar should be doing about all this?

A. Yes. I mean, they basically told the plaintiffs attorneys present and the defendants present that they had better get together and solve this problem, that the problem was out of control, and that they expected a solution.

Q. What conclusion did you reach as you left that conference?

A. I viewed it as an enormously significant event in the history of the asbestos litigation. I don't think anybody who participated in that conference could have gone away from it feeling that business as usual was going to be acceptable in the minds of the judges. And that something creative had to happen and that was my impression walking away from that conference.

Q. What, if anything, did the CCR resolve to do to follow-up on that conference?

A. We decided to follow what basically we had been told to do, and that is to together with the plaintiffs bar and see if we could come up with a solution.

Q. What, if anything, did the asbestos judges begin to do following that conference, particularly some of the federal judges?

A. Right. They did a couple of things. For the first time the asbestos judges decided to organize themselves in a

* * * *

[Tr. 94] A. Yes.

Q. — 1990, what happened then?

A. Right. In September of 1990, Chief Justice Rehnquist appointed a panel to study the asbestos personal injury litigation. That panel's report came out in May of 1991. So that's what occurred in September of 1990.

In November of 1990, several asbestos federal judges with significant asbestos dockets wrote to the Judicial Panel for multi-district litigation and requested a transfer of the cases under the MDL panel rules.

Q. Would you look at Exhibit 206, Mr. Fitzpatrick, and is that the letter of the judges you've just described?

(Pause in proceedings.)

A. Yes. 206, Exhibit 206 is the letter to the Judicial Panel from the judges requesting that the panel take action.

Q. After those two events, the appointing, not the conclusion of the Rehnquist Committee, and the judges' letter in November to the

multi-district panel with regard to asbestos, what happened to the global settlement efforts between plaintiffs and defendants?

A. Well, I think at this time, which is the fall of 1990, the global settlement discussions which had been taking place which had been intense actually intensified even more because of these — some of these actions and heated up even more than they had been and they had not been in active

* * * *

[Tr. 99] A. Oh, okay.

Q. I also apologize for everyone. This is not the complete document. I only want to ask about one page. We will substitute the complete document in the record.

(Pause in proceedings.)

A. Yes, I have that in front of me.

Q. Page 7 of this order. What is — this is an order of Judge Weiner dated 9-17-91?

A. Yes, sir.

Q. Look at Page 7.

(Pause in proceedings.)

A. Yes, sir.

Q. Who was appointed by the Court as the co-lead counsel for the plaintiffs?

A. Oh, Judge Weiner appointed two co-lead counsel. He appointed Mr. Motley and Mr. Gene Locks as co-lead counsel of the plaintiffs, steering committee in connection with the MDL cases.

Q. Did Mr. Henderson have a role in this steering committee?

A. Yes, sir, he did.

Q. And just because he's a name who will appear again, did Mr. Hatton have a role on this list of people?

A. Yes, absolutely.

Q. On Page 9, I'll only ask one more question. When the defendants organized themselves, was the Center represented [Tr. 100] in the steering committee, in the negotiating committee?

A. Yes, sir.

Q. When we began to organize in this Court as plaintiffs and defendants with Judge Weiner and when he opened the proceedings early on, what was the message that you took away from those large plaintiff-defendant sessions?

A. Well, after the cases were transferred to Judge Weiner, I got the very clear message that he wanted us to solve the problem and to come to a global solution. He made it very clear about solving the problem. He didn't mean just the present cases, he wanted the problem solved which included both the present and the future cases. I don't think anybody could have drawn a contrary conclusion from the messages he gave us.

Q. As a result, did the plaintiffs and the defendants begin to get together again on an active basis?

A. Yes.

Q. And what were the discussions — what were the major issues that were being discussed at that point in time?

A. Yeah. I think the major sticking points in the discussions at that point in time involved the present pleural cases.

Q. And what was the fight over regarding the present pleural cases?

A. The plaintiffs Bar was opposed to any global settlement

* * * *

[Tr. 105] plaintiffs, Bar at those meetings was with respect to pleurals, what did you report?

MR. BARON: Well, can you limit that to time, Counsel. I will object because it's just too general a question.

THE COURT: I don't know the time at this point, either. If it's important, some time after MDL-875 was formed and after the first pretrial order, I don't know.

BY MR. ALDOCK:

Q. Roughly in the first year after the MDL?

A. I think we're talking the fall of 1991 here.

Q. And what did you report back was your view, having attended all these discussions of where the plaintiffs' Bar were on present pleurals and future pleurals?

A. The plaintiffs' Bar on present pleural cases, cases that had been filed up to that point in time, was insisting on a modest payment for such cases in the fall of 1991.

Q. Did they ever define modest? Did we ever get to numbers at that point?

A. No.

Q. All right. Then what was the position on futures?

A. The position of the plaintiffs' Bar on futures, future pleural cases, was that such cases would be deferred and would not receive immediate cash compensation.

Q. Until when?

[Tr. 106] (Pause in proceedings.)

A. Until such time as they actually got impaired from their asbestos exposure.

Q. And there was no agreement at that point in time on what that definition was or where that medical line would be drawn, is that right?

A. All right. The medical issues were not resolved at that point in time in 1991.

THE COURT: Mr. Aldock, I believe I understand it, but the record certainly doesn't have a definition of what present pleural cases are or what a pleural case is. I'm confident I know what it is but the record doesn't have it in there. I don't know what —

BY MR. ALDOCK:

Q. Mr. Fitzpatrick, can you — can you fix that for the record? What is the — by present cases we meant what?

A. Yeah. A present case is a case that has been filed at the point in time that you define present.

Q. Right. And a pleural is what?

A. A pleural case is a case in which the claimant shows signs of asbestos exposure, pleural plaques on his lungs but has no impairment from his exposure to asbestos.

Q. And when we talk about a future pleural, what do we mean in this context?

A. A future pleural is again a claimant who only has signs [Tr. 107] of asbestos exposure but no impairment from that exposure but his claim has not been filed at the point in time that you define future claim. It is something to be filed in the future.

THE COURT: When you talk about impairment, you talk about physical impairment?

THE WITNESS: I think that's right, your Honor. I mean a plaque is —

THE COURT: Functional impairment —

THE WITNESS: Right.

THE COURT: — or lack of volume in the lungs? What are you talking about?

THE WITNESS: I think a plaque had been described as merely a freckle on the lung.

MR. BARON: Your Honor, we object to that very strenuously. He doesn't have the qualifications to give a medical opinion.

THE COURT: We want to know what the conversations were about, that's all we're talking about. Not defining some medical condition forever and ever as a scientific matter. We're talking about defining terms for purposes of discussions that were going on. So we don't need — I thought his answer was not responsive, but, so I don't — we've all listened to —

MR. ALDOCK: Is it fair —

* * * *

[Tr. 114] MR. ALDOCK: — that you wanted to have Mr. Motley follow me, that's okay.

THE COURT: Let's get yours finished, and we'll see where we go from there.

MR. ALDOCK: Thank you, your Honor.

THE COURT: You're still on direct, Mr. Fitzpatrick, you're under oath. Please proceed, Mr. Aldock.

LAWRENCE FITZPATRICK, Resumed.

DIRECT EXAMINATION (Continued)

BY MR. ALDOCK:

Q. Mr. Fitzpatrick, I want to pick back up with the negotiations between groups of plaintiffs and groups of defendants lawyers, plaintiffs lawyers and defendants lawyers in late 1991.

Did there come a point in those negotiations in late 1991 where they basically came to a head?

A. Yes. In late 1991, the defense group, the large defense group did make an offer to the group of plaintiffs attorneys. That offer was rejected for a couple of grounds. The offer had contemplated —

MR. BARON: Your Honor, the answer is not being responsive to the question, and I don't think there is a pending — I think he's answered the pending question, and he's just now giving a speech and —

THE COURT: I think the answer technically might [Tr. 115] have been a yes or no.

MR. BARON: Yes.

THE COURT: And once he did say yes, they did come to a head, maybe you ought —

MR. ALDOCK: Okay. Would you describe —

THE COURT: — to ask another question.

BY MR. ALDOCK:

Q. Would you describe, Mr. Fitzpatrick, in general terms what the defense offer was, and in general terms what the plaintiffs response was?

A. In general terms, the defendants in the group had made a settlement offer. It was basically based on their traditional, historical averages in the tort system. That offer was rejected for basically two reasons.

Number one, it contemplated giving the plaintiffs group a large pot of money, and we were informed by the plaintiffs attorneys that they would have difficulty in determining how to divide up that pot of money.

The second reason stated for the rejection was that plaintiffs attorneys wanted to negotiate their own present cases, and would not give up control of those present cases to any other attorney.

Q. The offer that was made by the defendants was for both present and future?

A. That's correct.

[Tr. 116] Q. Cases?

A. Yes.

MR. BARON: Your Honor, again I'm going to ask him not to lead the —

THE COURT: Sustained. Try not to.

MR. BARON: Thank you.

MR. ALDOCK: They also don't want a yes or no answer. It makes it tricky, but we'll continue to do it this way.

MR. BARON: Well, it's not the answer I've got the problem, it's the question.

THE COURT: Sit down, Mr. Baron. The ruling has been made, don't talk among yourselves.

MR. BARON: Thank you.

THE COURT: Get on with it, Mr. Aldock.

BY MR. ALDOCK:

Q. Mr. Fitzpatrick, the — what was in your mind meant by the idea that with regard to presence, we would negotiate with every plaintiffs lawyer separately? What did they mean by that? How was it going to work?

A. It meant that the defendants would have to go to each and every plaintiffs firm in the United States, and separately negotiate their present claims.

Q. And what was the defendants response to that?

A. The defendants as a group felt that approach was not [Tr. 117] practical or doable.

Q. When was this that the breakdown of those negotiations occurred?

A. It would have been in late 1991, I think November of 1991.

Q. How did the CCR respond to that breakdown of negotiations?

A. We decided that we wanted to pursue individual global settlement negotiations on behalf of the CCR after the failure of the large group negotiations.

Q. Why did we come to that view?

A. We felt that a global solution was desirable. We had participated in good faith in the larger group discussions. When they failed, we decided to go individually.

Q. How did we implement that desire?

A. We decided to approach Mr. Motley and Mr. Locks who were the co-chairpersons of the plaintiffs, MDL steering committee, and who had played prominent roles in various national matters for asbestos victims to attempt to negotiate a settlement with them.

Q. Why did we approach Mr. Motley?

A. We approached Mr. Motley because he was one of the co-chairpersons of the MDL steering committee. He had played a prominent role in the Manville bankruptcy and many other bankruptcy proceedings. Had been active in Congress, and [Tr. 118] represented some unions.

Q. Why did we approach Mr. Locks?

A. We approached Mr. Locks because he was the — one of the co-chairpersons of the plaintiffs MDL steering committee. Also had been prominent in national matters on behalf of asbestos victims, such as the Manville bankruptcy, the Unarco bankruptcy was actually the chairman of the Unarco entity that emerged from the bankruptcy, and brought something of a different perspective to the table than Mr. Motley did.

Q. Prior to this time in approaching these people in late 1991, had Ness, Motley and Greitzer and Locks been traditional allies in the

tort system in approaches to the national issues that had been the tort system?

MR. BARON: Your Honor, leading. Can we get a question that's not leading. I object —

THE COURT: Counsel, don't — I didn't tell you this. Don't argue any objection unless I ask you to.

MR. BARON: All right. Leading, your Honor.

THE COURT: If the objection is it's leading, objection sustained.

MR. BARON: Thank you.

THE COURT: The next rule of this Court is you don't thank me for making a ruling at any time, please. That applies to all counsel.

BY MR. ALDOCK:

* * * *

[Tr. 121] A. Primarily because we are only one of a number of defendants in the typical asbestos case, and plaintiffs attorneys just didn't want to fool around, if you will, with a center green card if they had to try their case against other defendants.

Q. Was there any other reason why it was not successful in your view?

A. Yes. Many plaintiffs attorneys were concerned about what would happen if they entered into a green card. Their claimant — their client rather became sick some years into the future, and the defendant granting the green card had become insolvent in the interim period. So the lack of funding for green cards was an additional reason that program was not terribly successful.

Q. Did a green card offer the claimant any particular sum or procedure for disposing of his claim when he had one?

A. No, not typically.

Q. Did the center ever explore a concept, the center and the Asbestos Claims Facility before it, ever explore a concept known in discussions as a funded green card?

A. We explored something similar to that.

Q. And what does that mean to you, and what did we explore?

A. During the days of the Asbestos Claims Facility and the center, we tried to explore the idea of insurance, cancer insurance for claimants who are today unimpaired, but may [Tr. 122] contract cancer or some other type of impairment in the future.

Q. And what was the result of that exploration?

A. We were never able to find an insurance carrier willing to write that sort of coverage at a premium that was reasonable or practical.

Q. Could you expand on why they told you they couldn't do it, or why it would cost what it would cost?

A. I don't think — I can't expand. The response back was that it wasn't practical at any sort of affordable premium.

Q. How did you measure what was an affordable premium? What was the standard that you would measure whether it was affordable or not compared to the tort system or otherwise?

A. Well, I think one has to look at the level of benefits that the carrier might be offering at the price. And when we looked at the sorts of proposals that we saw, there weren't many of them, they were for extremely low benefit levels at an extremely high cost.

Q. How did that cost compare with the cost of settling the claim in the tort system for a full release?

A. Yes. Let me back up. I don't think we ever got to the point of getting cost information when we did the facility investigation. We did see some cost information during the center days when we did the investigation, but the premium for the kind of insurance that was under discussion, was [Tr. 123] actually larger than it cost us to settle the unimpaired claim in the tort system, and get a full release.

Q. What, Mr. Fitzpatrick, is a pleural registry?

A. A pleural registry is very similar to a green card. It is an agreement to waive the statute of limitations in the case of an unimpaired claimant, and that claimant has the right to compensation if and when he or she ever does become impaired by asbestos exposure.

The major difference between a pleural registry and a green card, is that the pleural registry is enacted by an order of a court in a given jurisdiction, and therefore applies to all asbestos defendants in that jurisdiction, as opposed to green cards which are typically one-on-one contractual agreements between claimants and individual defendants.

Q. Were the efforts that the center made to explore the pleural registry concept and have them implemented around the country successful?

A. They enjoyed some degree of success, but they were not as successful as we would have liked.

Q. And why is that? Why do you think they were not as successful as you would have hoped?

A. Because there was opposition in many quarters from the plaintiffs attorneys to such pleural registries.

Q. And what was the opposition's argument? Why did they [Tr. 124] not want it?

A. Well, I think some of them wanted immediate cash compensation for their clients be they impaired or not. Others were more concerned about the lack of funding in the event their claimant went on a registry, became impaired years down the pike, and then found that the defendants whose products their client had been exposed to, had gone bankrupt in the interim.

Q. Was there any concern that they were local and not national?

A. Yes, that was another problem. Unless there was a national pleural registry, one could simply go to an adjoining state, if one wanted to and file the claim and avoid the pleural registry.

Q. Have we had — what is the extent of the experience we've had in the tort system, we the center, with green cards and registries over the last few years?

A. We have done some green card dispositions. Some cases had been put on pleural registries. I honestly don't know of the exact numbers. We've had some success, but it certainly hasn't been overwhelming.

Q. Has the — what's the timing of the green cards, and what's the order of magnitude roughly of numbers in terms of issued green cards over time?

A. I didn't understand the first part of your question?

[Tr. 125] Q. How many green cards do you think our companies have out there and roughly over what period of time?

A. I'm not sure, a few thousand probably in the few years that we gave green cards. It's not a great sum.

Q. And with respect to registries, are they a phenomena of the last few years or do they go back a long ways?

A. They go back to 198 — early 1986.

Q. And which registry was that?

A. The Massachusetts — the pleural registry in the Massachusetts Federal Court, I believe was the first pleural registry enacted.

Q. And of the registries that have been enacted, how many of them are within the last few years?

(Pause in proceedings.)

A. About half.

Q. And how many are there?

A. I'm not sure. i [sic] think they're somewhere between 12 and 17. I don't know the exact number. It's more than 10, but less than 20.

Q. Court by court or jurisdiction by jurisdiction in terms of state? How are they done?

A. They are generally done jurisdiction by jurisdiction.

Q. Are they state court or are they federal court or are they both? How are they done?

[Tr. 126] A. Ideally for a defense standpoint, you want them in both the federal and state court in a jurisdiction. Otherwise, one can just go to the federal court or the state court if one wants to avoid it. I think it's a mixed bag. Some jurisdictions have both federal and state court registries. Others have registries that are only federal in nature and some have registries that are only state court in nature.

Q. Has the — has the CCR ever done any particular studies of progression of disease and how many people progress from asbestosis to cancer or green cards, pleurals to cancers? Has CCR ever done any studies of any kind in that area?

A. No. We have never done any formal studies. We do, of course, have our own experiences in the center as having granted green cards and add pleural registry cases and has seen what has happened to those cases.

I would characterize that as a formal study.

Q. Would you characterize that as a modest or extensive experience with regard to that, given the numbers you've talked about earlier?

A. Well, it's obviously modest. We haven't given — we haven't disposed of many cases through those mechanisms and not many years have elapsed since we granted those kinds of dispositions, so that for diseases, like asbestos diseases that have latency periods of 20, 30 or 40 years, I don't think we can draw any sort of rational conclusions based on [Tr. 127] the limited data and number of years that we've done those kinds of dispositions.

Q. What's the difference between a limited release, Mr. Fitzpatrick, and a full release in the litigation?

A. Right. May I start with the full release?

Q. Sure.

Q. A full release is a release of all claims in exchange for some sort of consideration, usually monetary.

A limited release in contrast, typically only releases the disease that the victim is suffering from at the time the release is entered into. For example, a claimant with asbestosis occasionally does a limited release that releases his asbestosis claim in exchange for a sum of money, but allows him to come back in the event he gets lung cancer or mesothelioma.

Q. Which kind of release does the CCR generally provides in the tort system?

A. In the tort system, 90 percent —

Q. While in the — yes, go ahead.

A. I'm sorry. Are we talking the tort system or the Georgine settlement?

A. In the tort system.

Q. All right. In the tort system, since we've been in operation, we've attained approximately 90 percent of our releases have been full releases.

* * * *

CROSS EXAMINATION

[Tr. 90] article, "Should a malignancy subsequently develop, the claimant would then be allowed to present another claim." That was the intention of the limited release program that you intended to get underway, right?

A. As a long-term goal, yes, sir.

Q. Okay. Now, why was it that you wanted to set up green card programs, pleural registries, limited releases? What was the purpose for that? When I say you, I mean CCR?

A. Yeah, I understand that. I think in my own view, the pleural cases have faced what Mr. Motley called the Hopson's choice in his opening statement yesterday.

If they're told they have any sort of lung changes, they often must file a lawsuit or risk being barred by the statute of limitations.

Many times their claim comes up for resolution before they have developed any kind significant degree of impairment and they end up compromising their claim fora very small or a nominal amount. In many cases that precludes them from receiving additional compensation if and when they ever do really become sick from asbestos exposure.

So we've always struggled for a better way to handle the pleural claims and it's my opinion, and I realize other people differ with me on this, that green cards and pleural registry programs are a better way of dealing with the pleural claim problem.

* * * *

[Tr. 104] A. Yes.

Q. But you'll get it, won't you?

A. No —

MR. ALDOCK: Objection, there's nothing about Georgine that defines it as a green card.

THE COURT: Technically that's correct. If you want to characterize it differently, Mr. Baron, you may.

Sustained.

BY MR. BARON:

Q. Well, deferral would be another word to use.

A. No, sir.

Q. You're not a small part of the universe?

A. We are still a small part of the universe.

Q. Under Georgine, for people who have unimpaired pleural cases, there's a deferral, is there not?

A. There is a package of benefits, not a deferral.

Q. Well, what are the package of benefits if they're not a deferral?

A. In addition to being deferred, they get a package of benefits that the people who get green cards and pleural registries did not get.

Q. Okay. Well, let's see if we can draw a diagram to calculate that one.

A. All right.

MR. BARON: If I might stay here for a moment, your [Tr. 105] Honor, maybe we can fill in the blanks.

THE COURT: Sure.

BY MR. BARON:

Q. What does someone who does a green card with CCR get?

A. He gets a deferral.

Q. Okay. And describe for me what do you mean by deferral?

A. His case is put — the statute of limitations is waived, and his case is put in an inactive status until such time, if ever, that he develops impairment.

Q. Okay. So he doesn't have to worry about the statute of limitations?

A. Correct.

Q. Doesn't have to worry about development of another disease, having had a release for it because he can wait until he gets the other disease? In other words, a person who goes — who gets a green card, doesn't have to worry about compromising his or her claim for a small sum of money and signing a release. If that person develops a more serious injury, they can file a claim for the more serious injury, correct?

A. If they develop asbestosis, they can file a claim for asbestosis.

Q. Or if they develop lung cancer they can file a claim for lung cancer, or if they develop mesothelioma, they can file a claim for mesothelioma, can they not?

* * * *

[Tr. 116] Q. All right.

A. The additional — all right, I'll-stand by my answer for now.

Q. All right. What other package of benefits do claimants get under Georgine that are deferred?

THE COURT: Get near your microphone, please, Mr. Baron.

MR. BARON: Oh, I'm sorry.

BY MR. BARON:

Q. What other package of benefits do claimants get that are given to them under the deferral in Georgine?

A. I think there are basically three in nature. Number one, unlike your bucks in the item under green card, the deferred claimants under Georgine get real bucks when and if they become impaired. They don't get a theoretical right to sue, they get a sum certain based on our historical averages.

Q. Okay. Number two?

A. Number two, they get a guarantee that there will be someone there to pay those real bucks.

Q. Okay.

A. And number three, unlike your example, the people in the Georgine settlement who become impaired let's say due to asbestosis, and then subsequently contract a malignancy, have the

right to come back and seek compensation for the second disease, whereas in green cards and pleural registries [Tr. 117] and most jurisdictions if you come off, you only get one bite of the apple. So those are the three major benefits I think the Georgine claimants get that they are not given by pleural registries and green cards.

Q. All right. Well, let's talk about these benefits now.

An individual who in the tort system has a nonqualifying case, a pleural claim.

A. Right.

Q. And let's say that he lives in a state like what, New Jersey, that permits him to come for additional injuries. It's a second and third injury state, is it not?

A. I believe that's right.

THE COURT: You mean by their law or statutes?

MR. BARON: By their law and statute.

BY MR. BARON:

Q. Let's say we've got an individual who resides in New Jersey, and let's say that individual has a pleural claim that does not qualify under Georgine, let's look at what his options are.

Option number one is, he can prosecute the case and he can receive whatever money that he — that either the jury gives him, or he's willing to settle for, correct?

A. What time — I'm getting

Q. Today. January 15th, 1993.

A. Back up. Who is this claim brought against?

* * * *

[Tr. 132] A. I would.

Q. And then in 1990, the number of claims that were settled were 14,824, right?

A. Correct.

Q. And in 1991, the number of claims that were settled were 15,843, right?

A. Right.

Q. And in 1992, the number of claims that were settled were 25,354, right?

A. Right.

Q. And in 1993, you settled 52,136 claims during that calendar year, correct?

A. Correct.

Q. And that's a total of 128,164, which averages over a five-year period to 25,632 claims or thereabouts, would you agree with me?

A. I would agree that they — I haven't done the math. I would agree that if you divide 128, [sic] 164 by five that it may equal 25,632.

Q. Now, of the 119,400 claims that were filed, I believe it was your testimony that 196 had actually gone to verdict, is that right, over that five-year period?

A. No, that's a misstatement.

Q. All right. Well, why don't you correct it for me?

A. 196 cases went to verdict between the time of inception [Tr. 133] on January 15th, 1993. Okay. Some of these cases would not have even been filed by January 15th, 1993. Some of those trials probably involved cases that we had when we started up —

Q. Okay.

A. — prior to 1989.

Q. All right. So how many cases would we be talking about? We take off 1993 which is about 21,000 cases, and we add back in the cases that had been left over — that had been pending in 1988, correct?

A. Sure.

Q. And there were more cases pending in 1988 than 21,000, were there not?

A. Again Center members?

Q. Excuse me?

A. Again CCR members?

Q. Yes.

A. Yes, there were.

Q. So the number of actual cases that we measure the 196 against is probably much higher than 120,000 cases?

MR. ALDOCK: I object to the characterization of what we measure against. That's Mr. Baron's characterization.

MR. BARON: Well, what I am measuring it against.

THE COURT: The question is modified. Overruled.

[Tr. 134] THE WITNESS: You are measuring —

BY MR. BARON:

Q. Do you follow me?

A. No. I don't see what you are measuring.

Q. I'm trying to determine how many cases get tried versus how many cases get filed against CCR members?

A. Right, and I don't think you can do it from this chart because of the problem of timing. But, you know, I would say historically we have not tried a high percentage of the cases that are filed, that's for sure.

Q. Well, one percent of 120,000 claims would be 1,200 claims, would it not?

A. That's the math.

Q. Now, do you believe that CCR has tried 1,200 claims?

A. To verdict?

Q. Yeah.

A. No, I do not believe that.

Q. Substantially less than that, is it not?

A. Sure.

Q. So would you now agree with me that better than 99 percent of all cases that get filed against CCR do not go to verdict?

A. Do not go to verdict, yes, I would agree with that.

Q. Okay. Now, of the cases that get filed that do not go to verdict, they are disposed of in three ways, are they not?

* * * *

[Tr. 144] A. Yes, that's correct.

Q. Now, when you settle a claim, you lower the transaction cost, do you not, when you settle it quickly?

A. Generally speaking, that is correct.

Q. All right. You did that for a short period of time and then you changed your philosophy about settlement, did you not, and when I say you, I mean CCR?

A. Yeah. After the first two years of our existence, we changed our philosophy.

Q. And you changed your philosophy because you knew there were a lot more claims that were continuing to come in, correct?

A. We changed our philosophy because after having settled thousands of cases in the first two years of our existence, deemed by far the most liberal asbestos settlers in the United States of America, we found at the end of the two-year period that because of the new filings the backlog had actually grown against our membership, so — and I think not surprisingly at that point in time, we decided to rethink our settlement strategy.

Q. Well, if you had the same settlement strategy in 1990, '91, '92 and '93, as you did in '89, you would have settled about the same number of claims you received each year, would you not?

A. I don't know that I can answer that question. If we had [Tr. 145] it — what was the question again?

Q. Well, you settled about as many claims in 1989 as got filed against you, correct?

A. That's correct.

Q. And if you had done that in each of the next four years, you would have had just an even balance, would you not?

A. Yes. In the math, 20,000 equals 20,000.

Q. Right. But you made — you and CCR made the decision not to do that anymore.

A. I have said we decided to rethink our settlement strategy after being a very liberal settlement vehicle for two years.

Q. The number of claims that you received from 1988 through 1993 with peaks and valleys has remained essentially flat, has it not?

A. Yes. New filings have remained relatively constant.

Q. Okay. And if you would have settled the same number of claims each year, your inventory would be zero?

A. No, our inventory would have been what it was when we started the CCR.

Q. Right. But you would not have gained on the inventory?

A. We would not have gained or we would not have lost if we settled exactly the number of cases that came in. I think that's self-evident.

Q. I think it's very self-evident, Mr. Fitzpatrick. But you made the decision, you, CCR, made the decision not to do that [Tr. 146] anymore?

MR. ALDOCK: Objection, your Honor. Asked and answered twice.

THE COURT: Sustained. That's not his answer either. His answer was they changed their philosophy to something. I don't know what it is yet.

MR. BARON: Right.

THE COURT: Unless he said it earlier and I forgot.

MR. BARON: All right.

BY MR. BARON:

Q. The philosophy was what, Mr. Fitzpatrick, after it changed in 1990 or so?

A. Right. After we changed our philosophy, we determined in the third year of our life and in the fourth year to not do large blocks of inventory settlements with plaintiffs, attorneys unless we could get protection — not protection — pleural registries in the jurisdictions where those attorneys were practicing for future unimpaired claims.

Q. Well, in your deposition, you said protection against future claims.

A. Yes.

Q. Do you recall that?

A. I would view pleural registries as a protection.

Q. Protection for who?

A. Protection for the CCR companies and I think one could [Tr. 147] take the view protection for the unimpaired claimants, too.

Q. Well, something happened in about 1991 that changed things dramatically as far as CCR was concerned, the MDL process, correct?

A. The MDL process occurred in 1991, yes.

Q. Right. When you said previously — and I should have had you explain this — when you said previously that CCR made the decision not to do inventory settlements, what is an inventory settlement? Can you describe that for the Court?

A. Yes. I think an inventory settlement is an agreement with a plaintiff's attorney who practices in the asbestos personal injury area to settle all of these pending cases and cases ready to be filed in exchange for monetary consideration.

Q. As opposed to what other type of settlement?

A. Well, there can be trial calendar driven settlements which are just the settlement of cases that are scheduled for trial. There can be a small block settlement in which you settle a group of cases involving claimants represented by a given attorney and I think there are other permutations and commutations but those are some of the kinds of settlements that there are.

Q. Well, would it be fair to say that in the second half of 1990 is I think when you developed the strategy, if a plaintiff's lawyer could not get his cases up for trial, the likelihood is he wouldn't be able to settle with CCR in 1990?

[Tr. 148] A. 1991.

Q. '91.

A. In 1991, I think it's by and large correct. It's not totally correct. We didn't just do trial calendar settlements but by and large its correct.

Q. Unless the plaintiff's lawyer would agree to a pleural registry?

A. Yes.

Q. And the pleural registry provided protection for CCR against those claims?

A. It provided protection for the CCR members against future unimpaired claims and I believe provided protections for those claimants themselves.

Q. But the bottom line is the plaintiffs' lawyers were not recommending it for their clients so you couldn't get it done voluntarily very often, could you?

A. Not in many jurisdictions, that's correct.

Q. Well, did it reach the point in 1991 or certainly towards the end of 1991 that the only cases that were getting settled in the United States for the plaintiffs' Bar were those cases that were up for trial in jurisdictions where the docket was moving or those cases where the plaintiff's lawyer would agree to a pleural registry?

A. I don't think it ever got quite to that point. We continued to do some settlements that weren't strictly [Tr. 149] speaking trial calendar driven. We certainly were doing fewer of those kinds of settlements than we did during our first two years of operation.

Q. And you decided this was the way to go, did you not?

MR. ALDOCK: Objection.

Q. As CEO of CCR?

THE COURT: The question is did you personally individually and in a professional capacity as CEO make that decision yourself.

THE WITNESS: I did not personally make that decision.

BY MR. BARON:

Q. Who made the decision?

A. It was a decision by the CCR board of directors of which I am a member.

Q. All right. Now, in furtherance of this belief that pleural registries would provide protection for CCR, did CCR authorize and pay for the writing of Law Review articles?

A. The CCR did authorize and pay for a Law Review article on — and suggested that the topic be pleural registries, that's correct.

Q. All right. If you would, turn to Exhibit Number 54 in the book, please, Objectors, Exhibit Number 54.

A. Volume 1 or Volume 2?

Q. That would be in Volume 2.

* * * *

[Tr. 183] started believing that you were going to be able to do a deal for those future claims, right?

A. We became relatively confident in May or June of 1992 that the discussions would be successful, yes, sir.

Q. Okay. Now, was there a give and a take during these negotiations for the future claimants?

MR. ALDOCK: I object, your Honor. The witness wasn't present. He probably assumes what was going on.

MR. BARON: Well, I'm certain that it was reported back to him.

THE COURT: The objection is sustained. This man did not participate directly in the negotiations. You'll have to find out what he knew —

BY MR. BARON:

Q. Was it reported back to you that there was give and take between the parties to this negotiation during the summer of 1992?

A. I don't recall the summer of 1992. It certainly was reported back to the Center board from time-to-time that there were — these were hotly contested negotiations. I just can't speak for that window of time.

Q. Okay.

A. The early summer of 1992.

Q. And when you say hotly contested, what do you mean?

A. There were a number of outstanding issues and the parties [Tr. 184] were bargaining over those outstanding issues.

Q. And the two law firms were purporting to bargain for the future claims as you understood it?

MR. MOTLEY: Your Honor, I object again unless he makes it time specific. The witness has already said we weren't involved in this during the trial in Baltimore.

THE COURT: Sustained. Ask another question.

BY MR. BARON:

Q. During this period of time that you've just described where there were hot negotiations going on, and there was give and take between the parties, was that in 1992?

A. The negotiations did take place in 1992, but I know there was a period of time, for example, that the Ness, Motley firm did not participate in the negotiations because of the Baltimore trial.

Q. But during 1992 you believed that these two law firms were giving and taking on behalf of the future claimants?

MR. MOTLEY: Your Honor, I hate to -

THE COURT: Sustained for the same reasons as Mr. Motley pointed out before. The time problem is concerning me.

MR. BARON: All right.

BY MR. BARON:

Q. When can you remember any give and take as you've described it, at what point in time?

[Tr. 185] MR. FITZPATRICK: Objection, he doesn't remember give and take. You can ask him if he was advised, he wasn't there.

THE COURT: He called the term hotly contested. He didn't accept your term of give and take. He called it hotly contested.

MR. BARON: All right.

BY MR. BARON:

Q. What period of time did you believe the negotiations were hotly contested?

A. From the time they began until the time they finished is my understanding —

Q. Okay.

A. — based on the reports I received.

Q. All right. Good.

In order to be hotly contested, does that mean that the two sides are battling with each other?

A. Battling in what sense, physically?

Q. What do you mean by hotly contested, Mr. Fitzpatrick?

A. That they were difficult negotiations that were going on.

Q. Okay.

A. People had differences of opinion. How much clearer can I be?

Q. Well, the bottom line though is while those hotly contested negotiations were going on, CCR and you believed [Tr. 186] that Mr. Motley's firm and Mr. Rice's firm were negotiating on behalf of future claimants, correct?

MR. ALDOCK: Objection, it's an argument, no time frame, and has all the problems with everything else that's been going on.

THE WITNESS: I thought Mr. Motley and Mr. Rice were in the same firm?

BY MR. BARON:

Q. I mean Mr. Motley, Mr. Rice and Mr. Locks were negotiating hotly on behalf of future claimants?

MR. FITZPATRICK: Excuse me, Judge. I just don't understand why Mr. Baron doesn't understand that we have a time difference problem here, and he's been told this four times.

THE COURT: Well, I assume the question is whenever these negotiations took place.

MR. BARON: Exactly.

MR. MOTLEY: Well, if the record is clear, Mr. Baron is —

MR. BARON: Whenever.

MR. MOTLEY: Whenever.

MR. BARON: Whenever.

MR. MOTLEY: Whenever.

BY MR. BARON:

Q. Whenever these negotiations were going on, you believed [Tr. 187] that these lawyers were representing future claimants, correct?

A. I believed the discussions involved future claims, and when they were going on, they reported back to me and to the facility board as difficult contested negotiations.

Q. Let's try it again, listen carefully.

THE COURT: Mr. Baron, you're not going to ask the same question again.

MR. ALDOCK: I'm going to object to him trying it again.

THE COURT: He does not accept your phraseology that these law firms were representing future claims. You've asked it about four times and his response has consistently been future claims were part of the discussions, et cetera, et cetera.

So he's not going to accept your exact language, so move on to something else, please.

BY MR. BARON:

Q. Mr. Fitzpatrick, if you want to buy a piece of property, is it your usual practice to talk to the owner or the owner's agent?

A. I haven't bought that much property in my day, Mr. Baron. Okay.

A. I usually go through a real estate agent who gets a six percent commission.

* * * *

[Tr. 191] A. No, it isn't.

MR. BARON: Excuse me, your Honor. Is there an objection, there is a chorus —

THE COURT: I don't know, but I wish counsel would not be a Greek chorus. Be quiet, please. If you want to object, one lawyer will object and not instruct the witness. And please don't make arguments I don't ask for. I sometimes get sloppy and don't chew you out for it, but I don't need the argument unless I ask for it.

BY MR. BARON:

Q. Mr. Fitzpatrick, maybe we can make this easier. Let me refer to volume two of your deposition where I ask you similar questions, Page 259, Line 5.

A. I need a moment, Mr. Baron.

Q. Volume two of your deposition. It was done last week.

A. I know, I just need Page 259. I'm at Page 259 and —

THE COURT: What line?

BY MR. BARON:

Q. Line 5, we'll begin there. Your answer to a question that I had was, "I think I testified previously that in 1991 we had resolved not to settle large blocks of present inventories of asbestos claims absent some commitment to the future. In 1991 and 1992 the commitments that we sought for the future were largely pleural registry programs in various jurisdictions and we determined we wouldn't settle large [Tr. 192] blocks of inventory of present claims without pleural registries in jurisdictions."

Was that the position of CCR?

A. Absolutely.

Q. And did you make that very clear to class counsel?

A. I did —

Q. CCR make that very clear to class counsel?

A. I'm not sure if that position was made crystal clear to class counsel because I wasn't in those discussions.

Q. Now, the position changed again in '92, did it not?

A. Yes. There became a point in time in 1992 when we became reasonably confident that the Georgine negotiations would become successful. We then changed our position from not doing inventory settlements without pleural registries, to doing inventory settlements in exchange for commitments on the future.

Q. Okay. In exchange for commitments on futures.

And what were the commitments for futures that was the in exchange for?

A. We would agree after we became relatively confident that the Georgine negotiations would be successful to do inventory settlement of present cases if the attorneys we were dealing with would in effect agree to recommend to their future clients that lawsuits not be brought unless they had a reached a certain line of impairment or a certain degree of [Tr. 193] impairment.

Q. And did you make that very clear, and I say you, CCR, to Ness Motley to Greitzer and Locks?

A. Again, I wasn't in those particular discussions, so I —

Q. Was it reported to you that was made very clear?

A. I don't recall whether or not it was reported to me.

Q. And is that what led to the $215 million worth of settlements with those two firms, the commitment that they would agree to that?

A. Agree to what, sir?

Q. Agree to the limitation that you just described, the commitment?

A. We did inventory settlements with a number of plaintiffs firms who would agree to give us the commitment they would recommend to their future clients not to bring suits unless they had reached a certain line of impairment.

Those inventory settlements included settlements with the firm of Ness, Motley, Ness Motley's affiliates, Greitzer and Locks, and many other firms who are not affiliated with either Ness, Motley or Greitzer and Locks.

Q. Mr. Fitzpatrick, but for Greitzer and Locks and Ness, Motley giving you, CCR, those commitments for the futures, you would not have settled the $215 million worth of present claims with those two firms, correct?

A. Without a degree of confidence that the Georgine [Tr. 194] discussions would be successful, we would not have done the present inventory settlements with Ness, Motley, with Greitzer and Locks, or the other numerous unaffiliated plaintiffs firms we did inventory deals with, that is correct.

MR. BARON: Thank you. Pass the witness.

THE COURT: Any other people that have — objectors that have unique areas to cover?

MR. HENDERSON: Yes, your Honor.

THE COURT: Do you have any understanding among yourselves as to go next?

MR. ROSENBERG: It doesn't matter, as long as we understand that we can each go.

MR. BARON: Your Honor, for the record —

THE COURT: Get near a microphone please.

MR. BARON: On Page 136 of the transcript from yesterday, the direct examination of Mr. Fitzpatrick —

THE COURT: Do you have a line number?

MR. BARON: Yes, it begins — the question begins at Line 20.

THE COURT: Just read it in the record please.

MR. BARON: "Question: What is the futures' agreement with the law firm, Mr. Fitzpatrick?

"Answer: I define a futures' agreement with a plaintiffs' law firm to be an agreement to settle that firm's

* * * *

TESTIMONY OF AMBROSE VOGT

* * * *

[Tr. 144] Q. Would you state your address for the record?

A. 1206 Homewood Drive (ph), Pasadena, Maryland.

Q. Where is your home of Pasadena, Maryland located?

A. Approximately 12 miles south of Baltimore City.

Q. How old are you, sir?

A. 42.

Q. How far did you go to school?

A. I finished two years of college.

Q. Mr. Vogt, what is your occupation?

A. I'm an asbestos worker, insulator.

Q. How long have you been an asbestos worker, insulator?

A. Approximately 22 years.

Q. Are you a member of a union?

A. Yes, sir.

Q. Which one?

A. The International Association of Heat and Frost Insulators and Asbestos Workers.

Q. Have you been exposed to asbestos, sir?

A. Yes.

Q. When and how were you first exposed to asbestos or asbestos containing materials?

A. To my knowledge, the first time was in the Spring of 1965. I worked with my father on a job for approximately two days mixing asbestos cement.

[Tr. 145] Q. What was your father's occupation at that time?

A. He was an insulator, also.

Q. When and how did you first learn, Mr. Vogt, that asbestos could be harmful to your health?

A. I would probably say in the early '70s, just from talking to the other members of my local and people on the jobs and different publications.

Q. Have you ever been diagnosed yourself with any asbestos related disease?

A. No, sir.

Q. Do you think that you might get sick in the future as a result of your asbestos exposure?

MR. RICE: Objection.

THE WITNESS: It's very possible.

THE COURT: Overruled. It's not being offered for the truth of it. We don't know scientifically whether he will or won't but it's an issue in the case. I'll hear it.

BY MR. NOLAN:

Q. You said sir, it was very possible. Are you concerned about that?

A. Yes, I am.

Q. And why?

A. Well because in the last 20 years I've seen an awful lot of members of my local get sick and die from asbestos related diseases, and it's something anybody in my position, I think [Tr. 146] would be worried about.

Q. How did you first become involved in class action lawsuit?

A. Well in January — the week of January 10 of 1993, or possibly the week before, my superintendent, Donald Christy (ph) and you and Mr. Locks represented in an asbestos case, asked me if I'd be interested in finding some out details of a class action suit that was being filed. And he —

Q. And why were you — go ahead, sir.

A. — he told me if I was interested to call you.

Q. And what did you do next?

A. I don't think I called right away. I think it was around January the 12th or 13th of 1993, I called you at your office.

Q. Why were you interested at that time?

A. Well, I was interested in any sort of legislation or whatever you may call it, that would — could possibly help me in the future with a future claim.

Q. And sir, what if any meetings did we arrange during that telephone call?

A. When I called you on the 12th or 13th, you told me that you'd come down to my house, which you did on January 14th, 1993.

Q. And at that time, sir, what did I tell you about the proposed class action?

[Tr. 147] A. Although you didn't have the formal documents there, you had a list of — you had the schedule of monetary awards for the different illnesses, and you did explain to me at the time that simple exposure or pleural plaguing may not be sufficient grounds to recover any damages under the suit, that you had to be impaired. I looked at the list. The numbers there, they seemed consistent with some of the — some of the settlements that I knew other members of my local and other people had gotten in the past.

Q. Now, when you say you looked at a list of numbers, are you referring to compensation benefits and —

A. Yes, sir.

Q. — and dollar amounts?

A. Yes, sir.

Q. And at that time following our meeting of January 14th, What was your view of a proposed class action settlement?

A. I felt that it was — it would be faster than the tort system. That it had certain dollar amounts spelled out that were within certain ranges. It was not like the present tort system where it's a gamble of what you're really going to get. And it made me feel a little more secure in the fact that there would be money for me if I ever had a claim in the future.

Q. And sir, after we talked about the class action and the proposed settlement that had been negotiated between the CCR [Tr. 148] companies and Greitzer and Locks and other class counsel, did you agree to be a class representative in the class action lawsuit which we were going to file the next day?

A. Yes, I did.

Q. Did you authorize myself and Greitzer and Locks to file the class action lawsuit on your behalf and your wife's behalf?

A. Yes.

Q. Did we sign any papers at that first meeting on January 14th, 1993?

A. Yes, sir. I signed a contract naming you, Mr. Nolan and Mr. Locks' firm to represent me.

Q. And sir, you have before you and I refer you to Exhibit SPA-20.

A. Yes.

MR. NOLAN: Does your Honor have that?

THE COURT: Don't worry, go ahead. I've got everything up. Go get the book.

MR. NOLAN: Here's an extra copy, your Honor.

THE COURT: Thank you.

BY MR. NOLAN:

Q. Mr. Vogt, is Exhibit SPA-20 the two-page contract of employment and power of attorney that you and your wife signed on January 14th, 1993?

A. Yes, it is.

* * * *

[Tr. 152] A. Yes, because they were in the tort system at that time.

Q. Now, Mr. Vogt, have you been kept up to date on the progress of the Georgine class action since it was filed?

A. Yes.

Q. Did you receive any papers from me after January 15th, 1993?

A. Shortly after January 15th or 14th of '93, I received from you a copy of the stipulation, the settlement, and with that a letter from you saying if I had any questions about the stipulation, to call you.

Q. And sir, did we later meet about the stipulation and discuss its terms?

A. Let's see. We did — in January of '94 I believe — wait a minute, no. I don't think we did.

Q. Now, sir, did you receive any correspondence from your union concerning the Georgine class action?

A. Yes, I did.

Q. And sir, I direct your attention to Exhibit SPA-24.

(Pause in proceedings.)

Q. Do you have that in front of you, sir?

A. Yes, sir.

Q. Is Exhibit SP-824 a six-page letter that you received from Mr. Keith Wagner, the business manager of Local 11 in December of 1993?

A. Yes, it is.

[Tr. 153] Q. Sir, did you receive any correspondence concerning the settlement from anyone else?

A. Yes, on January 7th of 1994, I received a Dear Client letter from the law offices of Peter Angelos.

Q. And has that been marked Exhibit SP-323? A Yes, it has.

Q. And is Exhibit SP-323 a copy of a nine-page letter dated January 7, 1994 from Mr. Angelos with attachments?

A. Yes.

Q. I direct your attention, sir, to the third page of Exhibit 824 — excuse me — 823 — sir, on the third page of Exhibit 823, do you see your name typed?

A. Yes.

Q. After you received this letter, what did you do?

A. Well, I wasn't aware that I was a client of Mr. Angelos and I thought maybe — well, back in the early '80s I did go to his office for an asbestos screening —

Q. Did you sign anything? Did you sign a retention —

A. Well, that's —

Q. — agreement at that time?

A. I wasn't sure, so I called his office and I was informed that I was not in fact one of his clients.

Q. Now, sir, do you have family and friends who have been exposed to asbestos?

A. Yes.

[Tr. 154] Q. Have any of them filed lawsuits?

A. Yes, they have.

Q. For their asbestos exposure?

A. Yes.

Q. And, sir, can you describe what you personally know about how these folks have done in the tort system?

MR. ROSENBERG: I'm going to object to that, your Honor.

MR. BARON: Your Honor, I object on foundation.

MR. ROSENBERG: I object on hearsay. If this is being offered to prove the truth of how they did — in lawsuits, I believe.

THE COURT: Mr. Nolan.

MR. NOLAN: No, your Honor, it's being proved not for the truth of the matter, but for what his understanding is and how that has influenced him in his decision to be a plaintiff in this case.

MR. ROSENBERG: Your Honor, with all due respect, he does have a lawyer who I'm sure explained to him the differences between the court system and the Georgine system.

THE COURT: Well, two things. Number one, the form of the question is flawed and I'll sustain the form of the question. The second ruling is it's relevant and it's not offered for the truth and it's important to the Court and I'll hear the testimony.

[Tr. 155] BY MR. NOLAN:

Q. Mr. Vogt, do you know, sir, whether your father has filed a lawsuit in the tort system?

A. Yes, he has.

Q. You mentioned that your father was an asbestos worker?

A. Yes.

Q. If you know, sir, when did he file his lawsuit?

A. Approximately eight years ago.

Q. And, sir, has your father had a trial on the merits of his individual claim, if you know?

A. No, sir.

Q. Now, earlier Mr. Vogt, you described your reasons for retaining my firm and Mr. Locks' firm back in January of 1993. Would you describe your reasons for requesting that this Court approve the class action settlement that was filed on January 15th, 1993?

A. Yes, sir. As I stated earlier, I've seen a lot of — a lot of asbestos cases, a lot of friends, several relatives and it's — the dollar amounts that they have received has been — has varied from four figures to six figures for almost the same exposure, the same impairment. And it seems like there's very little equity there.

What I feel is fair about this stipulation is that the dollar amounts are based on national averages from what I've understood, the settlement time is very short, the [Tr. 156] Statute of Limitations is waived which I feel is very good.

The lawyers' fees are cut. So much of the money that the companies have that they're using that should be going to the people that are actually exposed or impaired, I feel is — I feel too much of it is going for legal fees and this will help that.

Q. Mr. Vogt, under the Georgine settlement, does everyone who has been exposed to asbestos manufactured by these companies qualify for an immediate cash payment?

A. No, sir.

Q. Why not, sir?

A. Well, they have to meet certain medical and exposure criteria. They have to be impaired to a certain point stipulated in the settlement.

Q. Mr. Vogt, do you understand that some people who now get money in the tort system will not satisfy the medical requirements and will not be able to get any money from the settlement unless and until they meet those requirements?

A. Yes, sir.

Q. Do you think that's fairer, sir?

A. Yes, I do because I think that the money that they would have gotten could be better used for somebody that's — that is impaired.

Q. Lastly, Mr. Vogt, were you present in court here on Tuesday?

[Tr. 157] A. Yes, sir.

Q. And were you present when Mr. Motley made his opening statement and described a plaintiff who had stated that he had seen over the years a lot of people get a lot of money, some people get very little? At Page 22 of the daily copy, Mr. Motley went on to say, "I've seen the well running dry. A lot of big outfits going bankrupt" —

MR. BARON: I hate to interrupt the reading, but I do object.

MR. ROSENBERG: This is going to be a leading question.

MR. BARON: Well, not only that, the —

THE COURT: I don't know what you're trying to accomplish, Mr. Nolan, but —

MR. NOLAN: I'll ask a different —

THE COURT: — it doesn't seem like an appropriate question to me.

MR. NOLAN: I'll ask a different question.

BY MR. NOLAN:

Q. Do you remember that statement in Mr. Motley's opening remarks?

A. Yes, sir.

Q. Was that a statement that you made in the course of your deposition on January 12?

A. Yes, it was.

* * * *

CROSS EXAMINATION

[Tr. 164] BY MR. ROSENBERG:

Q. The 12th of 1994, you did not have any disease of the chest, that is true, isn't it?

A. Yes, sir.

Q. And you had no complaints, physical complaints as a result of your exposure to asbestos, is that right?

A. Correct.

Q. It is equally true, is it not, that you are not bothered by your exposure to asbestos today in a physical sense, is that right?

A. Not in a physical sense, no.

Q. Now, prior to your participation in this class action, you had never consulted with a lawyer for the purposes of filing a claim as a result of your asbestos exposure, isn't that right?

A. Yes.

Q. You testified under oath on January 12th, 1994, that you were not seeking money damages at the time that you agreed to be a class representative in this case, and at the time that the lawsuit was filed? You testified that way under oath then, is that correct?

A. Yes.

Q. And that was true then, is that right?

A. Yes.

[Tr. 165] Q. And it is true today, is it not, you are not seeking money damages today?

A. Not today, no.

Q. Now, you testified that you saw Mr. Nolan for the first time in connection with this settlement with your participation in Georgine on January the 14th, 1993, is that right?

A. Yes.

Q. Prior to that time, had you reviewed any of the terms of the proposed settlement in Georgine?

A. No.

Q. Now, I believe you testified about the materials that you did review on January 14th at the time that you agreed to become a class representative, yes, is that correct?

A. Yes.

Q. And you have nothing further to add with regard to those materials, whatever it was that you said on direct examination concerning what you had seen, basically a sheet concerning the

payment of benefits, was there anything else in writing that you looked at besides that?

A. I'm not sure if it was in writing or not, but Mr. Nolan told me that the counsel's fee would be 25 percent, the standard fee.

Q. And you found that to —

THE COURT: Mr. Vogt, you're going to have to speak

* * * *

[Tr. 206] BY MR. WOLFMAN:

Q. Mr. Vogt, I am Brian Wolfman, I represent some of the objectors.

You said that you had some x-rays screenings, is that correct?

A. Yes.

Q. And as I understand it, your company pays for those screenings?

A. Yes, they do.

Q. And what is the name of the company, sir?

A. I work for PTX, Incorporated, and when I do asbestos removal.

Q. Were you working for them on January 15th, 1993 when the lawsuit was filed?

A. Yes.

Q. Okay. At that time you were not paying for your x-ray screenings, is that right?

A. That's correct.

Q. Do the other workers of that company have x-ray screenings to your knowledge?

A. By law they have to, yes.

Q. How many workers are there?

A. That varies greatly.

Q. Well, approximately in January '93?

A. I would say from two to ten.

[Tr. 207] Q. And am I to understand that none of those workers pay for their x-ray screenings? To your knowledge they're all paid by the company?

A. That's correct.

Q. Let me ask you this. Who was at the — the first time you met Mr. Nolan about this lawsuit, who was at that meeting beside yourself and Mr. Nolan?

A. My wife was present in the house.

Q. Did she attend the meeting, sir?

A. Well, we were more or less in the same room.

Q. To your knowledge, do you know if she has read the stipulation of settlement?

A. No, she has not.

THE COURT: Whether she's what? I didn't understand you.

MR. WOLFMAN: It's whether his wife has read the stipulation of settlement?

THE WITNESS: No, she hasn't read it.

BY MR. WOLFMAN:

Q. Okay. Do you know that she's a representative plaintiff in this action?

A. Yes, I do.

MR. WOLFMAN: That's all I have, your Honor.

TESTIMONY OF TY ANNAS

* * * *

[Tr. 225] Q. And what were you doing?

A. I was a helper to begin with.

Q. What's a helper?

A. They call it an improver in the union. That's one that does all the leg work, makes mud and all the stuff like that.

Q. All right. We're going to have to tell the Court what mixing mud means?

A. Well, it's insulating materials that are used to finish off elbows and fittings or all sorts and kinds. Equipment pieces. You mix it up with water with a hoe, and carry it out to the mechanic that's using it.

Q. Let me see if I can get away with this. Were you working with asbestos containing materials at that time, mixing it up and applying it?

A. Yes.

Q. And when you talk about mud, is that asbestos containing —

A. Yes.

Q. — cement products?

A. Yes.

Q. All right. Now, Mr. Annas, how long did you yourself work with your hands or with the tools in the asbestos trade, working with asbestos containing products?

A. Will you hold that until I can finish what you first asked me, please?

[Tr. 226] A. Yes.

A. And that was to recap my work history.

Q. Okay.

A. Which will answer your question, I believe.

After these original three jobs, I got with Daniel Construction, which is now Flor-Daniels (ph) at Pensacola when they took that job over, and I was a mechanic in that sense from then on.

The union has their stipulations what you can do, and I excelled in everything, but I couldn't go in the union, so when I got with Daniels I was able to perform pretty much all of the duties of a mechanic and then I went on to a foreman in later years, general foreman and then superintendent. In about 1973, I went into management and I never actually worked with hands-on.

Q. When you refer to being the mechanic, is that the same thing as an insulator?

A. Yes, sir.

Q. And throughout your career, 1951 into the 1970s, were you working with asbestos-containing products on a daily basis?

A. Every one of them that's listed in these after sheets I've worked with them.

Q. When you speak of the after sheets, you're talking about the attachments —

A. Yes, sir.

[Tr. 227] Q. — to your exhibit?

A. Yes, sir. To the best of my knowledge.

Q. Mr. Annas, going back to your work as an insulator, from the 1950s, '60s, and '70s, do you believe that you were exposed to asbestos on a regular, frequent basis?

A. Every day.

(Pause in proceedings.)

Q. Mr. Annas, were you married? Were you in the past married?

A. Yes, sir. We were married in 1949.

Q. And you and your wife had several children?

A. Two.

Q. And how about grandchildren?

A. We have five.

Q. Did your wife ever work occupationally with asbestos-containing materials?

A. No, sir.

Q. Do you currently have an asbestos-related disease or injury that a doctor has told you about to this date?

A. My last Thursday x-ray didn't show anything.

Q. And that was this past week you got x-rayed?

A. This past Thursday.

Q. Mr. Annas, because of your occupational exposure to asbestos in the past, do you have any concerns for your own future health —

[Tr. 228] A. I have —

Q. — as it relates to asbestos-related diseases?

A. I have many concerns for myself and my children.

Q. Why don't you explain to the Court why you have concern for your children from asbestos disease?

A. They were under the same exposure as my wife was when she washed my clothes and these skins that they put around the insulation materials.

Q. Would you tell the Court what happened to your wife and why you tie your concern about asbestos disease to your wife's —

A. You want —

Q. — condition?

A. How far back do you want to go with it?

Q. As far as back you want to tell him what happened.

A. In 1984, I believe it was, my wife was always good to have her physicals and she had pneumonia in Hopewell, Virginia and when she got over that they naturally x-rayed her again and it showed some calcification in her lung, her side and —

Q. What we call the pleura?

A. Yes. But we did not understand that. The doctor said it was an area which he had to watch.

When I retired, to keep myself active, I built a new home. She got very sick with breathing problems and we [Tr. 229] didn't know whether she was having heart problems or no.

So we went to Statesville, North Carolina to a heart specialist. He sent her to the hospital and had her x-rayed and her whole right lung was flooded.

Q. All right. You started out in 1984 in Hopewell, Virginia. What time frame, give me a year, that you went to the doctor in North Carolina and you just described to us?

A. 1990, I believe it was.

Q. All right.

A. She was losing her breathing capacities. And when he discovered the lung flooded, naturally they drew the fluid off, had it analyzed and the prognosis was mesothelioma.

I went to the dictionary to find out what that was and it is in five words a rare and fatal disease.

Q. Let me stop you for just a minute. Prior to that time, when your wife was diagnosed with mesothelioma, had you in the past, because of your work history, been called upon from time to time to testify in asbestos litigation as a product ID witness or a co-worker witness?

A. No, I have not.

Q. Had you helped identify people that worked on various jobs from time to time?

A. I have identified people that worked for me and with me.

Q. And you were familiar with the law firm of Ness, Motley from that involvement?

[Tr. 230] A. From that and Bob Branton.

Q. Okay. And Bob Branton is an employee of Ness, Motley?

A. He is.

Q. When you found out your wife had mesothelioma, beyond what you did medically, what did you do about any legal rights you may have?

A. Can I continue the — going to the doctor?

Q. Yeah, that'd be fine.

A. Okay. We researched where we might go for help. We talked to Mercy Hospital in Atlanta, Georgia and Duke University

Hospital in Durham, North Carolina and we decided to go there with her which we did. They determined that they had a drug maybe could help her. How much in detail do you want me to go from here, sir?

Q. Did your wife undergo treatment?

A. They went and went into her side and put this anti-cancer medicine in there. We were there two weeks under high — high temperatures. They didn't know what it was causing the temperature, infection or what. And between the heads there they finally agreed to operate.

So they opened up her rib cage, went in and scraped both sides of the lining of the lung area, left two tubes in it to drain and a week later they took the tubes — she was there 29 days. When they pulled the tubes out, the first tube looked as pretty and pink as any area of the lung you'd [Tr. 231] ever want to see. The bottom one looked like a handful of asbestos mud shorts.

Q. What'd you do next?

A. We went home. We had no idea what time frame if any that she might get better. She did not get any better. Her breathing got worse. From the time of this discovery of the fluid till nine months later, she passed away.

Q. And that was when?

A. July the 17th, 19 and 92. She died a very horrible death. I hope and pray that none of you have to experience that.

(Pause in proceedings.)

Q. Mr. Annas, at some point in time, in late 1991, did you and your wife make the decision to seek a legal claim on behalf of her and you for her mesothelioma?

A. It's ironic you asked that because when we got the first news, Bob Branton called me that evening for some information about another friend I worked with and I said, Bob, listen, what's (indiscernible) and he couldn't believe it. So he came up the next day and we talked and I signed a contract with Ness, Motley to pursue whatever recovery that was available for us.

Q. And a lawsuit was in fact filed on behalf of your wife shortly thereafter?

A. Yes, sir.

* * * *

[Tr. 238] limitations in your wife's case?

A. I was told if it was over two years I was out of luck.

Q. And was there discovery done in your deposition and on the doctor's on that issue?

A. Yes.

Q. Was the existence of the chest x-ray reports from 1984 one of the issues on the statute of limitations?

A. It was.

Q. When you discussed with Mr. Lyle the Georgine settlement, did you discuss with him the waiver of the statute of limitations that was available under the settlement?

A. Yes, I did.

Q. Did you think that was a good thing?

A. I certainly did.

Q. Why?

A. Because there's so many people like in our case don't even know they have that until it's too late.

Q. What other features made you want to be the class representative in this case? Or some of the others?

A. The areas of being exposed to asbestos like myself opposed to one being exposed like my wife. I have nothing wrong with me. So therefore, I should not and will not seek any damages or actions. If my wife's breathing had not deteriorated, there would never have been a case against the [Tr. 239] asbestos companies.

Q. Did you understand at the time you agreed to be a class representative that there were persons that had calcified pleural changes similar to your wife's that had no breathing impairment that would not be eligible for compensation under this settlement?

MR. BARON: Objection. Leading.

THE COURT: Sustained.

BY MR. RICE:

Q. When you met with Mr. Lyle, did you discuss the medical criteria in this settlement at all?

A. We did.

Q. And did you discuss the medical criteria as it related to the unimpaired claims?

A. I am aware of it and why should they be compensated.

Q. Was that the conclusion you reached in your own mind?

A. Yes, sir.

Q. Mr. Annas, do you believe or did you believe in December of '92, and do you still believe today that the Georgine class action settlement is a fair and reasonable settlement?

A. I expressed just now, I did then and I am also more proud of it today.

* * * *

[Tr. 242] Exhibit 1042A for identification on the record.

MR. LOCKS: That's SP.

MR. BARON: I believe it's SP rather than objector exhibits.

THE COURT: SP.

(Discussion off the record.)

THE COURT: Capital A, all right.

THE WITNESS: Mr. Rice, I had received a copy of this from my financial planner.

BY MR. RICE:

Q. All right. And when you got that editorial, did it sort of make you mad?

A. I responded right away, and I read my response into my deposition.

Q. Do you have a copy of the response that you wrote at the time you received this editorial?

A. Yes, sir.

Q. Do you have it with you?

A. Yes, sir. Do you want it?

Q. Would you get it out for me.

MR. RICE: And, your Honor, for the record Exhibit 1042 is an exhibit.

BY MR. RICE:

Q. Mr. Annas, what's marked as SP-1042, is that a copy of the editorial that you wrote in response to the receipt of [Tr. 243] Mr. Baron's editorial?

A. Yes, sir.

MR. BARON: Your Honor, I object, it was a letter.

MR. RICE: Excuse me, a letter.

THE WITNESS: Yes, sir, it's signed by me.

THE COURT: Let's make the record show that SP-1042A is a copy of a piece in the Wall Street Journal, Thursday, May 6th, 1993 entitled counterpoint in part by Mr. Baron. It's a four column item. Go ahead.

MR. RICE: Thank you.

BY MR. RICE:

Q. Mr. Annas, does Exhibit 1042 which is a letter to the editor of the Wall Street Journal a document that you wrote yourself?

A. Yes, sir.

Q. And does that document help express the feelings that you had about this settlement and Mr. Baron's comments on the settlement?

A. Yes, sir.

Q. Would you publish that in the record, please, sir?

MR. BARON: Have you offered it?

BY MR. RICE:

Q. Mr. Annas, just read it into the record.

THE COURT: Maybe he didn't understand your question.

[Tr. 244] MR. BARON: I'm sorry. Has this been offered yet?

THE WITNESS: Do you want me to read this?

BY MR. RICE:

Q. I want you to read your letter to the editor.

THE COURT: I don't think it's been offered.

MR. BARON: Your Honor, I object unless it's offered. And I'm going to object to the relevancy of the —

THE COURT: I think you already did. The objection on relevancy is overruled.

MR. BARON: Okay.

MR. RICE: We offer it, your Honor.

THE COURT: Is the only objection relevancy, Mr. Baron?

MR. BARON: Yeah.

THE COURT: You're very persuasive to yourself.

MR. BARON: Yeah.

THE COURT: We try to be that. Objection on relevancy is overruled, it's received in evidence.

(Settling Parties Exhibit 1042 received in evidence.)

BY MR. RICE:

Q. Mr. Annas, would you please read it into the record for me, and then I will ask you a couple of questions about it.

A. "Dear Editor: While I do read the Wall Street Journal occasionally, someone sent me a copy of Counterpoint by F. M. [Tr. 245] Baron in the May 6th, 1993 edition which is (an asbestos settlement with a hidden agenda), and I very much wish to express my feelings and thoughts on this matter.

"I am one of the plaintiffs in the Carlough class action Mr. Baron so freely criticizes while contending he has my best interest at heart. I worked for over 39 years in heavy construction, maintenance and operations, and many of those years were spent doing hands-on asbestos insulation work.

"I have not developed an asbestos-related disease and I know many many men I worked with who are not now sick. We are the fortunate ones. I believe my exposure period would compare to anyone working in the insulation trade from the late forties through the seventies, after which time I was in a management position.

"After being briefed on the Carlough action, it was easy to offer to be a representative for a speedy resolution to the current

wait until you die situation, while defense lawyers and transaction costs eat up the funds so badly needed for those unfortunate ones who are due just and speedy compensation.

To continue with the current system, I strongly believe will in time bankrupt the entire industry, with the cases tied up in court, while attorney fees eat up the proceeds. Those asbestos companies involved with the [Tr. 246] Carlough action, although only a part of the industry, have, now faced up to their legal responsibility and no longer deny their past mistakes, but are seeking to move forward in a very complex matter. They have my full support.

"Mr. Baron fails to point out that this action will come about only after a full public fairness hearing are conducted, so that all of us have the right to speak and be heard, even as Mr. Jones that was in his article without paying additional legal fees.

"So you may ask why am I concerned and involved when I'm not sick? The answer to that is that I lost my dear wife in July 1992 after suffering for nine months from asbestos called cancer, mesothelioma. She died a horrible death before she could receive any compensation, without even the satisfaction of knowing that any company would accept responsibility for her death, and without the comfort of knowing that, at least she could leave some financial and material aid to her children and grandchildren.

"I truly believe under the Carlough action the victims will receive a speedy, honest and very much needed compensation for their pain and suffering. Thank you for considering my thoughts for a better way. Sincerely Ty D. Annas."

Q. Mr. Annas, what do you mean for a better way?

A. Cases that are being tied up in the tort system under [Tr. 247] this action can be settled very quickly.

Q. Mr. Annas have you enjoyed your trip to Philadelphia?

A. Especially when I saw the Liberty Bell.

Q. What about that?

A. I could have cried.

Q. Why?

A. At my age I never dreamed I [sic] get to see that thing.

MR. RICE: Thank you, Mr. Annas. I pass the witness.

MR. LOCKS: Afternoon break?

THE COURT: Yes, we might as well. I'm just making some notes. Thanks, Mr. Locks. We'll have a 15-minute recess.

(Recess, 3:36 o'clock p.m. to 3:51 o'clock p.m.)

THE COURT: We resume after the afternoon break. Please be seated. You may proceed to cross-examine.

MR. ROSENBERG: Thank you.

CROSS-EXAMINATION

BY MR. ROSENBERG:

Q. Good afternoon, Mr. Annas. My name is Howell Rosenberg.

A. Good afternoon, Mr. Rosenberg.

Q. Mr. Annas, on January 15th, 1993 at the time that the Georgine lawsuit was filed, you were not seeking any money damages for yourself, were you?

A. Not for myself.

[Tr. 248] THE COURT: Quiet, please.

BY MR. ROSENBERG:

Q. Now, I believe that you testified on January 14th, 1994 at deposition, is that right?

A. Yes.

Q. Do you remember that?

A. Yes, sir.

Q. And you have had the opportunity, and have in fact reviewed your deposition before you've testified today?

A. Yes, I have.

Q. At deposition you testified that as of January 15th, 1993 that you hadn't authorized anybody to sue for money for yourself because of your asbestos exposure, is that right?

A. That's right.

Q. And that is correct today?

A. Yes, sir.

Q. And when you appeared at deposition, you testified I believe that you got involved in this case in order to help to get the case resolved and to help people before the money runs out, in that correct?

A. That's my statement.

Q. And at the time that you agreed to get involved in this case, that was your desire, that basically was your goal, to be class representative to help preserve the money, is that right?

* * * *

[Tr. 262] BY MR. BARON:

Q. Have you been given any information by these lawyers as to the economic well-being of these 20 companies?

A. I have not been given any information before I am hearing I'm very proud of. That this action will not go in the hole for lack of money.

Q. Okay. I believe you're right.

A. Thank you.

Q. Mr. Annas, remember when I took your deposition?

A. I sure do.

Q. I'm sure you do.

(Laughter.)

Q. I asked you in the questions on Page 54, whether or not you believed — it's Line 12 — that you were an appropriate spokesman for people who have pleural plaques that continue to work. And you told me you didn't think you were.

A. No. I won't change that today.

* * * *

REDIRECT EXAMINATION

[Tr. 268] A. 77 and 78?

Q. Yes, sir.

A. I have that Page 77.

Q. Would you look at the line that's numbered 21. Do you see that?

A. So when — yes.

Q. Mr. Baron was asking you questions about whether you had seen anything in the newspapers about the Georgine settlement and did you at that time tell him about a paper you had seen down at your daughter's house?

A. That was not the court thing. It was a local lawyer's ad he put in there.

Q. All right. But you saw that in the paper?

A. Yes, sir.

Q. All right. And you did see the Wall Street Journal article we talked about —

A. I did.

Q. — earlier?

A. I did.

Q. Turn back with me to Page 52, if you would.

(Pause in proceedings.)

Q. The line that starts out — Line 15 on Page 52. This was right before the question Mr. Baron asked you a while ago about do you believe you're an appropriate spokesman for the people?

* * * *

[Tr. 271] Q. Mr. Annas, at the time you agreed to be class representative, you were aware that people with pleural plaques that had no impairment would not be able to receive immediately cash compensation under this settlement, but had what you believed to be other benefits. I ask you —

MR. BARON: Your Honor, I object, leading.

THE COURT: Sustained, it's leading.

BY MR. RICE:

Q. Mr. Annas, what did you understand would happen to people that had pleural plaques with no impairment under the Georgine settlement?

MR. BARON: Your Honor, I object, it's inappropriate redirect. I don't think we covered that in cross.

THE COURT: Well, Mr. Rice, your response?

MR. RICE: I believe that when he asked him questions about — on Line 54, about whether he was an appropriate spokesman, that that brought in this area of inquiry.

THE COURT: The objection is overruled, I agree with you.

BY MR. RICE:

Q. Do you remember the question, Mr. Annas?

A. No, sir.

Q. Let me try it one more time.

Why do you believe — let me ask it this way.

[Tr. 272] Why do you believe it's fair if the Georgine settlement is approved in its entirety for persons with pleural plaques to be deferred as far as cash compensation?

A. I don't believe if there is impairment that anyone needs to be trying to collect money. If there is a situation down the road five years from now with me, and my asbestos exposure develops into an impairment, certainly I can go for a settlement, and I'm concerned about my son Mike back there the same way.

Q. Thank you, Mr. Annas.

A. People that are not impaired are exactly like those on the welfare system.

MR. ROSENBERG: Thank you, Mr. Annas.

MR. BARON: Might I ask one, your Honor.

THE COURT: One, you've got it.

RECROSS-EXAMINATION

BY MR. BARON:

Q. Mr. Annas —

A. Yes, sir.

Q. — you then believe that people who have pleural plaques should receive no compensation whatsoever, and that was your intent in entering into this agreement, correct?

MR. RICE: Objection, your Honor.

MS. WHITE: Objection.

THE COURT: Overruled, it's cross-examination.

[Tr. 273] THE WITNESS: If they are not impaired.

BY MR. BARON:

Q. If they're not impaired they should receive no compensation whatsoever?

A. That's my feelings.

MR. BARON: All right. Thank you.

THE WITNESS: Thank you, sir.

THE COURT: Mr. Annas, you're excused from the stand, sir.

THE WITNESS: I thank you, sir. It's really been a pleasure this week.

THE COURT: It's nice to have you in Philadelphia.

THE WITNESS: Thank you.

THE COURT: I'm sorry about your wife's passing.

THE WITNESS: Thank you, sir.

(Witness excused.)

TESTIMONY OF GEOFFREY HAZARD

* * * *

[Tr. 5] MS. WHITE: Good morning, your Honor, I'm Wendy White for the CCR defendants.

BY MS. WHITE:

Q. Professor Hazard, I'm going to start with a difficult question which is, would you please tell the Court what your address is?

A. My address at present 452 Humphrey Street in New Haven, but we're moving to Philadelphia, and we have a resident [sic] in Chestnut Hill here.

Q. What are you currently doing?

A. My present employment is in two jobs. One is I'm professor of law at Yale University where I teach in the law school. And the other which I have held concurrently for the last nine years is director of the American Law Institute.

The term director doesn't mean I'm on the board of directors, it really means I'm executive director, I'm the paid senior manager. And the American Law Institute is located here in Philadelphia.

Q. What are you going to be doing next year?

A. I'm going to join the faculty at the University of Pennsylvania.

Q. Are you teaching this semester?

[Tr. 6] A. Yes, I'm teaching in New Haven. I'm going back and forth.

Q. Professor, could you briefly describe your experience in the field of legal ethics?

A. Yes. Well, I was admitted to practice law in Oregon in 1954 and practiced in a general practice firm, did among things personal injury defense work.

After a year with the Oregon legislature, I joined the faculty at the University of California, taught civil procedure which had some ethics aspects, but it was not my primary subject at that time.

In 1964 I moved to Chicago where I undertook two responsibilities, one I joined the faculty at the University of

Chicago. And in the course of my service there, I taught courses in professional responsibility, primarily legal services for the poor.

I was also executive director of the American Bar Foundation. The American Bar Foundation is a non-profit research organization affiliate of the American Bar Association, and it did then and still does a wide range of studies about the legal profession, including ethical aspects of law practice.

A major part of the activity, the Bar Foundation when I was there, was to provide research assistance and I provided some consultation to the ADA project that produced [Tr. 7] what is called the Code of Professional Responsibility.

The Code of Professional Responsibility is a set of rules of ethics for lawyers. It was promulgated by the ABA after a six-year project in 1970. As I say, I was involved in consultation in that project. The primary reporter was Professor Sutton from Texas.

And then in 1970 I moved to New Haven and assumed a position at Yale, and just about that time I was engaged to be a consultant and draftsman for the Code of Judicial Conduct, which are the rules concerning judicial ethics and they have some incidental aspects so far as legal ethics are concerned.

In 1975 or so, I did a book based on some conferences we had concerning ethics in the practice of law, and that's the name of the book. It was a very interesting and searching colloquium on the subject.

In 1978 I was asked to be consultant and then reporter for an ABA special committee that was called the Kutak Commission, K-U-T-A-K, so-called because the name of the chairman of that commission was Robert Kutak of Omaha. And that project, that project that commission was responsible for was the reconsideration of the Code of Ethics, the Code of Professional Responsibility.

They concluded that the format should be changed, and that a number of provisions should be reconsidered and [Tr. 8] reformulated. And that undertaking led to a set of rules called the Rules of Professional Conduct, which were designed by the ABA as a recommended replacement for the Code of Professional Responsibility.

I should say the Code had been adopted in most states in the interval between 1970 and 1983. It was in 1983 that the ABA promulgated the Rules of Professional Conduct. That was about a four-year drafting, negotiation, revision process in which I was continuously involved.

And thereafter the Rules of Professional Conduct have been adopted in most states, in many instances with some revision. They have been adopted here in Pennsylvania, they were adopted in New Jersey. They were drawn upon for substantial revisions of the rules in New York and California and Illinois for example. And I've watched those developments with care and have been involved in some of them.

In 1985 I think, after I became director of the American Bar — American Law Institute, we began a project which we are still engaged in, maybe it was 1986 that we started, called the restatement of the law governing lawyers. In addition to the Ethics Codes that I have just referred to, there is a lot of common law governing lawyers, for example, the attorney-client privilege, and the contract between a lawyer and client, and other matters that are not covered in [Tr. 9] all details.

And some of them aren't covered at all in the Rules of Professional Conduct, but are the subject of common law. And obviously that involves ethical aspects, too. That project is still going on, and I have been involved in it.

And over the years since 1982, I've done substantial consulting practice, giving lawyers and judges advice or consultation in matters of ethics. Writing opinion letters, participating as an expert witness in various kinds of matters, and I do on a continuing basis, continuing legal education in the sense of participating in panels and giving talks.

We gave one to the Pennsylvania State Trial Judges here last summer, and I'm giving a talk to probate and estate planner lawyers soon, that is next month, and those are examples of the kind of continuing legal education of work that I've done.

Q. Professor, would you now describe your expertise in the field of class actions?

A. Well, when I first started teaching in 1958 I taught civil procedure and it's still one of my primary subjects. And a special field that I was quite interested in was joinder of parties, the problem of multi-party litigation. I've written several articles on that are at least incidentally related to class suits.

[Tr. 10] And in our case book that was published first in 1962, we devoted an unusual amount of attention, both in case annotation and textural notes about class suits, and tried to bring some kind of order in terms of analysis to what was at that point an extremely confused body of law.

And that analysis, even though it was in a case book, was relied on in significant part in the 1966 revision of the class suit rule, Rule 23. A lot of people think that rule is difficult now, but I can say it's a lot clearer than what was before.

And indeed the analysis of the difference between the three kinds of class suits, B1, B2, B3 is taken from the book that I've just referred to, the case book material. And since then we have revisited the problem of class suits in that book which is now in its sixth edition. The treatment of class suits is a major portion of the book.

In the meantime, ALI has had two studies that I've been closely supervise — I've been the close supervisor of. One is on enterprise responsibility. That was a reporter's study that dealt with a lot of problems, but included problems such as the asbestos cases, and the Bendectin (ph) cases, and other so-called mass torts, and a question then whether a class suit or some such might be an appropriate way for handling some types of those cases.

And Professor Arthur Miller and Dean Mary Kay Kane [Tr. 11] have just finished up a study also under the auspices of the ALI on complex litigation, of which this case is obviously a type. But that study focused on problems of administering those cases and various aspects to them, including as an incident, possible treatment of some of them to the suit class procedure.

And over the last ten years, I have been engaged intermittently, I guess, in a manuscript that goes through the history of class suits from the emergence of the concept in some coherent form about the middle of the Eighteenth Century, down to the

recent decisions, for example in *Philips Petroleum against Schutz* (ph), focusing on certain aspects of class suits.

And so I consider that I have paid considerable attention to the analytic and conceptual structure of these things, the legal aspects of them, and their practical administration since I have started teaching procedure.

Q. Professor, could you now describe your experience with or knowledge of the asbestos litigation?

A. Yes. My first acquaintance with an asbestos litigation in any focused way was when Dean Harry Wellington, who was the dean of the Law School at Yale some years back, became involved in the so-called asbestos facility in an attempt to work out some kind of settlement payments, medical exam, nonlitigation mechanism, and talked with him. And I think [Tr. 12] Harry gave a paper at the law school, an informal one describing what was being attempted and how it was going.

Not too long after that, I think I've forgotten when it was, I began following the studies done by Rand (ph) Institute of Civil Justice. I became a member of their advisory board for a period, I've forgotten exactly what years it was. I'm still what they call an emeritus member, and get all the publications and follow them.

In my opinion, Rand has done the best quantitation empirical study of tort litigation in general of so-called mass torts, in particular of any recognized scholarly or research institution. And I have paid close attention to that.

We have had a couple of conferences that I have attended on that subject. And the enterprise responsibility project that I mentioned to the ALI, some of the people there were quite familiar with the asbestos cases, and that was one of the aspects we were talking about.

And I am acquainted with — have followed the literature in general terms at any rate, and so I consider myself particularly from the judicial administration point of view, which has been another subject that I have been interested in and have done work in, so I have followed it I think fairly consistently.

Q. Are you familiar with an article by Peter Shuck, one of [Tr. 13] your colleagues at Yale?

A. Yes, Peter has done a book on this problem of the pleural registries and the calendar management, and I think the phrase the worse ought to go first. That is the people in most need of redress or compensation ought to have preference on the calendar. And Peter doing that, I remember asking me a question, could a court arrange its calendar in a way that took account of the neediness of claims and I said, as far as speaking on the background of judicial administration, I think it's perfectly clear that a Court can, for example courts make special arrangement for —

MR. BARON: Your Honor, we're getting a little bit outside of the scope of the question that was asked here. If he's going to provide testimony about what he did for Professor Shuck or what is involved in, I think there should be a pending question on that issue rather than just a general discussion.

THE WITNESS: I stop there and just say, I told him —

THE COURT: Well, wait a minute, Professor.

THE WITNESS: I'm sorry, sir.

THE COURT: Excuse me.

THE WITNESS: Yeah. Do you want me to just stop?

THE COURT: Typically in a courtroom when an objection is made the stops talking. That's been my [Tr. 14] experience.

THE WITNESS: Sorry.

THE COURT: I think you will do that for us. Thank you.

MR. BARON: And I certainly don't object to the —

THE COURT: I heard what you had to say. The objection's sustained. He was only asked if he was familiar with the article, and I think the answer could have been yes, and the another question might say how and so forth. So we'll have a few more questions.

MR. BARON: And the record should refl —

THE COURT: The objection's sustained.

MR. BARON: Okay. The record should reflect that he said book, and I think he might [sic] article.

THE COURT: I knew it was an — well, maybe you did write a book. I don't know. I didn't know about the article. There's no

testimony yet about whether there's a book or not a book until this moment.

BY MS. WHITE:

Q. Professor, would you describe your discussions with Professor Shuck about the article, to the extent you haven't already.

Q. The question Peter asked me, he said he was working on this problem. And I said — he asked me essentially, can a court have authority to arrange its calendar in ways that [Tr. 15] takes account of the needfulness of the claims in the cases before it, and I said, yes, indeed that's the whole theory of why you have a special calendar for temporary restraining orders and the like. And that's about what the discussion was.

I knew he was writing on the subject and I have very high respect for him.

Q. Professor, have you written a textbook on professional responsibility for legal ethics?

A. Yes. Professor William Hoades (ph) at the Indiana University and I have done a book called, The Law Governing Lawyers, which is organized around the model rules and is a text on the subject.

Q. If you will turn with me in your notebook to the tab that's identified as Settling Parties' Exhibit 900. Could you identify that for the record?

A. Yes, that's a professional biography or curriculum vitae of me.

Q. And would you turn then to the next document, Settling Parties' Exhibit 900A, and would you describe what that is for the record?

A. Well, this is a sort of boxed chart that lists the cases in which I've been a witness, giving testimony in matters of lawyer conduct and an indication of whether it was testimony by trial or by deposition. And the specifications are a [Tr. 16] little indefinite in some respects.

The details are incomplete on the first page, but after that it's complete. I just keep it on a running basis so that if lawyers ask me, have you ever testified before, I can hand them this document.

Q. I believe, Professor, you're describing the attachment to the revised curriculum vitae which forms the whole exhibit, Exhibit 900A, is that right?

A. Yeah, I guess maybe I missed what your question was. Is the 9A the more up to the date curriculum vitae, is that what you're talking about? Okay. I gave a second copy, a more recent printout of my CV. I think it has maybe one or two more newspaper articles on the back end of it.

MS. WHITE: Your Honor, we would offer Settling Parties' Exhibits 900 and 900A.

MR. BARON: Your Honor, I have no objection, with only one thing that I noticed here, and I might clear this up real quickly.

Professor Hazard, in your resume here, you have omitted the more recent issue of your book, have you not?

THE WITNESS: I don't know. Which book are we talking about?

MR. BARON: The one with Professor Krampton (ph) and Professor Coniac (ph).

THE WITNESS: Let's see. Yes. This printout [Tr. 17] doesn't have it, right. On Page 3, it should say, Law and Ethics of Lawyering, Second Edition, 1994, I think they said with Professor Coniac and Roger Krampton has become an additional co-author.

THE COURT: Excuse me, the date of that issue is what, sir?

THE WITNESS: I think 1994, it just came out.

THE COURT: At the top of Page 3.

MR. BARON: At the top of Page 3. If we could note that change, then we would have no objection to the admission of the —

THE WITNESS: What they're referring to, sir, is if you look down about the fifth book, it says, just before the one that's in Italian, it says, The Law and Ethic of Lawyering, yes, sir.

THE COURT: I found it, yes, sir. I found it.

THE WITNESS: Yes.

MR. BARON: The co-authors and Krampton and Coniac, correct?

THE COURT: That's what he said.

MR. BARON: Okay.

MS. WHITE: The settling parties would offer Professor Hazard as an expert witness on legal ethics and professional responsibility.

MR. BARON: With those limitations, we have no [Tr. 18] objections, your Honor.

THE COURT: The exhibits are received in evidence, and I rule that Professor Hazard are qualified to give opinion in the areas offered.

(Settling Parties' Exhibit 900 and 900A received in evidence.)

BY MS. WHITE:

Q. Professor, have you read the stipulation of settlement in this case, the Georgine case?

A. Yes.

Q. Have you read the depositions of the class plaintiffs?

A. Yes.

Q. Have you —

MR. BARON: Your Honor, at this point, I'm going to have to assert another objection, and I apologize to the Court for having to do at this point.

But as your Honor will recall, we filed a motion pertaining to this particular witness, and it was in the nature of motion in limine. At his deposition which was given, I believe on —

THE COURT: Excuse me, Mr. Baron. I know what the motion was, and I know that it's likely apparently that Professor Hazard has read things since his deposition was taken and perhaps since he wrote a report. That does not, per se, prohibit him from testifying that he read those [Tr. 19] things or testifying in this case.

You have an objection, and I can't remember whether — what I did with the motion at this point.

MR. BARON: Well, I believe you held for the time being, your Honor. You denied it initially without prejudice to reasserting

it, and the point that I'm making is that all of those depositions were available, transcribed, ready to go and available to Professor Hazard several weeks before he was deposed.

THE COURT: If you're renewing the motion, the motion is denied once again without prejudice. I can't tell what affect this has on his testimony, until we find out what's going on here.

MR. BARON: All right.

THE COURT: The fact that he's read something does not, per se, make his opinions different or prejudice the notice given to the objectors about his opinion at all. As a matter of superficial analysis, it just doesn't at this point. We'll see whether it did as time goes along.

BY MS. WHITE:

Q. Professor, have you read the testimony of Larry Fitzpatrick that was given earlier this week in this case?

A. Yes. That is, I read — I don't know whether I read yesterday's testimony, but earlier in the week.

Q. Are you familiar with the deposition testimony of Michael [Tr. 20] Rooney?

A. Yes.

Q. Have you read the opening argument of Mr. Baron in this case?

A. Yes.

Q. And are you familiar with the report of Professors Krampton and Coniac?

A. Yes.

Q. Finally, have you familiarized yourself with the depositions of Professors Krampton, Coniac and Coffey (ph)?

A. Yes.

Q. Professor, could you describe for the Court essentially what you understand the stipulation of settlement to provide?

A. On the side of the plaintiffs, it defines a group of people who will be covered by its terms.

In terms of exposure to asbestos, it specifies certain medical criteria that people so describe — criteria of medical condition that people so described, may have if this agreement — when this agreement goes in effect, if it goes into effect, and people who might have those conditions thereafter.

It specifies a procedure for their making — be able to make claims. It provides that they will not be time barred under the statute of limitation for withholding from making claims, under the terms of this agreement.

[Tr. 21] That they can make — seek compensation, obtain medical examination of evaluation of their condition. Assuming that the condition is of the kind that provides — involves — injury is recognized in these terms, provides a basis of compensation.

It has an arrangement whereby if the people's — individuals' medical condition thereafter worsens, and they come into a — how should we say it, a more severe category, that they're entitled to a reconsideration and additional basis of compensation.

And essentially it covers this arrangement for as long as this agreement remains in force, and it has an initial period, as I understand it, of ten years within which none of the signators can withdraw. And this facilitates the analysis, diagnosis and consideration of these peoples' circumstance, and provides for a nonlitigation compensation without some of the usual defenses. Particularly, the problem of proving causation as there is in some of these asbestos cases.

From the — so you could say that it provides a kind of structured settlement in terms of a payment schedule for these folks.

From the point of view of the defendants, it precludes punitive damages, which is a very uncertain and sometimes risky exposure. It provides for a pacing of the [Tr. 22] flow of claims. It's a flexible flow so to speak, but is designed to keep the line moving along in a orderly way.

It relieves these defendants from the expense of litigation, and the costs of defense and the uncertainties in terms of range of liability, and particularly the risk of a big hit of some sort.

It allows the defendants to therefore to plan their financial future in a more predicable, stable way, which in the case of business enterprises is very important, because it allows them to make their business plans with an eye to these responsibilities. And in my opinion, that has very great practical significance, from the point of a business person.

And considering it from the point of view of both sides, as I interpret it, it has the effect of reducing the transaction costs, which is a nice name for lawyers' fees and litigation expenses, that would be incurred on both sides. So, in that respect as it were, puts money on the table for the injured folks that otherwise would have to be expended in the tort system process.

At the same time it obviously leaves these claimants free to — leaves the futures claimants free to pursue their tort remedy against other people, who aren't covered by this agreement. So that they're not wholly outside the tort systems, as vis-a-vis other people. I think those are the [Tr. 23] main elements of this agreement.

Q. And what do you understand is the overall purpose of the settlement?

A. Well, I think that the basis idea is to have some stable, less expensive, compensation arrangements. Less expensive in terms of transaction costs. Compensation arrangement that has rational criteria for — of making compensation payments. And that treats, members of this defined class on an equal basis so they get equal treatment rather than being subject to the vagaries and discrepancies of outcome that can be incurred in a tort system.

It reduces somewhat the cost to them as a group in terms of the litigation expenses that I have referred to. It reduces the defendants' costs — counterpart costs, and it I think provides in a sense peace of mind in the sense of eliminating uncertainty on both sides.

Q. Based on the materials that you have read, that you have already described to the Court, do you have an understanding as to when the settlement negotiations for global resolution of the asbestos issues started?

A. Well, having regard for the testimony of Mr. Fitzpatrick, since 1987 I have to say, based on my own knowledge of the background, I think thoughts of some kind of way of dealing with the problem obviously antedated that but he says, and I am hence thereby informed that discussions looking to some [Tr. 24] kind of an arrangement for settlement on across-the-board basis, he testifies, began in 1987. I think he said specifically discussions of an exploratory sort were held with Mr. Motley at that time and I believe that a number of people have — from that point — from thereafter, many people, judges and lawyers, academics and so on had commented on the idea and I think that given this is sort of an open forum, that continued the discussion that he says originated in 1987.

Q. Do you have an understanding as to whether those negotiations included a discussion of settling pending cases or future cases or both?

A. Well, I understand from his testimony that it was always on the agenda that you'd have to look at futures cases and pending cases. Obviously plaintiffs and their lawyers are immediately concerned about pending cases. I think conscientious plaintiffs' lawyers were concerned about futures cases. They knew there were going to be more cases coming the line.

Obviously the defendant has got the pending cases right before it and is expending whatever it takes to respond to those cases, so those cases are of concern to it and obviously a business person, and all the defendants are businesses, and their insurance companies, has to look down the road of where's this going to go, what is the future for [Tr. 25] us?

So if they were behaving rationally on both sides, they would have to be thinking about, as I take it all humans do, now and tomorrow. And that's present and future.

Q. What do you understand the role of the firm of Ness, Motley to be in these negotiations?

A. Well, my understanding of Ness, Motley is one of the leading firms in this field and that Mr. Motley was engaged in — as a primary participant, discussant in those negotiations as they went on intermittently.

MR. BARON: Your Honor, I didn't get a chance to insert an objection there. I wanted to limit the question. I object unless the question is limited to his knowledge based on what the testimony that he described earlier that he had read as opposed to his own independent information. I think the question wasn't properly formed. I think what she intended and I think that's what he answered.

THE COURT: Well, I inferred from the answer that he referred to the testimony.

MR. BARON: Right.

THE COURT: I didn't hear him refer to anything else.

MR. BARON: Well, the question wasn't phrased to ask him to only refer to the testimony but I believe that's what he's been doing and I wanted the record to be clear that he [Tr. 26] is referring — the information that he's reciting is based on what he has read as opposed to his independent information.

MR. MOTLEY: Excuse me, your Honor.

THE COURT: I don't know if he did an independent investigation.

MR. BARON: I don't either and that's why I wanted — that was the purpose of the objection to the question. The question wasn't limited again as she limited the other questions to based on what you have read.

MR. MOTLEY: May it please the Court, may I comment, or I'll sit down, whatever you please.

THE COURT: Well, first — Mr. Motley, the witness is being presented by a lawyer. That lawyer is handling all the objections. So it's the only way we could proceed otherwise the questioning lawyer is distracted by another lawyer making an objection about a matter that she's presenting and she chose the language and I'd like to hear it from her, please.

MS. WHITE: Your Honor, I'm not sure I understand Mr. Baron's objection. Professor Hazard testified as we began that he has some experience and knowledge in the asbestos litigation. He is going to be offering an opinion on ethical issues from — and he

will base that opinion on information that he knows. He can't exclude that from his [Tr. 27] knowledge and what he has read.

If Mr. Baron was asking whether he did some independent investigation, I think that Professor Hazard will tell you he didn't do that, but his answers to these questions have to be based on what he knows.

MR. BARON: Well, your Honor, that again goes to the heart of my objection and I think that we're all on the same boat —

THE COURT: Wait a minute. I don't know what we're doing here. We have a question, we have an answer, then you stood up to make an objection on something —

MR. BARON: I didn't give my —

THE COURT: — that's already happened.

MR. BARON: Right. I didn't want to interrupt. And the witness answered before I could insert my objection, your Honor.

The objection was that the question wasn't properly limited as the prior questions had been properly limited to his giving testimony based on what he had read in the discovery material in this case.

THE COURT: Well, I don't know that he's so limited.

MR. BARON: Well, the prior questions had asked him —

THE COURT: I don't care about prior questions. I don't believe the witness is so limited. There then may be [Tr. 28] other things that I haven't heard about yet because I never read his deposition and —

MR. BARON: Well, then I would object based on lack of foundation because there's no foundation that he would know any of this material without relying exclusively on the prior material, your Honor.

THE COURT: Well, his objection to a question that's been asked and answered is overruled. If I rephrase it to a motion to strike, the motion to strike is denied and if the questioning lawyer wants to straighten this out, she may try to do that and if it isn't straightened out, you can do it on cross-examination or objecting to another question.

MR. BARON: All right.

BY MS. WHITE:

Q. Professor, had you finished your answer?

A. Yes.

THE COURT: Wait a minute. Fine. I'm glad he said that. Because the question's so long gone that we won't know what he's answering. Ask another question, please. I'll speak for myself. I wouldn't know what he's answering.

MS. WHITE: All right.

BY MS. WHITE:

Q. Professor Hazard, what do you understand the role of Greitzer and Locks to have been in the negotiations that led up ultimately to the Georgine settlement?

[Tr. 29] MR. BARON: Your Honor, once again I'm going to object on foundation unless —

THE COURT: Yes. I sustained.

MR. BARON: Thank you. Oh, I'm sorry.

THE COURT: Objection sustained.

Ms. White, I think you have to —

MS. WHITE: I'll rephrase the question.

THE COURT: Heaven knows where that question would allow him to go. I think there's some merit to what counsel said but manage it that way to get that behind us and manage better what we're doing now.

BY MS. WHITE:

Q. Professor, based on the materials that you have read in preparation for your testimony and materials that you are familiar with that you have already described to the Court, do you have an understanding of the role of Greitzer and Locks in the settlement negotiations that ultimately led to the Georgine settlement?

A. I think I do.

Q. And what is that understanding?

A. That when this case — that the negotiations leading to this settlement emerged from the MDL assignment of these cases here, that the MDL assignment of these cases here after the cases got here involve a designation of two plaintiffs' law firms as, I will call them, leaders in the discussions [Tr. 30] that were to be conducted or being conducted and one of those firms was Ness, Motley and the other one was Greitzer and Locks.

So they were the lead firms in the matters proposing in this Court at this time.

Q. And what do you mean when you say they were the lead lawyers? What are you referring to?

A. Well, that they were designated by the Court as primary spokespersons to the Court with the attendant responsibilities of lead counsel, vis-a-vis, the other lawyers on the plaintiffs' side for the management of the affairs being conducted in this MDL proceeding which as I understand it was — could be characterized as an extensive kind of settlement conference.

So that's what I understood they were recog — they were recognized by the Court as having that position and they carried it out.

Q. Professor Hazard, as you know, under Rule 23, one of the issues that the Court must address in this proceeding is the adequacy of counsel in negotiating the stipulation of settlement.

Given your understanding of the history of the asbestos litigation and the role of class counsel in this litigation, based on the materials that you have read and already described, given your understanding as to the process [Tr. 31] of the negotiation, also based on those materials, and given your expertise in the field of legal ethics, do you have an opinion as to whether class counsel here acted in a manner consistent with their ethical obligations?

A. Yes.

Q. What is that opinion?

A. In my opinion, they — judged by what they have done as I have understood it from the materials you talk about, they carried out their representation with intelligence, based on informed experience, with focused concern for the interests of the clients and

diligence and energy. So I think they met the — the standards that you would hope for in counsel and met them clearly.

Q. Do you have an opinion as to whether or not in negotiating the stipulation of settlement, there were any impermissible conflicts of interest which would disqualify them as class counsel in this case?

A. I have an opinion on that subject.

Q. And what is your opinion, sir?

A. I do not think they had a conflict of interest that impaired their ability or in any way disqualified them from performing the functions that they performed.

Q. And what is the basis of that opinion?

A. They represented a proposed class. I say they spoke on behalf of a proposed class in a strict and proper sense. [Tr. 32] There was no client until, and will be no client, until the Court takes official action to recognize the set of people or the group of people as a legal class.

A class suit can be proposed, it can be filed but it doesn't exist as a legal entity and therefore you don't, strictly speaking, have a client until it's — the lawyers are recognized as having that capacity by the Court.

Nevertheless, they undertook the kind of responsibilities that one undertakes for a client. I think that they understood a fiduciary responsibility to these people, even though in a strict sense the futures class was not — were not clients for the reason I just stated.

And the question is whether it was improper for them to undertake to act in behalf of the futures class for the reason that these lawyers also represented claimants with pending claims which I will call the inventory or pending claims, meaning claims that had been either filed in court or in which they had office files of clients who had come to see them or had been referred to them by other lawyers as was the case in many instances as I understand it.

So the question is whether a lawyer for more than one plaintiff may proceed to negotiations on behalf of one client, here the futures class, when it is the case that the lawyer or law firm concurrently represents another client who was injured or suffered

injury by a course of conduct similar [Tr. 33] to or identical with that injured the first client.

That is, you can think of these as two great big groups but I think that if you look at the group of futures as a client for purposes of analysis and look at the pending cases as a client, then the question is it permissible for a law firm to represent two clients, both of whom have been injured in a similar course of action or the same course of action when those clients may have somewhat different bases of claim against the common defendant.

And my view is that is not an improper conflict in the absence of any showing of a specific wrongdoing, vis-a-vis, one or the other of the clients.

And indeed, it happens all the time and a simple illustration to show that is as follows: Suppose that a parent, husband and wife, are driving in an automobile with a child or two children in the back seat and suffer a severe collision and assume that the wife is driving and the husband is in the passenger seat and the husband is the registered owner of the car. And the children are both minors.

In normal tort law, it is possible that the wife's claim would be subject to some reduction under the principles of comparative negligence if it could be shown that the way she drove was negligent.

Furthermore, it is possible in some states that negligence would be attributed to the husband as the owner [Tr. 34] under principles of vicarious attribution.

But as I understand tort law, at least in many states, if not all of them, that the children would not be — have their claims subject to attributed comparative negligence of either of their parents.

And so that the legal bases of the claims of the members of the family would be somewhat different. Plus of course the problem of what would be an appropriate amount of money and type of settlement for them might be different.

In the case of children these days, very often one has a structured settlement so that you build a system of long-term payments and sometimes these days even a kind of a look-see or second look in terms of medical benefits. The point being that the

concept of damages and the principles of redress that would cover the two clients could be different.

And yet, given those differences, I think it is not a violation of 1.7B of the rules which is the rule that's involved here, not a violation of the traditions of our profession.

To the contrary, I think it's widely recognized that it's quite appropriate for a plaintiff to represent all the members of the family. And you would not say, I certainly wouldn't say that there was a conflict of interest in representing the children because the plaintiffs' lawyer also represented the parents in that situation.

[Tr. 35] Now, it requires the lawyer to exercise proper judgment and fairmindedness in working out the negotiations concerning allocation of any settlement but that's part of the job. It doesn't mean you're out of the job.

And so I think that this case, as indicated by that illustration, is simply a large scale complicated version of concurrent representation that is very familiar and well-recognized and completely ethical.

Q. Professor, have you had an opportunity to analyze the objections raised here based on ethical conduct and adequacy of class counsel?

A. Yes.

Q. And how would you characterize the objections? Have you analyzed them?

A. Well, in trying to define my own response, I think that there are — there's an objection that the settlement is tainted because the lawyers in conducting, the lawyers on behalf of the plaintiff have violated professional ethics. I've just referred to one aspect of that.

And secondly, the view in the terms of the settlement substantively, what it provides for, that the settlement is unfair.

Now, I do not consider my province to examine in detail the unfairness question. I understand the Court has a procedure in place whereby that will be examined.

[Tr. 36] I did review the stipulation with this question in mind. Is there anything in here that is indicative of unfairness that would

lead to the inference that there was a conflict of interest or some kind of collusion or something bad that produced it.

So I was reviewing it as it were, as an indicator of suspicious things. Were there any suspicious indicators there and I didn't see any. I don't purport to know the appropriateness of the medical criteria, for example, and it may be that those are inappropriate criteria. So I don't want to suggest that I can affirm that it was fair. All I can say is, I didn't see anything that pointed, from the basis of my knowledge to the contrary.

Now, with that in mind, the essential objections that have been made are a conflict of interest to which I've referred to generally.

Secondly, that there is a violation so it is said of Rule 5.6 concerning a restriction on the right to practice law, and finally, there is an assertion that there was or must have been collusion. That is, essentially the plaintiffs' lawyers were guilty of fraud in the way they conducted the negotiations.

That I think is the essential contentions that are made.

Q. Do you believe, Professor, that any of these three [Tr. 37] contentions are soundly based?

A. No.

Q. Professor, I would now like to analyze each one of those issues that you just identified for the Court.

Let's look at the first objection that you described, that is the contention that there is a conflict in representing present claimants while negotiating for the future. Are you familiar with that objection?

A. Yes, sir — Yes, ma'am, I'm sorry.

Q. What responsibilities if any did Messrs. Motley, Rice and Locks have to members of what became the Georgine class when they pursued the negotiations of Georgine and the global settlement?

A. Well, I think, as I said, I do not think in a strict sense they have a "client" at that point for the reasons stated.

I do believe that undertaking to do what they did, entailed what I will call basic principles of fiduciary responsibility. There's nothing mysterious about that term. Its basic elements are loyalty

to the purposes of the person on behalf of whom you're purporting to act, and reasonable care and diligence in carrying it out.

And judge by those standards, in my opinion they conducted themselves appropriately. The indication from the testimony of Mr. Fitzpatrick is that the negotiations were [Tr. 38] extensive induration [sic] and intensity, which indicates that this was deliberately and pursued over a sustained period of time which would allow opportunity for reflection and deliberation and assessment.

There is indication that very careful attention was paid to the financial aspect of it, so far as the defendants' providing the flow of money necessary to make this thing go. The terms of it indicate that the attention was paid to the individual interests, providing for examination and reexamination and so on of the claimants.

So it seems to me from what one can tell, looking at the agreement and what evidence is available about how the process was conducted, that they fulfilled the duties of competency, diligence and loyalty in carrying them out.

Now, there is a contention made that it's a kind of further detail about the so-called conflict of interest, in that the terms proposed in the stipulation, so far as the futures are concerned, are not identical with those so far — involved in the pending cases.

But a point is, that the pending cases are conclude folks who have already incurred the transaction costs of engaging a lawyer on whatever the contingent fee is. In most instances, in filing suit and entering the — and the cost of entering the tort system, getting medical testimony and so on, so that I would have thought that you would have to take [Tr. 39] account or certainly legitimately take account of the fact that the pending cases or inventory cases were in general, in certain respects are somewhat different.

So the fact that the terms might not be identical, I don't think is indicative of conflict of interest. Indeed if it's — it could easily be indicative of attentiveness to this kind of difference.

So if you look at it in those terms, I do not see an inappropriate conflict of interest. Perhaps I ought to stop there and say, if you wish me now to talk about the so-called — the restriction on practice of law, I will do that.

Q. Professor, before we get to that point, would you turn in your book to Page 11 of the report of Professors Krampton and Coniac, and look at Paragraph 23?

A. Well, I'll see.

THE COURT: Is that an exhibit somewhere?

THE WITNESS: I see —

MS. WHITE: Your Honor —

MR. BARON: Yes, your Honor, it's a —

MS. WHITE: — it is not — excuse me.

MR. BARON: I'm sorry, it's an objectors' exhibit.

THE COURT: I'm asking Ms. White, is this an exhibit that's been marked for identification or —

MS. WHITE: Your Honor, when I was putting my book together last night, I realized that their expert report has [Tr. 40] not been listed as an exhibit, and I don't know how to work with the witness without it.

THE COURT: I'm not saying it should be. I just want to know how to find one.

MS. WHITE: It's in your book, your Honor.

THE COURT: The daily book you've given me?

MS. WHITE: The book that I provided for you.

THE COURT: All right.

MR. BARON: Is this the one that's under tab Krampton, Coniac report?

MS. WHITE: Yes, sir.

THE COURT: January 31, 1994?

MS. WHITE: That's it.

THE COURT: Thank you. Would you get us back to Page 11 and what part of it please.

MS. WHITE: Paragraph 23, Page 11.

MR. BARON: Your Honor, for identification purposes, perhaps we should mark that as the next exhibit number.

Apparently we —

THE COURT: All right. Would it more likely be an objectors' number?

MR. BARON: It would be an objectors' number, and I've noticed that apparently inadvertently it was left off.

THE COURT: What's the next number, 67?

BY MS. WHITE:

[Tr. 41] MR. BARON: It's a great one to leave off. 67.

MS. WHITE: We thought maybe you weren't going to offer it.

THE COURT: 67.

MR. BARON: We'll call it O-67.

THE COURT: Objector's 67. Okay.

BY MS. WHITE:

Q. Professor, could you tread [sic] the last sentence of Paragraph 23. Why don't you read it out loud so we all know where we are?

A. It states, this is Paragraph 23 on Page 11, second — third sentence.

"We believe that Messrs. Locks, Motley and Rice breached their responsibilities to the class under Model Rule 1.7B when they presumed to negotiation of the rights of class members, while concurrently representing individual clients with pending claims against CCR."

Q. Now, I take it from what you just testified, you would disagree with that statement, is that correct?

A. I do indeed.

Q. Professor, when you reviewed the testimony of — the deposition testimony of Professor Krampton, and when I asked him about this subject, do you recall what his response was when I asked him the following question and you can follow along.

[Tr. 42] MS. WHITE: Your Honor, it's in your book for today, Page 54 of the Krampton deposition, it's the last —

THE COURT: I have it, thanks.

MR. HENDERSON: Your Honor, I have no — you get a book and nobody else does, because it seems to me that I ought to have the opportunity to know what's being used, and counsel didn't do that. I don't have the Krampton deposition.

THE COURT: I asked counsel to and all counsel to give me exhibits they're going to use. I've asked you, I've asked everybody to give exhibits they're going to use with witnesses, so I don't have to dig in the books. That's all.

MR. HENDERSON: I understand and I think that's appropriate.

THE COURT: And I've done it privately so that there's no diminution of the tactical concepts of how counsel's putting their examination together. But these are not secret exhibits.

MS. WHITE: No, sir, they're all in the record.

THE COURT: We're just doing this to save time, Mr. Henderson.

MS. WHITE: I don't think it's a surprise that I'm using the deposition of Roger Krampton.

MR. HENDERSON: Well, would you wait a moment please.

[Tr. 43] THE COURT: Sure.

(Discussion off the record.)

THE COURT: Most trial counsel have available to them the matters that will come before them that day, and I try as well. But I don't know what counsel may be up to.

MR. BARON: 36 depositions, your Honor.

MR. LOCKS: Yes, but there's only five mini-scripts of ethics and they only take that amount, and they're in a folder and I have them and everyone else has them. That's — sorry.

THE COURT: There's no — no inappropriate procedure going on here. It's just a matter of logistics.

(Pause in proceedings.)

MR. HENDERSON: What page are you on?

MS. WHITE: I'm going to read the question and the answer on the bottom of Page 53 to 54.

BY MS. WHITE:

Q. Professor Hazard —

A. No, no.

Q. — I asked —

A. Oh, you're asking me now —

Q. Yes.

A. — what you asked Professor Krampton.

Q. I'm going to read it and then I'm going to ask —

A. All right.

[Tr. 44] Q. — you to comment.

A. Okay. Thank you.

Q. I asked Professor Krampton, "Am I right, that given your understanding of CCR's posture with respect to the settlement of future claims, that no plaintiffs' lawyer who had any existing asbestos cases negotiate a Carlough deal without having an impermissible conflict of interest?"

Professor Krampton answered, "I was assuming that qualification. It would have been very easy for Mr. Locks to have turned over his cases and Greitzer and Locks to turn them over to another law firm. He would have had no existing cases. He then could purport properly to negotiate the interest of classes of future claimants in a way that would look after their interest in a single-minded way."

Do you have any opinion as to the necessity or practicality of Professor Krampton's proposed solution here?

THE COURT: Finish reading the answer please in its entirety so that there's no question about it.

MS. WHITE: Oh, I'm sorry.

THE COURT: Because you're getting into some of the areas that commenting on without the rest of the answer.

MS. WHITE: Yes, I'm sorry.

BY MS. WHITE:

Q. And if the answer is, "Well, there are no lawyers in the United States who know anything about mass torts, or could [Tr. 45] serve as class counsel will in this case, who don't have asbestos cases, I think the proposition is absurd. It's not true. Of course, all we've been saying only goes to one of the conflicts of interest."

What is your view about Professor Krampton's solution, his view of the conflict and his view of the solution?

A. I do not believe that one is required to drop a present client in order to represent another client, here a future's client, who has a similarly caused injury in a similarly caused course of action. I don't think there's any standard of ethics that requires that, indeed quite the contrary. It's very common for a plaintiff to have one — or a plaintiffs' lawyer to have one or two cases arising out of a transaction for example, a bus crash or something like that, and then that other cases come into the office. And the notion that you would have to drop the first cases in order to take the second cases is just totally inconsistent with recognized practice.

I might say it's also not to the advantage of the clients, because one thing the lawyers gets from already having a case, and here we're talking about thousands of cases over time, is familiarity with that type of case. The facts, the legal theories, the likely defenses and so on.

So A, there's no conflict, and B, I think in many [Tr. 46] situation [sic] it would be a positive disservice to the client to try to drop one in order to take the other.

Q. Professor, do you understand that in this case, the defendant CCR companies made it clear that they were only prepared to settle present inventories if class counsel would do something, would make some agreement — reach some agreement as to a procedure and approach for handling future cases. Does this settlement posture affect your view of the conflict?

MR. BARON: Your Honor, I object. It's leading and there's been no foundation, and I don't believe that (inaudible). But certainly —

THE COURT: I certainly accept the leading and the question doesn't incorporate what knowledge he's referring to when he perceived to answer it.

MS. WHITE: I'll rephrase the question.

BY MS. WHITE:

Q. Professor Hazard —

THE COURT: The objection's sustained, if I didn't say that.

Q. Would you turn to Page 11 of the report we just marked Objector's Exhibit 67, and turn to Paragraph 24.

(Pause in proceedings.)

Would you read the first and second sentences of that paragraph?

[Tr. 47] A. I've read the whole paragraph.

Q. All right. Would you read for the record the first and second sentences.

A. "At some point in 1992, CCR made it clear to Messrs, [sic] Locks, Motley and Rice as well as to other lawyers representing clients who had filed claims against CCR that current legal proceedings on behalf of current asbestos clients would not be settled until or unless agreement was reached concerning alternative dispute resolution procedures for handling future claims. See Exhibit C.

From the moment CCR adopted this posture, a conflict of interest arose between the interest of the present clients, represented by Locks, Motley and Rice, and the future clients who are now before the Court as a class."

Q. Do you agree or disagree with this statement?

A. I entirely disagree with it.

Q. And what is the basis of your disagreement?

A. Typically in my experience as a practicing lawyer, going back years ago and presently as a consultant, defendants do not settle cases against the same lawyer involving similar or the same transactions unless they will settle them all, except under extraordinary circumstances.

The reason is, that the defendant still has the transaction cause, the certainty and so on in dealing with the transaction. You want to get it cleaned up if you can.

[Tr. 48] Now, there are some times you can't do it, but that is the base line approach that defendants take for perfectly sensible reasons, and their lawyers advise them that is an appropriate strategy and cases are settled like this all the time.

My family case is an illustration. The bus case is another illustration. It's an entirely familiar practice. And if this contention here is correct, then any time you had two clients, doesn't make the difference if they're present and future or that they're class if you have two clients whose interest [sic] are being settled at the same time, there would be an impermissible conflict and that's simply not the law or the practice.

Q. Professor, I believe that you testified that you read Professor Coniac's deposition?

A. I did.

Q. Do you recall in that deposition a discussion with Mr. Motley about issues related to the settling of the inventory cases as to whether or not the cases were filed or unfiled?

A. There was some discussion as to whether all of the inventory cases were filed cases, or included some cases that had not been filed.

Q. Do you have an opinion as to whether or not the settling of inventory cases which may have included some cases which were ready to be filed but had not been filed, raises an [Tr. 49] impermissible conflict?

A. No. It's often the case — I mean it easily be the case that you have arising out of the same transaction or related transactions, one plaintiff for whom you've got a case on file, and another for whom you do not have one on file.

I again go back to my husband and wife and child case. It might well be that a plaintiff's lawyer would file on behalf of the parents, because he's very mindful of the statute of limitation, but not file presently on behalf of the child, because the statute of limitations in most jurisdictions, if not all, does not begin to run as to a child until the child reaches majority. And you want to wait

and see whether the child is responding to medical care or the injuries have stabilized or whatever.

It could well be that the case was not on file, but you then saw that the — the plaintiff's lawyer then sees that its [sic] reached a sufficient condition of stability to be appropriate for settlement, and you call up the defendant and say let's settle the cases that are on file, and we're ready to talk about the youngster's case as well.

You don't have to go ahead and file that suit in order to settle it. You may have to have an application to the Probate Court or the like to get court approval of settlement, but you don't have to file the suit as such in order to make it eligible from an ethical point of view to [Tr. 50] talk about — in regard to settlement.

If that's true, and that's very perfectly okay as far as I know under standard ethical conceptions. I don't see why it is inappropriate to settle cases you've got in the office, some of which have been filed in court, and some of which haven't.

And I might add there is at least one state where you don't file the case properly so-called, until you get along through discovery or have some kind of motion, and that's New York. You serve first and maybe later file. A lot of cases never are filed.

Q. Would your view change, Professor, if the lawyer that you were just describing was at the same that he or she was concerned with the settlement of those cases, was also considering — or was also in the process of negotiation with the same defendants for the settlement of future claims?

A. No. That really raises the question, whether it is proper to have a settlement of claims of a future class. That goes really to a question of class action law and practice. I regard that as a question of law for the court.

I am assuming in this discussion that under appropriate conditions, a class action can be settled, a class action that deals with future claims. And if that's true, then it necessarily follows that futures claims can be the subject of negotiation. Because if you said they could [Tr. 51] be settled, but they couldn't be negotiated, it would be a practical contradiction.

Q. Unlike your automobile or bus example where there are finite number of clients and you could discuss with the clients, for example, all of the family members, what their options were.

When you're dealing with a class action or as I think you've described it, inchoate perspective class, you don't have the freedom, you don't have the practical ability to do that. Does that factor change your view or have any impact on your view about conflicts of interest in this case?

A. No. That is — essentially that's a suggestion that a class suit in which the identity of the specific members of the class, we'll say the beneficiaries of a settlement or a decree, cannot be now identified. That's true of any kind of class suit where that is the case.

Now, it turns out there are lots of class suits of which that is the case, for ex — not just damages class suit. But take for example the school decrees. A school desegregation decree orders that a set of described beneficiaries, all children going to PS34 in the Philadelphia school system, shall be assigned schools and classes without regard to race.

That settlement, if that's how it's arrived at, or decree — we're talking about settlement, is going to cover [Tr. 52] people whose eligibility to go to school has not yet been determined, they haven't reached age six. So by definition it's an indefinite class.

I think similarly of prison decrees. There are lots of those that say all persons who come into the prison shall be accorded the following rights, and you have a long negotiated settlement.

You can't tell who is going to be a prisoner, they haven't been sentenced yet. Obviously the ones that are already in prison will be beneficiaries, but there is a futures class there, and they can't be engaged in conversation the same way that you could engage a present class.

Now, there are classes where you have a list of all the people who nor are and whoever could be covered by the decree, and that's easier to deal with. But the fact of the matter is, that there are class settlements that cover and are designed to benefit of [sic] set of people whose constituent members are not specifically identified, and could not be now specifically identified, and

therefore people with him no one could have a conversation because you don't [sic] who the opposite number specifically is going to be.

Q. In the circumstances in the cases that you were just describing, is it the case or not that generally there is a complaint on file before an injunctive relief or consent [Tr. 53] decree or settlement is reached?

MR. BARON: Your Honor, that's three to four different questions there. I think that —

THE COURT: It's complicated to me, I didn't understand it.

MS. WHITE: Let me try it again.

THE COURT: Maybe that might influence counsel to withdraw it.

MS. WHITE: I withdraw the question.

BY MS. WHITE:

Q. Is it in your experience usually the case or not that before a settlement is reached, a complaint is on file in the kinds of cases that you were just describing?

A. You cannot have strictly speaking a class suit and a class suit settlement unless there is a case on file. And in order to get a case on file, you have to have a complaint.

Q. In this case, was there a complaint on file before the settlement was negotiated? What is your understanding?

A. No. But there has to be before what is proposed as a class in a class suit settlement comes into legal being, that's a — the resultant of official action by the judiciary.

Q. Does the fact that there was not a complaint on file during the process of negotiation, have any impact on your view about conflicts of interest in this case?

[Tr. 54] A. Not in substance. And technically as I have stated, there was not a class to be a client before the suit was filed.

However, in substance I believe lawyers seeking a negotiation, whether in this type of case or for example in an employment discrimination case or school desegregation case, in contemplation that there would be a class and a settlement, should proceed with

the kind of loyalty and attention to the interests of the class members as though they were a client, and I think counsel did that here.

Q. In your view then, would it have changed the — your analysis had the complaint been filed before the negotiations took place?

MR. BARON: Your Honor, I'm going to object because she's not asking for his analysis of what?

THE COURT: The only issue on which he's been testifying out of the — that is the ethical consideration. I assume that's what you're talking about?

MS. WHITE: Yes, your Honor.

THE COURT: Counsel — Mr. Baron, I assume that's what your objection is talking about.

MR. BARON: Yes, I didn't know what she was talking about.

THE COURT: The objection is overruled. The only analysis he's giving is an ethical analysis, and that's what [Tr. 55] she's asking him about.

If you remember the question —

THE WITNESS: Yes, sir, I do.

THE COURT: — you can answer it.

THE WITNESS: Yes, thank you.

It seems to me that the — at the moment after filing, if the sequence was file, no certification yet, then settlement negotiations and settlement proposals, still no certification yet, strictly speaking the plaintiff's lawyer has offered himself or herself as the lawyer for a prospective class.

But it's just sort of a self-nomination. Nobody has been elected yet because the only person empowered to elect, select, designate, appoint, confirm the existence of the class, and hence the client is the court.

That said, I believe, that the lawyer bringing such a suit assumes responsibilities to this group as though they were a client. I think at that point they are substantially a client in the sense they might be disestablished as a client if the court doesn't approve the

certification, doesn't certify it. But I think from that point forward, it's in the hands of the court and the lawyer should proceed as though he has a client, and I think lawyers do.

BY MS. WHITE:

[Tr. 56] Q. Professor, would you now turn back to the report, and I'm looking at Paragraph 44, Page 25.

THE COURT: Objectors' 67?

MS. WHITE: Yes, sir.

THE WITNESS: I'm sorry, ma'am, page?

BY MS. WHITE:

Q. I'm looking at Page 25.

A. Yes, ma'am.

Q. Paragraph 44.

A. Yes.

Q. The last two sentences which begin "Although class representatives"?

A. Yes.

Q. Could you read those last two sentences for the record, please?

A. "Although class representatives do not have total control over class counsel, they're entitled to be consulted about conflicts of interest of class counsel, and steps that are being taken on their behalf. In this case they appear to be figure heads [sic] who were selected late in the date and told virtually nothing about the case, not even in some cases that a stipulation of settlement was filed at the same as the class action."

Q. Do you understand this proposition to be one of the bases for the analysis for the views of Professor [sic] Coniac and Krampton?

Tr. 57] A. They assert it as propositions of fact.

Q. Do you agree or disagree with those statements?

MR. BARON: Your Honor, I object unless she says whether he's disagreeing with the factual basis or the legal basis. If it's a factual basis, then we have another objection.

THE COURT: Let me just read it again to myself.

MR. BARON: Sure.

(Pause in proceedings.)

THE COURT: I'll sustain the objection and see if counsel can rephrase.

MS. WHITE: Let me ask the question this way.

BY MS. WHITE:

Q. Do you agree or disagree with the legal analysis about the role of class representatives?

A. Well, I certainly agree with the first proposition although class representatives do not have total control over class counsel. That's absolutely right.

That is, the class representatives can't tell the class counsel for example, defendants offered me $50,000, I want to take it and run, and you dismiss the suit. So you don't have — although an individual plaintiff could tell a plaintiff's lawyer I want to settle for 50,000 and that's that.

The class does not have that legal authority because [Tr. 58] they have representative responsibilities. It is also a fact that in many class suits, particularly those dealing with a large number of people who are not a pre-existing body, that is like members of a church or something like that, some pre-existing unincorporated group, and particularly when you're talking about people who are dispersed in their location, and maybe not all college graduates, effectively class counsel as distinct from the class representatives, has much heavier responsibilities in terms of initiative and formulation of strategy and conduct in negotiations and so on.

So realizing that statement — what I have just said is consistent with that, I agree with that part. I think it doesn't go far enough.

They are entitled to be consulted about conflicts of interest of class counsel. I think they are entitled to be informed in an appropriate way. But I point out that in the kinds of institutional decrees I have been talking about, there is no way that some youngster who is going to go into the eighth grade in a school desegregation case can have been told about supposed conflicts of interest on the part of the lawyer that's representing the class.

And when you're talking about a substantial size class, particularly one that's dispersed, again not having some pre-existing organizational connection to each other, that's simply not possible, and therefore I disagree with the [Tr. 59] statement that they would be entitled to be informed in the same way that a one-on-one single represented client is consulted.

And the same point holds about steps being taken on their behalf.

MR. BARON: Your Honor, I object to the answer, it's not responsive and I move to strike because it talks about class representatives, not class members, and he was referring to class members, unknown class members.

THE COURT: The motion to strike is denied. If it's not helpful to the proponent or the witness, then it's not helpful.

BY MS. WHITE:

Q. Professor, you may in your testimony, although —

A. Well, let me just add this point.

I think that the class representatives confront of the same kind of problem. The question is, what is appropriate to inform them given the responsibilities that are involved in a class suit.

And I think one of the important points about a class suit is the court's supervision is now going on, so that we're not limited to the kind of disclosure that a lawyer makes one-on-one. It's a much more public kind of process.

Q. Do you have an opinion, Professor, as to the appropriate [Tr. 60] role of class representatives in this litigation?

A. Yes. I do. I do have an opinion on that subject.

Q. And what is your opinion?

A. Well, I think they demonstrate, their presence demonstrates that there's a real injury here, a real legal basis for redress of a set of people, that they have an understanding that their rights are being involved in this case and in the settlement, that they have an understanding generally of the concepts that are involved in the settlement and have reason to feel confident in the technical expertise and integrity of their lawyer.

When you get a complicated stipulation, and this thing is a — more complicated than some bond issues that I've written — or read, there's no way that a class representative could understand and detail the literal terms and significance of all the provisions of that agreement. That's why we have a hearing.

Q. Professor, do you have a view as to whether or not if the analysis contained in the report that we've just been looking at, Objectors' Exhibit Number 67, were correct, would it have been possible for any lawyer to have represented the class in this case?

A. No. Not possible. There's no way you could meet the standards that they're talking about in terms of communication.

[Tr. 61] Q. And with respect to generally the conflict of interest as analyzed by Professors Krampton and Coniac, the simultaneous representation of present and future cases, is there any lawyer who could have come into this Court and been class counsel without having the conflicts discussed in this report?

A. Well, I think it's possible to imagine a lawyer coming in, purporting to represent the class innocent of any prior encounter with asbestos litigation who therefore would be clearly free of conflict but it's hard to see how any such lawyer could possibly provide adequate representation given the difficulty of this kind of litigation.

So in a sense, according — I think to their analysis, you could have loyalty but not adequacy or adequacy but not loyalty. And I just don't think that the rules of ethics operate with that constricting effect.

Q. I'd now like to turn to the second objection that you identified earlier in your testimony, the objection that dealt with Model Rule 5.6.

Would you start, please, by explaining to the Court what Model Rule 5.6 provides?

A. This is one of the rules concerning the practice of law and it states a lawyer shall not participate in offering or making, and then the relevant part is, B, an agreement in which a restriction on the lawyer's right to practice is part [Tr. 62] of the settlement of a controversy between private parties.

And then the comment states, Paragraph B, prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

Q. Thank you. If you would turn in your book to Settling Parties Exhibit 302A.

MS. WHITE: Your Honor, the pages that I'm going to use are in your book, not the entire exhibit.

THE COURT: Will you describe it for counsel so they know what you're talking about.

MS. WHITE: Yes.

It's 302A and it's CCR 2000362.

THE COURT: It's entitled CCR Settlement Agreement. It's entitled CCR Settlement Agreement.

MS. WHITE: CCR Settlement Agreement but there are many of them, so I was identifying which one it was that I was using.

(Pause in proceedings.)

BY MS. WHITE:

Q. Professor, I would also at the same time like you to turn to the next exhibit in your book which is 302C. It is a letter dated August 3rd, 1992 from Gene Locks and it's identified in the record as CCR 2000530.

A. Yes, ma'am.

Q. Professor, have you seen these two agreements before?

[Tr. 63] A. Yes.

Q. In your opinion, Professor, do these agreements or any provision in these agreements violate Model Rule 5.6?

A. I do not think they do in the circumstances of this case.

Q. And would you explain the basis for your opinion?

A. Well, the first point is that as I understand it the two agreements that are mentioned here have to do with so-called pending or inventory cases, not as such the futures cases that are the subject of this class suit. But the suggestion is that because the settlement of the pending cases was a part of the negotiations or concurrent with the negotiations, that it is relevant to the question

of the class suit. I think my understanding is correct in that respect.

Now, on that understanding, I am correct that the CCR settlement agreement is an agreement about the pending cases and is not the stipulation concerning the futures class. Am I correct in that?

Q. Yes, sir, you are.

A. Yes, I thought I was.

Now, so my initial question is why is there any objection concerning the futures class that's based on an agreement counsel made concerning the pending cases and as I understand the contention it is, is this, that there was an improper agreement concerning the pending cases and an agreement that in the future those pending cases would be [Tr. 64] handled in a way that is indicated in this agreement and that either contaminates the futures agreement or somehow shows that the futures agreement is improper.

I must say I'm at a loss to understand what the logic of that contention is, but assuming that contention in its own terms made sense, then the question is in this context, is it inappropriate for counsel to make this kind of agreement, that is, counsel who handles — has been handling a whole bunch of these cases over a long period of time has a substantial inventory of them is negotiating a futures agreement which if the futures agreement goes into effect will cover cases that later — that come within the terms of that so that if the futures agreement does go into effect which counsel can't predict because it requires this procedure and ultimate court approval, but in the event that this agreement does not come into — does come into effect, it will cover the situation.

So this is in a sense against the contingency that the futures agreement won't come into effect. And speaks to pending cases.

Now, is it inappropriate for a lawyer who has a whole bunch of cases and contemplates a continuing flow being asserted against a defendant to say it's our understanding in our professional judgment that these pleural cases, the ones with the lung marker, shouldn't be filed and — but the kinds [Tr. 65] of claims we're

going to make are as stated in these criteria. And that's how we propose, we agree that we will handle futures cases.

I think that the net value of that, net effect of that is not a restriction. It does say something about how we're not going to prosecute pleural cases but it says something affirmatively about the standards that will apply to the cases the way we'll prosecute and that seems to me to say to the prospec — to this set of defendants, we're going to apply these as our claims screening procedures.

Plaintiffs' lawyers always have some criteria for assertion and this is an affirmation to you that when you get these cases that we do file, they should be treated with corresponding seriousness and recognition that they have this — this standard.

Now, the question is, does that net out to be a restriction and I think if you look only at the part that says — refers to what they're going to do with the pleural cases, you could say that there was at least a nominal limitation but if you look at what the thing — how the thing would work, I think it facilitates the assertion of the other kinds of claims because it's an affirmation that you're not going to be — you, defendants, are not going to be confronted with claims whose value is primarily settlement value, that is transaction cost value.

[Tr. 66] And I think that given the situation that they were in and these experienced lawyers to whom cases are being referred because they have expertise in this field, that that is an arrangement that doesn't violate the purpose of 5.6 and in fact is not a net-out restriction so far as I can see.

Q. In your opinion, Professor, did these commitments compromise the ability of Mr. Locks, Mr. Motley or Mr. Rice to represent the futures class here?

A. Well, assuming that there were a violation which I don't think there is, I can't see that it's significant or material and that it would undercut or impair the force or clarify [sic] or loyalty with which they could act in behalf of the futures class.

Q. Did class counsel have an obligation to disclose the fact of these present inventory settlements to their future clients?

A. Well, that gets us back to this problem about what you can disclose to the futures clients under any condition. I think it is

appropriate that these matters be before the Court. They are before the Court. That the investigatory process that's going on here, having in mind the number, the dispersion, and the situation of the now specified class, again assuming it is designated as such by order of this Court, that it would be appropriate to have some kind of disclosure in my — now, whether you post a notice on the [Tr. 67] courthouse or print it in the newspaper, is a matter of — or send it to some members of the class or whatever, all those are matters of implementation that I don't purport to speak to.

I think given what is in my opinion the relative insignificance of this point that it would be a waste of time and energy to try to have some elaborate disclosure of this made to the future class members who as a practical matter I think would think that this is a pretty technical matter at best.

Q. Can you identify any adverse effect on the inchoate Georgine class that resulted from the negotiation of the provisions that you have just been discussing?

A. No. I think if it had any effect it facilitated trying to come to terms with this very difficult, very complex matter. So I don't see how it adversely affected it.

Q. Professor, let's turn to the final basis of the objection that you identified at the beginning of your testimony, that having to do with collusion. Can you describe for the Court, as you understand it, the allegations or the objection based on collusion?

A. Well, in — yes, it's a charge that the lawyers sold out the class, that they were not faithful to the interests, that — it's not just that they were — failed in energy, failed in diligence, failed in attention to specifics and details, [Tr. 68] it is that they wanted to gain for themselves something at the price of their client, that they essentially cheated their clients. I mean that's what collusion is.

And I do not see any indication in the materials I have seen to that effect. The only thing I have heard read is that lawyers representing a class are in a position if they want to to sell out a class.

Well, if they can escape the review of the Court, they might be able to do that. Anybody who's in a fiduciary position is in a

position to breach trust if he's clever enough and faithless enough. So that is possible in this unfortunate world.

But the question is, is there any indication that that happened? I don't see it.

Q. Have you read the deposition of Professor Coffey?

A. Yes.

Q. Based on your analysis of that deposition, what is the basis for Professor Coffey's view that there has been collusion in this case?

A. Well, I think, as I read it, the principal source is Professor Coffey's extensive research in the settlement and his conclusions about the settlement of stockholder derivative suits. And stock — Stockholder 10B5 suits where he has said in his observations, and I've heard him make these statements, that he thinks that sometimes the [Tr. 69] combination of the remedy and the fees indicate that the defendants have effectively bought off the plaintiffs' lawyers because the plaintiffs' lawyers get lots of money in some of those cases, so he says, and the class doesn't get very much.

I think many people credit his studies in that field. I don't think it's appropriate for me to pass a scholarly judgment on them. I think they are very serious. I think they are responsible. I think they are widely recognized as contributions to the literature.

That said, I do not understand how he crosses the bridge from a pattern he has studied in detail, that is, stockholder derivative suits and 10B5 suits to this kind of suit.

And I think the way he crossed the bridge was in terms of theoretical possibility and I agree, I've said, I think there is a theoretical possibility. What I did not see is any data to support the conclusion that the possibility actually occurred in this instance.

Q. Does Professor Coffey's analysis deal with the different treatment of pleural claims as between present claimants and future claimants under Georgine?

A. I think that that's a thing that he pointed to. I've already talked about that. That the present pleural claimants are people who have signed up with a lawyer, have [Tr. 70] got whatever contingent fee agreement they have, who in most instance haves [sic] filed. Some of them have not filed. And who have therefore

entered the tort with the hope and fears that attend that way of proceeding.

On the other hand, what's proposed here is a system that doesn't involve that kind of process, which we lawyers I might say are very used to, but a lot of laypeople regard with great trepidation. This procedure doesn't involve that kind of trepidation and, apart from the economic aspects of it, that psychological aspect.

So I think that you're — we are talking about apples and oranges. They're both things to eat. They have certainly some common features, but they are not exactly identically situated, and if that's true, then the fact that there might be some differences in the way they're handled wouldn't signify much of anything.

Q. Does Professor Coffey also have a view with respect to collusion that compares the historical settlement values for class counsels' cases with the amounts that they were paid in the pending inventory settlements?

A. As I understood his analysis, and it's a kind of law and economics analysis, it's done a lot of these days, much of it valuable, the — his view is that the cases assigned to the MDL went into a kind of purgatory or permanent — semi-permanent black hole or deep freeze from which the federal [Tr. 71] court would never release so that these cases could never be tried, so that they never had the settlement value that results from having the threat of going to trial.

And if you made that assumption, then I think you would say, if the federal courts intended to bury these cases in a deep freeze forever, then they have no settlement value.

The settlement here belies that and I might say I don't understand at all that the federal courts intend to keep these cases here without trying them and without settling them on an indefinite basis.

So I think his premise is just wrong.

Q. Professor, do you find that there was any impermissible conflicts suggested by the manner in which CCR approached Mr. Locks, Mr. Motley and Mr. Rice in pursuing the negotiations that became Georgine?

A. No.

Q. And why not?

A. If you wanted to on a behalf of a defendant to enter into the settlement, it would have credibility with the court, credibility with the class, credibility with concerned observers, public opinion in some sense. You would want to make sure that you were dealing with somebody who the court would regard as a responsible and competent representative of the interests on the other side.

It would be foolheartedly [sic] to engage someone [Tr. 72] inexperienced for a win, because you would have no assurance at the end of the day that respect would be accorded to an agreement reached for such a person, as I read this record, such as I've read.

Motley and Locks are the opposite. They are both very experienced, smart lawyers, recognized as such indeed by their peers. Who else would you go to? You can't go to everybody. You can't conduct negotiations as have been revealed by Mr. Fitzpatrick's testimony with a huge army or a very large number of folks on the other side, the negotiations break down the same way they break down among the defendants.

So if you're trying as a limited number of defendants to get some kind of an arrangement, you'd want to go to people that you think have the ability, to be credible and who have the seriousness to be willing to talk to you. They're not just going to fool around. And I understand that Mr. Motley and Mr. Locks met those criteria.

They were designated as leaders here and I understand Mr. Motley had been lead counsel or some such in a class suit down in Texas. So those are pretty good qualifications.

Q. Are you aware as to whether or not there are provisions in the settlement agreement for an oversight role or continuing oversight role for class counsel in supervising or [Tr. 73] administering the settlement?

A. Yes.

Q. Do you have an opinion as to whether those oversight functions create an impermissible conflict here?

A. To the contrary. Those are very similar. I think it's protective of the class. It means that it isn't fall — befall solely to the court or to an occasional member of the class, but befalls then responsibility for monitoring this thing. It reminds me very much of the role of class counsel in the kind of institutional decrees I have mentioned.

Indeed an aspect of judicial remedies is the problem of having somebody pay attention to whether a decree or judgment that contemplates and calls for continued conduct will in fact be adhered to. This builds it in and I think it's just carrying out the — further carrying out of the representation, like the kind you get in the kind of decrees I have mentioned, or in a commercial case where you've got a requirement that there would be payments over time, you appoint some accounting firm to keep an eye on whether it's being observed. It seems to me it's the same kind of thing.

THE COURT: Ms. White, we're at a time where we ordinarily take a recess. We're possibly behind that time.

MS. WHITE: As the Court wish —

THE COURT: Are you close to being finished with your direct or not? If it's going to take more than five or [Tr. 74] ten minutes, we ought to take a break now.

MS. WHITE: It might.

THE COURT: All right. Take a 15-minute recess.

(Recess, 11:05 o'clock a.m. to 11:23 o'clock a.m.)

THE COURT: Welcome back everyone. The witness will be seated. Thank you. Counsel you may proceed.

DIRECT EXAMINATION

(Continued)

BY MS. WHITE:

Q. Professor, before the break, I believe you were discussing the oversight role that class counsel plays under the stipulation of settlement. Could you describe generally what role, if any, the court will play if the settlement is approved?

A. Well, I do not know exactly what role. A court that enters a judgment, whether by a consent decree or some other kind of determination that calls for continuing responsibilities on the part

of one of the parties, here primarily the defendant, but obviously plaintiff class members have to take actions to be get [sic] benefits, the court has what is called continuing jurisdiction.

And how that is exercised is a matter of judicial discretion and it could range from intensive, continuous, monitoring with the aid of special master or referee and so on, on the one hand to keeping the file open and assuming, [Tr. 75] particularly here with the role of counsel involved, that attention will be being paid on a continuing basis to the implementation of this arrangement.

If disputes arise that would be within the jurisdictions of the court, then the court can respond. So this business of continuing authority is very familiar and it's a classic derivative of equitable jurisdiction which is where Rule 23 comes from.

Q. Are you aware that Professors Krampton and Coniac in their report, Objectors' Exhibit 62, have made some allegations or based their opinion on certain allegations of conflict of interest in the past by Gene Locks, one of the class counsel here?

A. I realize references have been made to that.

Q. What do you understand those conflicts to be, the alleged conflicts to be?

A. As I understand them, one arose in the court in Richmond where Mr. Locks, being trustee of a fund for payment, I think it was of Dalcon Shield claimants had disagreement concerning the question of how the money should be invested. That led to a dispute with the judge, without trying to rehearse that matter, I don't see that that was a question of legal ethics as such.

There was no claim I know of any dishonesty on the part of Mr. Locks. So there wouldn't be any implication so [Tr. 76] far as his role as a lawyer. And therefore, that matter if it had significance at all, had to do with a dispute as to exactly how a trustee's responsibilities ought to be carried out. And, as far as I can see, as I understand it, Mr. Locks certainly had a reasonable position and a sincere one in his handling of that.

The second one has to do with imputed disqualification to his firm by reason of the fact that the fact employed a person who had formerly been a lawyer with the Government and an objection was made that because that lawyer had worked on asbestos problems

while in the Government, that was a reason for disqualifying Mr. Locks' firm.

That conclusion might have been right under the law as it stood at the time. I point out that as I understand the facts of that case, the Rules of Professional Conduct, and I might the rules governing former Government lawyers now propounded in the code [sic] of Federal Regulations, according to those there would not have been even a nominal conflict and therefore no basis for a vicarious attribution of conflict.

So the Court may have been right. I don't want to go into that, but the point is, that the kind of conduct in question was vicarious attributed conflict to some other lawyer according to a rule I think has been now superseded, if I understand the situation.

[Tr. 77] And finally I understand that the last of the events was some criticism by a judge of Mr. Locks' raising a question in a bankruptcy case as to whether there should be separate representation for a futures class in that limited fund situation. And I didn't understand frankly why that wasn't an appropriate suggestion for Mr. Locks. Apparently maybe the Court thought Mr. Locks was suggesting that he, Mr. Locks, ought to take on that representation too, but in any event, it seems to me that isn't what he was suggesting, as I understand it.

So I do not think any of those cases, as I understand them, and I don't pretend to have gone back through all the transcripts and everything, raise any question as to his competency, his diligence or his trustworthiness or integrity.

And I have to say, these days it can often happen that a lawyer will get cross-wise with the Court, and I know many honorable lawyers who have gotten in that situation because they thought they were doing the right thing and you'd have to know exactly what the facts were before you could draw any conclusion as to how it would effect fitness for some further matter.

Q. Professor, in the report of Professors Krampton and Coniac, in Paragraph — on Page 35, 60 — I can't read it on mine, 62, can you turn to Paragraph 62 —

A. Yes, ma'am.

[Tr. 78] Q. On page 35, please?

And would you read the first sentence of that paragraph into the record?

A. "Although the broad standard of appearance of impropriety stated in Canon 9 of the AMA Model Code of Professional Responsibility is muted in the ABA Model Rules, appearances have a special importance in a proceeding of the dimension and character of this case."

Q. Do you agree or disagree with that statement?

A. I disagree with it. As to the recital, although they are muted, the appearance of propriety — of impropriety was deliberately abolished in the model rules.

New Jersey and it's version kept it and they've had trouble ever since, because it's absolutely open-ended. One person's endeavor to handle a difficult situation is in the words of an accuser, an appearance of impropriety, and it just was unmanageable and unpredictable in its application.

So it wasn't muted, it was abolished.

Secondly, I think the question of integrity and fairness is important in a proceeding involving a class suit. I don't think the right way to think about it is in terms of appearances. I think the right way to think about it is in terms of reality.

So I don't know that appearances is a useful way to [Tr. 79] think about anything of this importance.

Q. Do you know Professor Coniac?

A. Oh, yes.

Q. And what is your relationship with her?

A. Well, Susan was a student of mine in law school. She's been a friend and colleague and we did that book together. We talked about each other's papers. I mean, she's commented on papers I've written and vice versa. We are doing a program, a set of materials on continuing legal education — I'm sorry, on professional ethics in law school. We've been trying them out with lawyers, so they work both ways, and she's a fine person, and very intelligent, and I sometimes disagree with her.

Q. What about Professor Krampton, do you know him?

A. I've known Roger since 1962 or thereabouts. A long time, 30 years. He's a very fine person and very conscientious and I have a high regard for him. He's now a co-author of a case book. And I often disagree with him.

Q. What about Professor Coffey?

A. I've known Jack about ten years, something like that. I don't know that I knew him before the AIL Corporate Government's project. I observed and appreciated his work there. He's very well recognized in the corporate law field. He's written a lot. I've referred to it earlier in my testimony.

[Tr. 80] I do not think he knows very much about asbestos cases.

Q. Do you agree or disagree with the views of Professors Coniac, Krampton and Coffey with respect to conflict of interest and collusion in this case?

A. Yes, I do not think there's a conflict of interest, and I don't think there's any indication of collusion.

Q. So you're — I think I asked the question agree or disagree. So is your answer —

A. I disagree insofar as they suggest, as I think they do suggest, that there was a conflict of interest and they suggested that there was an appearance of collusion. I don't think there was any appearance of collusion and I don't think, as far as I've seen there was any collusion.

Q. In your view, is this disagreement that you have with these Professors based on the facts, the context, the law or what?

A. Well, I think it's some elements of both. That is, for example, on — I think certainly on the facts. What you understand to be the background, and so on, they recite a lot of things here that I think are incomplete, let's say. And I think on some aspects of the law, the part that we've just talked about on the continued significance of "appearance of impropriety". I think that the way it's stated here is just wrong.

* * * *

TESTIMONY OF ROBERT GEORGINE

* * * *

[Tr. 4] the fact that folks in the room back here want to hear.

And so please try to keep your voice up and close to the microphone.

Your name is Robert Georgine, G-E-O-R-G-I-N-E?

A. That's right.

Q. And where do you live, sir?

A. I live in Silver Spring, Maryland.

Q. Are you the same Robert Georgine who's listed now as lead class representative in this case, that brings us here in Philadelphia?

A. Yes, I am.

Q. Where are you employed?

A. Employed by the Building Construction Trades, Department of the AFL-CIO.

THE COURT: Can I have your voice up a little bit, sir?

THE WITNESS: In Washington, D.C.

THE COURT: You have to keep your voice up a little bit. You have to be more than conversational, unfortunately.

THE WITNESS: I'll try.

THE COURT: Do your best.

THE WITNESS: Okay.

MR. MOTLEY: If I could push this back, with your Honor's permission, I found sometimes the further I get from a witness, the more they feel like they have to speak to me

* * * *

[Tr. 18] A. — to hang our lower ceilings.

Q. How would you push through it?

A. You'd push through with a piece of pencil rod, and if you couldn't get it through that way, with a hammer or something like that.

Q. In the course of these activities that you have described, was there any dust created from the use of these fireproofing products?

A. Yes, there was a great deal of dust. In the application there was a great deal of dust, and we were always in the area. And then when you'd go back trying to put in hangers and put the other finish work that had to be done after, you'd have the same problem.

Q. Were you personally exposed to that dust?

A. Yes.

Q. Did you breathe that dust?

A. Yes.

Q. Do you recall — and I don't want you to go through a long list of names, but do you recall the names of any of the manufacturers or the brand names?

A. Well, they were all the Gypsum companies that supplied materials to U.S. Gypsum, Gold Bond, those kinds of companies.

Q. Were you exposed to those products, sir?

A. Yes.

* * * *

[Tr. 51] MR. MOTLEY: Yes, I was going to ask him if he made the objection if there's a jury sitting over there.

BY MR. MOTLEY:

Q. Are you — do you have any concerns about your own asbestos exposure, sir?

A. Well, yes, you always have concerns.

Q. Why did you — when you settled — you said you settled your claim, did you receive any cash?

A. No, I did not.

Q. Why did you settle your case if you did not receive any cash?

A. Because —

Q. What did you get in exchange for settlement of your claim?

A. Well, I got the whole system. I got this whole system that has been developed here. I got peace of mind. I got the knowledge

that if anything does go wrong, I have a right to file a claim and that it will be honored.

Q. In your evaluation of the rights that you have if you get sick later, what factors did you consider? What do you understand your rights to be if you get breathing impairment or cancer, sir?

A. If there's any impairment on me physically, related to asbestos, that I have the right to file a claim. And that claim will be processed as all other claims are processed.

[Tr. 52] Q. Mr. Georgine, have you in the past presented your views about who should be compensated from —

A. Yes.

Q. — asbestos disease to any federal agencies?

A. Yes, I have.

Q. In writing?

A. I'm sure in writing. I'm not absolutely sure, but I think so, yes, in writing and orally.

Q. And what are your views in that regard, sir, that you have expressed in the past before you became —

A. Well my views are that those that are hurt the most ought to be taken care of first. They ought to have a higher priority.

Those that are in danger of dying ought to be taken care of first. Those that are very sick ought to be taken care of first. I think there ought to be some priority established.

And those that are in danger at all and have no impairment, in my view, would get taken care of as they get to them, or should be. I mean, that's the way I think it should — that's the order that I think should take place.

* * * *

CROSS EXAMINATION

[Tr. 94] A. Yes, pretty much.

Q. Mr. Georgine, what — do you believe that people that have asbestosis and are found to have breathing problems by a doctor as a result of the asbestosis, do you believe that the Georgine settlement automatically compensates them?

A. Yes, I do.

Q. If you were to learn that there are people who have pulmonary asbestosis and who have breathing problems as a result of the pulmonary asbestosis, but do not qualify for automatic compensation under this plan, would that lead you to believe that the plan was not fair?

MR. MOTLEY: Again, your Honor, I assume that's a hypothetical.

MR. ROSENBERG: That's correct.

THE WITNESS: I don't believe that's the case.

BY MR. ROSENBERG:

Q. If it turned out to be the case, would you believe that the plan was not fair?

A. Well, you know, if it turned out to be the case, yes, I would think that that's inconsistent with what I believe the plan to be.

Q. Now, who is it that discussed with you the — which asbestos-caused lung cancers get paid, and which asbestosis cases get paid? Who gave you the background to understand how that works in the Georgine system?

[Tr. 95] A. Well, I think it pretty much spells it out in the plan in a general way. But let me go one step further. There is a provision in the plan that provides for a panel of doctors that any individual making a claim through the process, if they're not satisfied with the result of that claim, that they can make application to this panel of doctors for these five doctors to decide whether or not they qualify.

Q. And then they get it or they may not, isn't that right?

A. Well, I think that's — yeah, you do that in life care, don't you? I mean you present your case and you either qualify or you don't qualify —

Q. Well, not —

A. — I don't see anything different there than oyu [sic] do in anything else?

Q. Well, there is a substantial difference, I don't intend to argue with you, but there is a substantial difference which we will point

out to the Court later on. You're not the witness who we're going to do that with.

A. Okay.

MR. MOTLEY: Excuse me, your Honor. I respect greatly my fiend [sic], colleague's ability and talents, and I'm sure he'll make that same statement in closing argument, but I'd move that what he just commented to the witness be stricken from the record.

* * * *

[Tr. 115] "Answer: I think it's around 90. I don't know exactly.

"Question: To your knowledge, were those unions contacted before the AFL-CIO took the position that this was a fair settlement?"

And the answer was, "Each one of them, I don't know. I don't have any knowledge about that."

As you sit here today, Mr. Georgine, do you have any knowledge about whether each of the 90 affiliated unions in the AFL-CIO were contacted about whether they thought this was a fair settlement?

A. No.

Q. Mr. Georgine, you've indicated that you've had asbestos exposure; isn't that right?

A. That's right.

Q. And you've indicated that you've actually been checked to determine whether you have asbestos disease; isn't that correct?

A. That's right.

Q. And as we sit here today, it is true that you have no asbestos disease as far as you know; isn't that correct?

A. As far as I know, I do not.

Q. And as we sit here today, you are not seeking money from any of these companies that you have sued in this case; isn't that right?

[Tr. 116] A. That's true.

Q. And at the time the lawsuit was filed — at the time you became class representative, you were not seeking money from them; is that correct?

A. That's true.

Q. Now, were you aware that there were certain unions — that there were unions that were targeted for notice in this case by the people who were charged with the job of implementing the notice; were you aware of that?

A. I don't know what that means. What do you mean?

Q. Well, were you aware that one of the plans for letting people know about this settlement, one of the plans was to contact directly the members of the affiliated unions of the AFL-CIO; were you aware of that?

A. That's right, yes, I do know about that.

Q. You knew an effort had been made in that regard to contact those members and give them notice; isn't that right?

A. That's right, yes.

Q. Now, you would think, wouldn't you, Mr. Georgine, if the unions, the individual unions endorsed this deal and thought it was fair that they would want their members to have full and complete information about the terms of the settlement; namely they'd want them to have the notice packet that was approved by the Court; wouldn't you think that?

* * * *

[Tr. 120] MR. ROSENBERG: I'm going to back up, your Honor.

MR. ALDOCK: Your Honor, could I make one further objection? I think it's objectionable to show him Exhibit 3 without Exhibit 2 because Exhibit 2 has to do with what the unions did with respect to the notice and this is misleading.

THE COURT: Yes. I think Mr. Rosenberg is going to take a different approach, I don't know.

MR. ROSENBERG: Yeah. I don't intend to mislead Mr. Georgine at all.

BY MR. ROSENBERG:

Q. Let me back up a little bit and just ask you a couple of questions about notice itself.

I take it you saw the advertisements on television about the settlement when it was called the Carlough settlement; is that right?

A. Yeah, I saw one.

Q. You're aware of it?

A. Mm-hmm.

Q. Did you dial the 800 number that was there to get the packet of materials, or did somebody provide it for you?

A. No, I didn't dial the 800 number. And I saw the materials, yes.

Q. Did you ever see the packet of materials that —

[Tr. 121] THE COURT: Mr. Georgine, could you take your hand away from your mouth?

THE WITNESS: I'm sorry, I'm sorry, your Honor.

THE COURT: We need to get everything you have to say right in that microphone.

BY MR. ROSENBERG:

Q. Did you ever see a packet of materials that were being provided to give notice to people about this settlement?

A. Yes, I did.

Q. And do you understand that packet of materials that you saw are the same packet of materials that the people who were implementing notice were trying to get to various union members; do you understand that to be the case?

A. That's my understanding.

Q. Now, do you know how many unions cooperated in the notice effort so that their members could get individual packets? Do you know how many?

MR. MOTLEY: I object to the assertion, your Honor, which is misleading that the only cooperation was the mailing of the entire packages, that there were other aspects of it that —

MR. ROSENBERG: Well, I know that, except that we've already had predicate questions establishing that if the unions felt that it was fair, that it was good, that they would want to make sure their membership got the full notice packets in order to make a judgment.

[Tr. 122] THE COURT: That's not what this witness said.

MR. ROSENBERG: I thought that —

THE COURT: He said I don't know about notice packages, but they ought to have accurate information. That's what he said. But you may ask other questions in this area.

MR. ROSENBERG: Thank you.

BY MR. ROSENBERG:

Q. Mr. Georgine, did you actually open the envelope and look at the notice materials yourself?

A. Yes, I did.

Q. In your opinion, did they provide a complete and accurate description of what union members ought to know about the settlement before making a judgment on it?

MR. ALDOCK: I object, your Honor. That's a legal — the Court has passed on that already —

MR. ROSENBERG: I asked about his opinion whether this is good notice for his members.

MR. ALDOCK: (Inaudible)

THE COURT: I don't view the question as requesting a legal opinion. The question follows up on the question that I just recalled for the record, that he thought the union members ought to get accurate information, so the objection is overruled.

[Tr. 123] THE WITNESS: What I saw, I thought the information was accurate. I thought that it was complete. I — as a union member. I looked through it. I thought that it was pretty extensive.

BY MR. ROSENBERG:

Q. And did you think that it had sufficient information in it so that a person who read it could make an informed judgment about whether he wanted to be in the settlement? Would you think that's the case?

A. Yeah, I think that there was enough there for a person to make an informed judgment.

Q. Now, were you aware that unions throughout the AFL-CIO were requested to either mail those notice packets to their

membership or provide mailing lists so that they could be mailed to the membership; are you aware of that?

A. Am I aware that what? Specifically what are you asking me?

Q. That your members, the member unions of AFL-CIO were requested to cooperate in the effort to distribute those notice packets to their members.

A. Yes, I'm aware of that.

Q. And are you aware of the fact that they were asked for mailing lists so that they could be mailed to those people? Are you aware of that?

A. Well, I assumed that took place. I didn't follow it to every — you know, all the way through the process.

* * * *

REDIRECT EXAMINATION

* * * *

[Tr. 165] Q. You under —

THE COURT: I thought you finished the question?

MR. MOTLEY: Well, I — I don't think I — because I was about to ask him in exchange for something and what was that something he understood he received in exchange for the —

THE COURT: I thought you just wanted a yes or no answer and then ask him another question. You have to ask it all over. again.

I'll let him answer this question yes or no. Yes, and did you know if you had a claim you were giving it up for zero. If this — you had a claim?

THE WITNESS: Yes. The answer is yes.

MR. MOTLEY: Okay. Thank you, your Honor.

THE COURT: And that's a question by the Court is subject to the objection Mr. Rosenberg made. Go ahead.

BY MR. MOTLEY:

Q. Did you consider whatever benefits might be allowed to you in the Georgine system in making that decision? Did you personally?

A. Yes.

Q. And what considerations are those?

A. Well, the considerations are that I — I've not precluded myself from coming back, if I develop a cancer or a cancer- [Tr. 166] related — asbestos-related cancer, that I have the opportunity to come back. I have — that gives me a certain amount of peace of mind that I'm covered in the eventuality that I do contact a disease that is asbestos-related.

Q. Sir, I ask — this if [sic] the final question I'm going to ask you.

You were asked a series of questions about — and I want to make sure the record's not confused here.

There was a meeting in Palm Springs. now, [sic] tell us again so the record is clear, what organization was it that met in Palm Springs, California?

A. Building and Construction Trades Department of the AFL-CIO, had it's quarter — first quarterly meeting of the governing board of general presidents.

Q. And you had referred earlier to meetings that took place — that meeting in Palm Springs was in January of this year?

A. That's right, January 17th.

Q. But you referred to earlier meetings and communications throughout the year of 1993, correct?

A. I did.

* * * *

[Tr. 170] Q. Mr. Georgine, you realize that there are lung cancers that are alleged to be asbestos caused that may be nonqualifying under this plan, do you realize that?

MR. ALDOCK: Objection. Beyond the scope and repetitious for other things —

THE COURT: Sustained for both reasons.

BY MR. ROSENBERG:

Q. All right. Now, you were asked by Mr. Motley what you got in return for what you gave up, isn't that right?

A. That's right.

Q. Well let's go over exactly what you gave up. You gave up as you see it, your right to seek money damages from CCR today, is that right?

A. That's right.

Q. But Mr. Georgine, you've been represented by Mr. Motley in this case. Has he indicated to you that you have a current right to seek money damages from CCR —

A. Well —

Q. — because of what asbestos has done to you?

A. — I don't believe I have a current right to seek damages —

Q. That's correct.

A. — from CCR.

Q. And neither has —

A. Only because — only because I'm not impaired, and I have [Tr. 171] no damage that I know of that's caused by asbestos. Therefore, I don't feel that I would have any claim to any —

Q. And no lawyer in this case has ever advised you that you do, did they? That you have a current claim for money damages as a result of being exposed to asbestos?

A. No.

Q. Right. So what you gave up is your right not to file a claim that you couldn't file anyway, correct?

MR. MOTLEY: I object to that, your Honor. It's his personal philosophy.

THE COURT: Sustained.

MR. MOTLEY: He's not studied the law of whether he can file a claim or not.

BY MR. ROSENBERG:

Q. You hail from the State of Maryland, is that correct?

A. That's right.

Q. And you indicated that — as Mr. Motley asked you the thing of value that you thought you were getting, is that if you ever had

cancer — well, first of all, have you ever had a nonqualifying disease and then got cancer, that you would have the opportunity to come back with CCR's, is that right? Was that one of the things that you think is a benefit, a matter of value that you're getting in this case?

* * * *

TESTIMONY OF MICHAEL ROONEY

* * * *

[Tr. 175] began, please?

A. Beginning in 1980, I assumed responsibility for the handling of asbestos related claims. And in 1981, the responsibility for supervising asbestos related claims.

Q. What responsibilities did you assume when you became the vice president for claims at the CCR?

A. I assume responsibility for the supervision of settlement of asbestos related claims on a nationwide basis.

Q. Did those responsibilities change when you became the chief operating officer?

A. Yes. In addition to responsibility for the claims department, I assume responsibility for the other CCR operating departments.

Q. Did you succeed anyone as COO, or is that a newly created position?

A. No, that was a newly created position.

Q. Who do you report to at the center?

A. I report to Mr. Fitzpatrick, the chief executive officer and to the CCR board of directors.

Q. Are you a lawyer, Mr. Rooney?

A. No, I'm not. Just someone surrounded by lawyers.

Q. I'm going to ask you now a series of questions about the negotiations that resulted in the proposed class action settlement.

Did you actively participate in those negotiations?

[Tr. 176] A. Yes, I did.

Q. Who were the principal negotiations for the CCR defendants?

A. Yourself, your partner, Mr. Aldock, and also your partners, Mrs. Geise (ph) and Mr. Geers (ph), although they're involved with substantially the medical criteria.

Q. And who were the principal negotiators for the class of claimants?

A. Mr. Motley, Mr. Locks, Mr. Rice and they were joined at various times by additional colleagues.

Q. Did you know Locks, Motley or Rice before these negotiations began?

A. Not really. I had met Mr. Locks in 1980, during my early days of involvement handling asbestos claims. And I met Mr. Rice and Mr. Motley on one or two occasions, after I joined the CCR. But I certainly knew all three by reputation.

Q. And what was that reputation?

A. Well I think it would be fair to state that all three are leaders of the asbestos plaintiffs' bar, who have been involved in the litigation for a long time.

Mr. Motley and Mr. Locks have also been involved as co-counsel for the plaintiffs' committee on MDL. Both law firms have been involved for a number of years litigating cases and settling cases with the CCR.

Q. When did your participation in the negotiations that [Tr. 177] resulted in this settlement begin?

A. Some time in February or March of 1992.

Q. How would you describe the status of negotiations at the time that involvement began?

A. Well, I think that based on the previous few years of global settlement negotiations, there were some basic conceptual agreements that were reached, such as the concept of deferral of unimpaired cases, although I think it's fair to say that there was no agreement on a line for the impairment criteria, if you will.

I think it was agreed that the negotiations were viewed in a way that the CCR companies were not a limited fund. I thin [sic] the parties were looking for the development of an administrative system that minimized transaction costs.

And I think probably the other significant issue would be the concept that the CCR historic average — averages would be used as a bases for the negotiation.

Q. Did Locks, Motley and Rice participate actively in the entire negotiations during the entire time, from February through January 1993?

A. Mr. Locks participated in negotiations during that entire time period. Mr. Motley and Mr. Rice left the negotiations for several months.

Q. Why was that?

[Tr. 178] A. They were busy trying the consolidated case in Baltimore from probably — I don't know, May through July.

Q. Did they re-enter the negotiations at the end of the Maryland trial?

A. Yes, they did.

Q. Did you meet often with Motley, Locks and Rice?

A. We met very often. Typically at least weekly. There were several occasions where it was more than once a week. And there were numerous conference calls.

Q. Where did you meet generally?

A. Usually we met in Philadelphia or Washington, perhaps Charleston. Occasionally other locations.

Q. Did the CCR decide at some point in these negotiations to share confidential claims data with Locks, Motley and Rice?

A. Yes, we did.

Q. Had the CCR defendants ever before shared such data with any plaintiffs' counsel?

A. No.

Q. I'm going to refer you and the Court, if I may, to Settling Parties Exhibit 500 and Settling Parties Exhibit 501. Both of these exhibits are letters under Shea and Gardner letterhead from John Aldock, the first addressed to Mr. Gene Locks, and the second to Mr. Ron Motley.

Can you identify each of these documents for the Court?

A. Yes, I can. These are basically letters that state, "In

* * * *

[Tr. 200] Q. I'll ask you turn back now to SP-300, the stipulation itself, and I'd like to refer you to the table to the contents beginning at little "i."

(Pause in proceedings.)

Q. How long is that table of contents, Mr. Rooney?

A. Almost five pages.

Q. Would you look that over and identify for the Court any sections or subsections of this agreement that would not be subject of extensive negotiation?

A. I don't recall any sections that didn't include substantial negotiation, but I can look through the list in its entirety if you'd like.

Q. Review it briefly, and if you can, I'd just like some sense from you as to the extent of the negotiations and the characterization of the negotiations with respect to the provisions that are reviewed there in the table of contents?

A. These were long difficult frustrating and very complex negotiations resulting in this 100-page stipulation of settlement. I don't recall any specific provision in here that would be described otherwise.

Q. Before turning to the terms of the class action settlement itself, I'd like to ask you a few questions about the so-called inventory settlement of present claims that the CCR defendants negotiated with Greitzer and Locks, with Ness, Motley and with the different affiliated law firms with Ness, [Tr. 201] Motley in Georgia, Illinois and West Virginia.

Would you describe to the Court what you mean by the term inventory settlement?

A. An inventory settlement is one in which we settled all or substantially all of the pending cases with a given law firm, and quite typically would include the settlement of cases that are in the particular plaintiff's attorney's office in the pipeline, if you will, that are basically cases ready to be filed, cases where there has been a medical work up and some indication of the defendants that will be brought into that case.

THE COURT: Would or would not include?

THE WITNESS: Would include some of those cases, your Honor.

BY MR. HANLON:

Q. At some point after the negotiations that resulted and the proposed settlement began, did Locks, Motley or Rice ever ask you about the CCR's intentions with respect to the claims already pending against the CCR's defendants?

A. At many different points in time they did.

Q. What did they ask you?

A. They were concerned that the negotiation of a settlement that dealt with future cases not be used in any way to — by the CCR to avoid or delay the settlement of pending cases.

Q. And how did you respond to that concern?

[Tr. 202] A. Well, we had for some time in the global-negotiations that had been previously described, we had been looking for some rational way of dealing with the entire asbestos problem, both pending cases and futures.

And we indicated to them that once we believed that there was some rational way of dealing with the futures, that we were prepared to address the settlement of pending cases.

Q. Did the CCR later decide at some point after these negotiations began to attempt to negotiate inventory settlements without seeking a commitment from the settling counsel to support the adoption of a pleural registry?

A. Yes, we did.

Q. When did the CCR make that decision?

A. Once it was probable to us that the negotiations would be successfully concluded for class action settlement, we began to negotiate inventory settlements without a pleural registry.

Q. When did the CCR come to believe that the class action settlement negotiations were probable or likely to result in a class action settlement?

A. Some time in May or June of 1992.

Q. And what was that belief based on?

A. That was based on the progress at that point in time in the negotiations with Mr. Locks. We basically had developed a substantially detailed draft of a class action settlement, [Tr. 203]

and it was our belief that the negotiations were likely to result in an agreement.

Q. Now, at what point in time did the CCR begin active negotiations on an inventory settlement of Greitzer and Locks' present cases?

A. Approximately June of 1992.

Q. And did the CCR defendants later attempt to negotiate settlement on an inventory basis of certain claims represented by the firm of Ness, Motley?

A. Yes, we did.

Q. And when did those negotiations begin?

A. Some time in late September or early October of 1992.

Q. Was the CCR also attempting to negotiate inventory settlements with other counsel around this time?

A. Yes, we were negotiating with a number of other firms.

Q. And did these negotiations with class counsel with law firms affiliated with class counsel or with other counsel, result in any inventory settlements either shortly before or after the filing of the proposed class action settlement on January 15th, 1993?

A. Yes, they did.

Q. Could you briefly summarize those inventory settlements for the Court, please?

A. The — we reached a settlement with Mr. Locks for approximately 4,000 claims primarily in four states, [Tr. 204] Pennsylvania, New Jersey, New York and Kentucky. We reached an agreement with Ness, Motley with respect to their firm's cases in South Carolina for approximately 450 cases. We reached agreements to settle approximately 10,000 cases with Ness, Motley affiliates primarily in the States of West Virginia, Illinois and Georgia.

And in addition to that, we negotiated settlements of approximately I think somewhere between nine and 10,000 additional cases with eight or ten other law firms.

Q. Would you describe to the Court what you mean by the term Ness, Motley affiliates?

A. Ness, Motley has arrangements, if you will, with various firms throughout the country where they, as I understand it, at least have some agreement with respect to Ness, Motley trying cases in various jurisdictions throughout the country.

Q. Do you have some sense of how many affiliated Ness, Motley firms there are?

A. I really don't know what the total number are. It seems to — it changes daily but it's substantial. It's well over 50 law firms.

Q. How did the CCR negotiate the settlement amounts agreed to in each of these inventory settlement agreements?

A. Primarily we used the historic settlement averages as the basis for negotiations with appropriate adjustments based on factual differences between the historic cases and the [Tr. 205] inventory cases that were being negotiated.

Q. What sort of differences are you referring to?

A. Typically we would find that there were differences with respect to occupation or job site. In some situations differences in the percentages or make-up of the medical.

Q. In the case of the firms that were affiliated with Ness, Motley, were the relevant historical averages, the CCR's averages with Ness, Motley or with each of the settling counsel?

A. With each of the settling counsel.

Q. The affiliated counsel themselves?

A. Yes.

Q. Were the settlement amounts payable by the CCR defendants under these inventory agreements generally payable up front?

A. No, they were not.

Q. How were they payable?

A. They're payable over a number of years.

Q. Let me ask you to turn now, Mr. Rooney, to the three exhibits marked SP-302A, 302B and 302C.

(Pause in proceedings.)

Q. I'd like you to turn first to 302A which contains three settlement agreements between the CCR and Ness, Motley

regarding claimants in the State of South Carolina. The first of these agreements is dated January 14th, 1993 and the next two agreements which purport to supersede that January [Tr. 206] agreement are dated June 11th, 1993.

Can you identify these documents?

A. Yes. These are the settlement documents which confirm the settlement of Ness, Motley cases in South Carolina.

Q. Did you negotiate each of these documents with Ness, Motley in the — with Ness, Motley?

A. Yes, we did.

THE COURT: Excuse me. Is that only in A or is that all three of those?

MR. HANLON: I was going to turn to B right now, your Honor.

THE COURT: The testimony was about 302A?

MR. HANLON: With respect to 302A. And the three agreements regarding the South Carolina claimants.

BY MR. HANLON:

Q. Let's turn now to 302B, Mr. Rooney. 302B contains a number of similar settlement agreements. They purport to be between the CCR and a number of different counsel in the States of Georgia, Illinois and West Virginia. Again, they're dated different times. Some dated in January of '93 and in some cases additional superseding agreements dated in June of 1993.

Can you identify ea[illegible]of these agreements for the Court?

A. These — yes. These are the settlement agreements and [Tr. 207] the superseding agreements with each of the Ness, Motley affiliates in those jurisdictions.

Q. Did you execute each of these agreements for the CCR defendants?

A. Yes.

Q. I'd like you to turn now to the group of documents contained at 302C. These documents appear to be letters from the law firm of Greitzer and Locks to the CCR regarding various inventory settlements in different jurisdictions.

Can you identify each of these letters for the Court, please?

A. Yes. Each of these letters either from Mr. Locks or one of his partners are directed to Mr. Geers in the CCR confirming the settlement of cases in the states where they had cases, including Kentucky, Pennsylvania, New Jersey and New York.

Q. Did any of the inventory settlements referred to in the settlement agreements in 302A or 302B or referred to by the documents from Greitzer and Locks to the CCR defendants in 302C? Did any of those inventory agreements include any unfiled claims against the CCR defendants, claims that were unfiled at the time the agreements were negotiated?

A. Yes. I'm sure that there were some unfiled claims in those settlements.

Q. Was there anything unusual about the inclusion of unfiled [Tr. 208] cases in those inventory group settlements?

A. No. As I've described, it was — it's not unusual at all for an inventory settlement to include cases that a lawyer has that are not yet filed but cases that are ready to be filed, if you will.

Q. Do you know how many unfiled claims were included in these various inventory settlements?

A. I don't know the exact number, but it's a relatively small percentage of the cases.

Q. After you reached an agreement as to the terms of one of these inventory settlements and the numbers of the inventory claims to be settled, did you later agree to add any additional unfiled claims with respect to any of these agreements?

A. No, I don't believe so.

Q. Now, when the CCR began negotiating these inventory settlements with Locks, with the Ness, Motley firm and with the different Ness, Motley affiliate firms in the period from June through November, 1992, had any agreement yet been reached on the precise medical criteria that's contained in the proposed stipulation of settlement?

A. No, it had not.

Q. What was the status of the negotiation on the medical criteria contained in the stipulation for non-malignant claimants during that period from June through November, [Tr. 209] 1992?

A. There was an agreement reached on the concept of deferral of non-impaired claims or deferral of some claims that would not meet a criteria but the actual criteria had not yet been agreed to.

Q. When you reached agreement first with Greitzer and Locks and then with Ness, Motley, and the dozen or so Ness, Motley affiliate firms in Illinois, Georgia and West Virginia, on each of the inventory settlements agreed to by these firms in the different jurisdictions, were any other commitments obtained from these firms by the CCR with respect to potential future claimants represented by these firms?

A. Yes.

Q. And what were those commitments?

A. We obtained a commitment from the Ness, Motley firm that they would not file cases against CCR members in the future unless they met certain specific disease criteria and agreement from the Greitzer and Locks firm that they would not handle cases unless they met certain mutually agreeable disease criteria.

Q. Did you obtain similar commitments from the Ness, Motley affiliate firms?

A. Yes.

Q. Did you make any commitments to these firms in turn for the commitment regarding future claims?

[Tr. 210] A. Just an agreement to toll the statute of limitations.

Q. I'd like to refer you now to one of the Greitzer and Locks letters in SP-302C. It's one dated October 26th, and it's marked CCR 545 in the lower right-hand corner. It's a copy of a letter from Lee Balefsky, one of Mr. Locks' partners to Kevin Geers.

Can you identify this letter for the Court?

A. It's a letter from Mr. Balefsky dated October 26 to Mr. Geers at the CCR confirming the settlement of 2,602 cases in the State of Pennsylvania.

Q. Did you receive a copy of this letter at or about the time it was sent to Mr. Geers?

A. I'm sure I did, yes.

Q. Now, Mr. Locks had met a prospective client, say, in early October and his claim had not yet been worked up by mid-October, is that a claim that would have been included in the inventory settlement of the Pennsylvania cases?

A. No, I would think not. The negotiation of the settlements in each of these jurisdictions took place, oh, for a period of a few months and the cases that would have been included would have been cut off at a certain point in time, otherwise we'd have a moving target in terms of the cases to be included in any settlement.

Q. Let me turn your attention to the last paragraph of this letter, please.

[Tr. 211] Mr. Balefsky states there, and I quote, "It is further understood that in the future Greitzer and Locks will not handle or process claims against the CCR defendants unless they meet certain mutually agreeable disease criteria."

What was your understanding as to the purpose of that sentence?

A. The purpose was to confirm the commitment with respect to future cases citing the fact that we would use specific disease criteria once it was agreed to.

Q. And again what was that commitment?

A. The commitment to not handle cases in the future unless it met certain criteria.

Q. Did you understand when he specifically meant by his reference to mutually agreeable disease criteria?

A. Yes. We intended to use the criteria that was ultimately negotiated in the class action settlement.

Q. Was that criteria agreed to at the time of this October 26th agreement?

A. No, it was not.

Q. When was that medical criteria contained in the proposed class action settlement actually agreed to?

A. The medical criteria was negotiated continuously, oh, up until probably just a few days prior to the filing of the complaint and the stipulation of settlement in January of

* * * *

[Tr. 219] slow cadence?

THE COURT: I'm not thrilled. Sit down, Mr. Motley.

MR. HANLON: The question I have for Mr. Rooney, your Honor, was whether he had negotiated and executed this agreement on behalf of the CCR defendants?

THE COURT: And he said not all of it, as I recall.

MR. HANLON: He said he had not negotiated all of it, the question was then, had he executed this agreement on behalf of the CCR defendants?

THE COURT: Unless someone forged his name, it's at the end, yes.

BY MR. HANLON:

Q. Would you confirm that's your signature, Mr. Rooney?

A. That is my signature.

Q. Would you turn to the next two agreements in SP-302A, Mr. Rooney.

Are these the two agreements dated June 11th, that purport to supersede the January 14th agreement that you identified earlier for the Court?

A. Yes.

Q. Why did the parties decide in June 1993 to amend the January 14th agreement?

A. Shortly after the January agreement, there was a — an ABA opinion letter, which was published and it was the intent of the parties to further clarify our earlier agreement.

[Tr. 220] Q. Can you describe how these superseding agreements changed the January 14th agreement?

A. Basically they changed the agreement by segregating the understanding with respect to future claims into a separate — a separate agreement. So that Section 5 of the earlier agreement is addressed in a separate agreement, in the June version.

Q. Did the superseding agreement carry forth the will not file language that you referred to in Paragraph 5 of the earlier agreement?

A. No, it did not. It changed the will not file to will recommend an ADR mechanism with respect to those cases that don't meet specific disease criteria.

Q. In your view, did that change — change the nature of the commitment made by Ness, Motley with respect to future claimants represented by that firm?

A. No, it did not. The — we always viewed both versions as a commitment, a good faith commitment by those law firms with respect to future cases. I had no objection with respect to changing the language after the ABA opinion letter, because in my experience in litigation over some 14 years, rarely does a client reject advice of counsel, so I didn't view the will recommend as being significantly different than the will not file.

Q. Mr. Rooney, in your deposition Mr. Baron asked you at

* * * *

[Tr. 246] couldn't have been offered, your Honor. He asked an impossibility.

THE COURT: I don't think that's grounds for an objection. Overruled. If that's the question, it may be a non sequitur, but that's — if you want to ask —

BY MR. BARON:

Q. Was it ever reported back to you that Mr. — well, by this time that you were negotiating with Mr. Locks, and that was into December of 1992 on his present inventories, was it not?

A. I don't recall the specific time frame of the negotiations, but

...

Q. I believe the last agreement that you entered into was the New York agreement which you entered into in December, if that refreshes —

A. Sounds about right.

Q. All right. By December you knew that there was going to be — that there was a strong likelihood that there was going to be a Carlough agreement, did you not?

A. I would say it was more probable than in June.

Q. Okay. Did Mr. Locks in December of 1992 demand that his present pleural cases be handled under the terms of this deal that was going to be filed the next month.

A. In December of 1992, Mr. Locks' present cases were settled.

[Tr. 247] Q. Okay. And non [sic] of them were deferred, were they?

A. No, his present cases were not deferred.

Q. Okay. Now, let's talk about Ness, Motley for a while. You settled about 10,000 cases with Ness, Motley between September and January 14th of 1993.

A. That's correct.

Q. Do you know whether any of those 10,000 cases involved claims for people who had pleural injuries?

A. I'm sure there were such claims in those inventories.

Q. Do you know whether any of the Ness, Motley lawyers demanded deferral for those pleural cases within that 10,000 number group of cases?

A. I'm not aware of any such demand made by Ness, Motley.

Q. And once again were you the person that was supervising the negotiations with Ness, Motley pertaining to the inventory deals?

A. Yes, I was.

Q. Was it ever reported back to you that Ness, Motley was demanding that their own present pleural cases be dealt with under what was going to be the Georgine or Carlough agreement?

MR. MOTLEY: Your Honor, objection. I have an additional ground to Mr. Locks. I know you already passed on Mr. Locks' objection, but I have a slightly different ground in addition to what he said.

* * * *

[Tr. 256] those 14,000 cases?

A. Yes, sir.

Q. Are you requiring two pathologists in the mesothelioma cases?

A. No, I have already said that we weren't.

Q. Are you requiring underlying asbestosis or markers in the lung cancer cases?

A. No, sir.

Q. So the present cases got a better deal than the future cases, didn't they, because they don't have to go through all of that?

A. The present cases got a different deal. I agree with that.

Q. Well, it's an easier deal, isn't it?

A. It's certainly easier in terms if you have to have one diagnosis versus two, I guess you could state it was easier.

Q. Well, for somebody with lung cancer you don't have to have underlying asbestosis, yet you wouldn't qualify under Georgine, so it's a better deal for those people, isn't it?

A. It's easier — it would be easier to be qualified, I guess that's right.

Q. Well, it would be impossible to be qualified automatically under Georgine if you don't have markers, correct?

A. The criteria speaks for itself, but generally I have [Tr. 257] agreed that there is a requirement for some underlying finding in addition to lung cancer, yes.

Q. Mr. Rooney, an individual who had lung cancer, who had a doctor that said it was related to asbestos, but he had no markers would receive zero in terms of the automatic provisions of Georgine, yet if he had been represented by Ness, Motley, in the present inventory deals, he would have gotten historical average for lung cancers, correct?

A. I've already said that the standards with respect to the settlement of present claims are different.

Q. Is that true what I just said?

A. Yes.

THE COURT: I think it would be unfair not to note for the record that the claimant in that situation might get compensation under Georgine if it were approved by going through the claims process and have the dispute resolved. It doesn't mean they're not going to get any money. I just —

MR. BARON: Your Honor, we're going to argue —

THE COURT: — wanted to point that out.

MR. BARON: — that point at the right time, because I don't believe they can meet the requirements even of the special exceptions panel, but that's not what I'm asking him here.

THE COURT: I know, but I think you're constantly asking questions that leave out the other half of the — at

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TESTIMONY OF MICHAEL ROONEY

* * * *

[Tr. 76] BY MR. RICE:

Q. Mr. Rooney, you told us at some point you became reasonably confident and that you then proceeded to negotiate with the Greitzer and Locks firm, resolution of their inventory of cases. Whatever that time was, I want to know what you became reasonably confident of?

A. We became reasonably confident that we would be able to negotiate a class action settlement with respect to future claims.

Q. At the time you developed that reasonable confidence as it related to Mr. Locks, was Ness, Motley at the table, Mr. Motley and myself at the negotiating table at that period of time?

A. No, you were not.

Q. And do you have any personal knowledge as to where we were?

A. I have a lot of personal knowledge. You were in Baltimore trying the consolidated proceeding.

Q. When, if ever, did you develop a comfort — a reasonable comfort level with Mr. Motley and myself on the same type issues you referred to having the comfort level with Mr. Locks in the summer of '92?

[Tr. 77] A. Some time after your re-entry into the negotiations, approximately September of 1992.

Q. Now, I believe the testimony has been that the Ness, Motley, so-called inventory deal was done in November of '92, is that true?

A. The agreements I believe state that they confirm the agreement of principal with respect to certain jurisdictions around November of '92, that's correct.

Q. Mr. Rooney, did Ness, Motley and its affiliates during that period of time have involvement in more than nine or 10,000 cases that were currently filed against the CCR?

A. Certainly.

Q. And can you tell us to the best of your knowledge, the approximate number of the pending cases that CCR had during that period of time that Ness, Motley was involved in, either directly or through its affiliated counsel?

A. Sorry, that period of time being approximately September of '92?

Q. September, October '92?

A. Probably somewhere in between 20 to 25,000.

Q. I want to focus with you on Mr. Baron's comments in an opening statement, not quoting word for word, but basically argued that the — Ness, Motley was forced to enter into some type of arrangement with CCR because they're cases or inventory cases were stayed or trapped in federal court.

* * * *

[Tr. 102] Q. That concept of their being the need — their being clients that didn't accept the recommendation of the client (sic) how did that concept apply to Paragraph 5 in the futures provisions?

A. It's basically the same concept. There would forseeably be rare circumstances where your recommendation would not be accepted, and a client would insist that their case be filed, and it would be filed.

Q. And in both contexts, both the presents under the agreement and the futures, if the client didn't accept the recommendation, could the case be filed and status quo kept?

A. Yes, that's correct.

Q. Now, Mr. Rooney, you told us that at the time the inventory deal with Mr. Locks was done, and subsequently at the time the inventory deal with Ness, Motley was done, that the CCR was reasonably confident that a resolution to part of their asbestos crisis was going to be reached, than an action similar to Georgine to proceed.

Tell us what your understanding is of what would have happened to the cases that were settled under these inventory agreements if in fact a stipulation of settlement had not been reached and had not been finalized subsequent to November of '92?

[Tr. 103] A. Whether or not the stipulation of settlement was ever filed, had no bearing on whether these settlement agreements were in full effect. They were and would have remained in effect no matter what the outcome of the negotiations.

The CCR basically took the risk at some point in time based on their anticipation that or expectation that it was probable that we would be successful in our negotiations.

Q. Mr. Rooney, I want to focus your attention a little bit more to the particular cases involved in the Ness, Motley inventory settlement.

Yesterday you told Mr. Hanlon that occupation or occupational mix was one of the many factors that the CCR claims people looked at in dealing with a case and valuing a case and settling a case because it effected the exposure, do you recall those discussions?

A. Yes.

Q. Did that apply also in the so-called inventory deals?

A. Certainly.

Q. Mr. Baron has made reference in a prior hearing before this Court a few weeks ago, that "A large number or large volume of cases of the Sheetmetal Worker Union trade were involved in the Ness, Motley inventory settlements."

Do you recall those comments being made?

A. I've become aware of those comments, yes.

* * * *

DEPOSITION OF ANDREW CHURG

* * * *

[Tr. 49] And then, lastly, there is a long section on how to count exposure and how much exposure. And a lot of this is sort of historic on industrial hygiene, if you will, that I really don't feel qualified to get into, except that clearly, the intent of this, which appears to be reasonable, is that when you take the people we know historically had high exposure or some sort of reasonably high exposure, we know the periods in which these occurred, and we will make some formula which says what this exposure should tally out to.

What this does, I think, is again, to balance the interest of plaintiffs and defendants. It prevents everyone who has nothing to do with asbestos from coming forward and claiming that they have a lung cancer caused by asbestos.

On the other hand, in my opinion, it also favors the plaintiffs, because my own belief, on a scientific basis, is that the only association of asbestos exposure and lung cancer is the association of the specific disease asbestosis, that is, diffuse fibrosis and lung cancer.

[Tr. 50] And my belief from the science is, if you don't have asbestosis, your lung cancer has not been caused by asbestos exposure.

Well, this settlement is more generous than that. It doesn't require asbestosis. It requires some other diseases, which, in fact, occur at lower exposures, and which are considerably more common than asbestosis.

So it is reasonable in the sense that it is scientifically defensible. It is reasonable in the sense that I think it balances everyone's interests.

Q. Doctor, you mentioned your own belief.

Do you have an opinion concerning whether there is a debate in the medical and scientific literature concerning the requirements for attribution of a lung cancer to asbestos exposure?

A. Oh, yes, there is a debate.

Q. And have you yourself had occasion to write on that issue recently?

A. Yes, I have.

* * * *

[Tr. 56] these studies have followed groups of workers. In the study from Hughes and Weill in New Orleans, they followed workers of an asbestos cement plant, and the studies by Sluiss-Kramer, which is from South Africa, they have autopsied lungs from workers at an amosite mine.

They also had exposure data. In other words, they knew how much exposure or what the exposure level was and how long, so they could tell, in an individual case, what the actual exposure was. Fiber burden is simply another way of looking at actual exposure.

And what both these studies concluded was it was not fiber burden that was associated with lung cancer. It was asbestosis specifically.

So that's very good, hard scientific data that says that fiber burden is not informative in this regard, and fiber burden is not what you should be using.

So for those reasons, I don't think that fiber burden is a reasonable approach in determining when to compensate a lung cancer.

Q. Doctor, do you have an opinion concerning what the majority or consensus view is among [Tr. 57] researchers and investigators in the field of asbestos and disease concerning what is required to attribute a lung cancer to asbestos exposure?

A. Well, that's a very difficult question. I think the majority opinion can be viewed thusly.

If you would combine the proposition that you must have asbestosis to attribute a lung cancer or you must have a very high level of exposure to attribute a lung cancer, you would probably have now the vast majority of people in the field.

The notion that any exposure, no matter how low, increases lung cancer is held by a very small minority, and I don't think is scientifically compensable.

Q. Doctor, as an observer and consultative participant in the tort system as it relates to claims for asbestos and disease, do you have an opinion regarding whether this Amended Stipulation of Settlement, if adopted, would represent an improvement over the tort system in the manner in which individuals are determined to be eligible for compensatory payments for asbestos-related disease?

MR. ROSENBERG: Objection.

* * * *

[Tr. 60] BY MR. HOUFF:

Q. Doctor, just by way of further explanation, you indicated, I believe, that you had testified two or three times a year in trials; is that correct?

A. That's right.

Q. Over what period of time has that been true?

A. Oh, I would say, probably the last six or seven years.

Q. Has that been in the United States?

A. Yes.

Q. And approximately how many depositions have you given on an annual basis, on the average, over the last ten years?

A. On an annual basis, I don't know. I have given several hundred depositions. It would sort of be a guess. It probably could vary between 20 and 60 in a given year. 60 would probably be very high.

Q. Now, Doctor, one final question.

What is your understanding of whether persons who have pleural plaques and no evidence of pulmonary function impairment, how they [Tr. 61] would be treated under the Stipulation of Settlement?

A. Well, my understanding is that they would not be eligible, if that was all they had, for any kind of compensation. They would be eligible, if they later developed one of the other conditions that's listed in the Settlement, but if all they have is plaques and nothing else, they wouldn't be eligible.

Q. And how do you view that treatment of persons with pleural plaques without any other impairment?

A. I think that's eminently reasonable. Pleural plaques, without any other evidence of impairment, are simply a blemish. They are something that shows up on your chest x-ray.

A lot of this, obviously, is a legal issue. Are you entitled to compensation for having an ugly chest x-ray?

From a medical point of view, my answer is, why should you be entitled to compensation, when there is nothing wrong with you? Particularly, in a setting in which there are people who have something that clearly is wrong with them caused by asbestos.

[Tr. 62] Q. Doctor, do you have an opinion concerning whether your view that pleural plaques, in and of themselves, constitute, as you call it, a blemish, represents a consensus or majority view among researchers and investigators into asbestos and disease?

A. I think it does.

MR. HOUFF: Doctor, those are all the questions that I have for you at this time. I suspect we are going to want to take a little bit of a break and reorganize here. Maybe you would like to take a break. We will go off the record, and we will come back on either direct by Mr. Locks or cross by Mr. Rosenberg.

THE WITNESS: Do you know that you have no image that I can see at the minute, by the way? I think you are still on document.

MR. HOUFF: Okay. How are we now?

THE WITNESS: That's good.

MR. HOUFF: We are going off the record now.

* * * *

TESTIMONY OF PAUL EPSTEIN

* * * *

[Tr. 24] A. A disease is quite simply a process that changes the way the individual feels or it produces a change in the physiology of the individual or it shortens his life span.

Now, if a person doesn't feel any different, and it doesn't change his physiology and it doesn't shorten his lifespan, I don't call that a disease. I think there has to be something wrong with the individual, in the way he feels or functions.

THE COURT: You're saying the mere presence of an abnormality and nothing more is not a disease.

THE WITNESS: Right. Exactly. And that is very much the type of thing that I was indicating with regard to the sun exposed individual, who has thickening of the skin on the back of his neck. I don't think that's a disease, I think that's an observable change that's due to his occupation. But I don't call that a disease. I don't think anyone else would, either.

BY MR. BEERS:

Q. Asbestosis you do call a disease.

A. Oh, certainly I call asbestosis a disease. That is something that will make the individual feel bad. I can measure the changes, and that might shorten the individual life's span.

Q. But pleural plaques and pleural thickening you do not [Tr. 25] regard as a disease.

A. I don't. And the reason I don't is that pleural plaques or pleural thickening will in the vast majority of the cases cause no symptoms. It will cause no change in physiology, and it will not have any affect on the individual's life span.

THE COURT: Isn't there some change in physiology by the mere presence of the plaques or thickening themselves?

THE WITNESS: Well some —

THE COURT: I mean, the cells are different.

THE WITNESS: — some people think that that happens. I've looked at the literature on that fairly carefully, and in my opinion,

the vast majority of people who have those plaques or pleural thickening will not have a change in their lung physiology.

There are very rare cases where it does occur, but by and large, I don't think that is a common problem.

BY MR. BEERS:

Q. Do pleural changes grow into a disease? Do they transform —

A. No.

Q. — transform into a disease?

A. No. Look there may be individuals who have progressive thickening of the pleura. Under very rare circumstances, that can cause disease, and we would be able to measure that [Tr. 26] ge in physiology. But you don't have a transformation of pleural thickening into disease.

For instance, pleural thickening or pleural plaques don't transform into cancer. It just doesn't happen. Those are two different processes. You don't have an individual who has the same thickness of pleura over a period of 20, 30 years, and suddenly one day they're diseased.

If there is progression of that pleural thickening or pleural plaque formation, it's possible that that individual may become diseased. But then you should be able to pick that up by the standard measures of pulmonary function.

Q. Does the presence of pleural thickening or the presence of pleural plaque act as a predictor of future disease?

A. No, it does not. Again, that's something that has been fairly extensively studied. In my opinion, after reviewing all the literature on this, I don't believe that that is a predictor.

I think an individual could possibly progress, but there is no prediction by looking at an individual's chest x-ray or looking at his pulmonary function tests or doing an examination. You can't predict who is going to change or progress and become diseased later.

* * * *

[Tr. 55] Between 1976, after the Act had been in place for a few years, between '76 and '79, when the exposures in the work place

were clearly much decreased, there's one half-year credit given for one year of exposure.

And after 1979, when — there was really very little exposure in the work place, there is no credit given for that period.

I think that's a reasonable type of decision to come to. I think looking at the exposures from a fiber count standpoint, from a regulation standpoint and from my own knowledge of speaking to large numbers of people who have been exposed to asbestos in the work place, I think that's a reasonable compromise to come to.

Now, in addition to that, the stipulation also says that if the work place can be shown not to have conformed to the Federal Regulations, but there is another adjustment made for that.

Once again, I think these are very reasonable standards to apply to individuals who are applying for compensation.

BY MR. BEERS:

Q. Under this agreement, evidence of exposure alone is not sufficient to make a diagnosis of asbestos related cancer?

A. That's correct. And I agree with that stipulation.

Q. And why?

[Tr. 56] A. For a variety of reasons. First of all, even if the individual were exposed in a major way, we know that most people who are exposed to asbestos do not develop any asbestos related change.

And right at the beginning of my testimony, I mentioned that my understanding of this document was to try to compensate people who were injured by asbestos and not compensate people who were not. Not everyone who's exposed to asbestos is injured.

So I don't think that exposure alone is sufficient to get to the point where an individual should be compensated.

Q. Dr. Epstein, I take it you have diagnosed cancers as asbestos related in your practice that would not meet the criteria that we've been talking about?

A. That's correct, I have.

Q. And how do you square that with your opinion that this is a reasonable agreement?

A. Well, look, I think that as I had mentioned earlier, no agreement with [sic] give you standard criteria for automatic payment in all circumstances that I would agree with. But this stipulation also talks about an exceptional medical panel.

In other words, if I feel that an individual has developed a lung cancer on the basis of his asbestos [Tr. 57] exposure, and he's not automatically compensated, this individual can come back to the exceptional medical panel and say, look, I think I was damaged by the asbestos, and the expert medical panel, the exceptional medical panel will review all of the data that's available, and under appropriate circumstances compensated that individual, even though he doesn't come under the automatic standards for compensation.

I think that's a reasonable compromise. We're talking about a document that is a compromise document, but tries to compensate as many people as is reasonable under the standard provisions and then allows for individuals to come back and apply different criteria under different circumstances.

Q. In conclusion on the subject of lung cancer, can you give us your overall opinion as to the reasonableness of the medical criteria?

A. My overall —

Q. Of lung cancer?

A. — improvement — excuse me.

My overall impression of the lung cancer agreement is that it is fair and reasonable.

Q. Now, let's turn for a moment to pleural changes. This agreement does not provide for compensation for evidence of [Tr. 58] pleural thickening or pleural plaques alone, does it?

A. Correct.

Q. And could you tell me what your opinion is as to the reasonableness of that?

A. Yes, I will. The fact is that in my opinion pleural thickening or pleural plaque formation in and of itself, does disrupt that individual's life in any way. And I think I had mentioned that earlier in my testimony.

I am not trying to compensate — excuse me — not me, but in my opinion, it is not appropriate to compensate someone simply because they have a change in the appearance of their chest x-ray. I don't think that is an appropriate thing to go, and I have said this many times in my prior testimony in the underlying cases.

I think that if the individual is damaged by the exposure to asbestos in a way that has produced the types of abnormalities that I have discussed earlier, then it's appropriate to compensate that individual.

Q. To what extent are your views of the subject of these pleural changes consistent with that in the medical literature?

MR. BARON: Your Honor, I object to that unless there is a foundation laid.

MR. BEERS: All right.

THE COURT: Yes. I'm not aware that the medical [Tr. 59] literature goes into who gets compensated and who doesn't.

MR.BEERS: You're absolutely right. I'll —

THE COURT: So if there —

MR. BEERS: — rephrase it.

THE COURT: — is a foundation, lay it. Objection sustained.

BY MR. BEERS:

Q. Can you tell us whether your views as to the significance of pleural thickening and pleural plaques are shared widely in the medical literature?

MR. BARON: I object again, your Honor, no foundation to medical literature. It's not —

MR. BEERS: If he knows.

MR. BARON: — referring to anything.

THE COURT: Overruled. The witness knows the medical literature. The question is it one seeking medical opinion and information, the objection is overruled.

THE WITNESS: Yes. My reading of the medical literature is that the majority of physicians who are knowledgeable in this area would agree with me.

Now, there are some physicians who feel that pleural changes will affect pulmonary function. There is that opinion out in the medical literature. But in terms of an abnormality that will affect the individual's life, I think that the majority of the medical literature would say the [Tr. 60] same thing that I did just now.

BY MR. BEERS:

Q. Are there other pleural changes that in your opinion can led [sic] to some sort of sickness or can constitute disease or however you want to define that?

A. Yes, there are. There are rare situations in which the pleural thickening is so great that it restricts the movement of the lung. That has a variety of medical names that are not really important here.

The fact is that readily the pleural thickening in and of itself can cause an abnormality of lung function, but that would be picked up by the pulmonary function testing.

Q. Is there a provision in this stipulation for compensation in circumstances of that type?

A. Yes.

Q. How about — can you tell the Court what a pleural effusion is?

A. Yes. A pleural effusion means that there is a fluid that has collected between the two layers of pleura. In other words, there is a fluid that leaks out of the lung or leaks out of the inside of the rib cage, and collects between the rib cage and the lung tissue, pushing the lung tissue out of the way.

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[Tr. 237] BY MR. MOTLEY:

Q. Doctor, I take it — would you characterize yourself as intimately involved in asbestos research?

A. Yes, sir.

Q. And do you attempt to read everything you can that comes out about asbestos?

A. Yes, I do.

Q. Do you find in this day and time, sir, that there are very many scientists who hold the view that asbestos exposure, by itself, standing alone with nothing else, no asbestosis, no bilateral pleural plaques, no heightened asbestos fiber tissue burden, no heightened asbestos body burden, just exposure standing alone, is sufficient to relate a specific lung cancer to asbestos exposure?

A. I would consider that to be an uncommon fringe viewpoint.

Q. Uncommon and what?

A. Fringe viewpoint.

Q. Fringe?

A. Yes, sir.

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[Tr. 4] THE COURT: I don't blame you. I saw Mr. Rosenberg on the street downstairs at 8:30 this morning, so he's had plenty of time to be here.

COUNSEL: Good morning, your Honor.

THE COURT: Good morning.

(Pause in proceedings.)

THE COURT: Mr. Motley, you may proceed.

MR. MOTLEY: Thank you, your Honor.

BY MR. MOTLEY:

Q. Now, Doctor, yesterday — I want to go back where we were, where we left off. You indicated yesterday that you understood from reading the stipulation what the objectors of the settling parties was, correct?

A. Yes, sir.

Q. Now, do you have an opinion based upon your review of the stipulation of settlement whether or not the objectors of the settling parties are accomplished in a way that's medically reasonable in the document, Plaintiffs' Exhibit 300?

A. Yes, sir, I do.

Q. And what is that, sir?

A. I believe that the settlement agreement encompasses most of the diseases that are asbestos-related and that it follows most of the current scientific literature and associating diseases with asbestos exposure and that overall that it was [Tr. 5] a fair agreement and that it is an inclusive agreement and in some ways, according to the thing as expressed in my book, it's even over-inclusive toward the plaintiffs' side.

Q. Would you elaborate on that, if you would, please?

A. Well, in that regard, I mean that there are cases in the settlement agreement that would be included and paid for that if this case — such cases were sent to me in consultation, that I would write back reports saying that I could not say that that case was

related to asbestos exposure to a reasonable degree of medical certainty.

Q. Doctor, in fact, on occasions have I sent you cases to look at from my firm and solicited your opinion — strike the word solicited — elicited your opinion as to whether or not there was a probable causal link between the disease and the asbestos exposure and you have sent me back such a report that in fact there was not such a link?

A. Yes, sir, on more than one —

MR. ROSENBERG: Objection.

MR. MOTLEY: I'll rephrase it.

MR. ROSENBERG: It —

MR. MOTLEY: I'll rephrase it.

MR. ROSENBERG: Your Honor, I object to the —

THE COURT: First of all, it's slightly leading but —

MR. ROSENBERG: Well, aside from the slightly

* * * *

[Tr. 36] concludes was not asbestosis, is on Page 76 of the article.

Q. Doctor, what is your — moving on now to a different subject. What if your opinion regarding the exclusion and the medical fairness of some benign asbestos related conditions such as asbestos as pleural effusions in cases of only pleural plaques without impairment from immediate cash compensation under the settlement agreement?

A. I think that that's a fair compromise that was arrived at in this agreement. I think that patients who have pleural plaques alone are generally as we've referred to previously, nonimpaired clinically.

I think that there are some epidemiologic studies that show some pulmonary function tests that can abnormal in groups of patients with pleural plaques. But in that regard, it's very important to realize that when you're looking at large groups, you can find changes that are statistically significant because you're looking at large numbers. But the changes of the individual may not be clinically significant.

And this is a point that's been brought there many times by Dr. W.K.C. Morgan. And the importance of that is that epidemiologic studies that show mild restriction, mild obstruction, whatever they show, do not necessarily imply that an individual, certainly the majority of individuals would have any clinically significant impairment.

Therefore, I think that it is fair that the system is set up so that these individuals — so that the companies don't have to pay for individuals who are unimpaired with pleural plaques. But nonetheless, these patients have the opportunity to come back into the system, if at some later date they should develop asbestosis, that is, shows clinical impairment. If they should develop pleural disease with clinical impairment, or if they should show up with any asbestos related malignancy at a subsequent time, that would qualify under this document.

And in that regard, the patients do not lose their rights to sue for a clinically significant impairing asbestos related diseases, because of time limitations or statute of limitations in this document.

Q. Doctor, did you examine the latency period requirements for nonmalignant diseases in this agreement?

A. Yes, sir.

Q. Do you have an opinion as to the fairness and reasonableness of such latency requirements?

A. In my opinion, they are overly inclusive about the criteria which I would use. The criteria which I use and refer to in my book for all asbestos related diseases is basically 15 years from initial exposure until the disease is diagnosed.

There are some historical exceptions to that. Individually people can show you cases where individuals have had relatively short latency periods with asbestos, but those were mostly exposures that took place at the turn of the century where the individuals developed diseases and died at say by age 30 of asbestosis. We don't see that any more. In all the cases that I've seen of asbestos related, nonmalignant asbestos related diseases have had latency periods of at least 15 years, so the document

having a latency requirement of 12 years I think is overly inclusive toward the plaintiffs.

Q. Dr. Roggli, yesterday when we were discussing the — your invitation to myself and Mr. Gurard (ph) who represents Pittsburgh-Corning, to submit to you for inclusion in your book, chapters on the various perspectives, plaintiffs' perspective in the — at least that defendant's perspective.

Did you serve in somewhat of an editorial fashion? I mean, did you review what we had written?

A. Yes, I did.

Q. And can you give the Court some idea of how frequently you meet with and consult with lawyers from my office on medical issues related to asbestos? Is it once a year or more frequently, or how would describe it?

A. I'd say it's very frequent, and it's both formal and informal. Formal in terms of reports that are written and specific questions that are asked, and informal occasionally by telephone calls where one of the lawyer's in your firm

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[Tr. 42] pathologists at the Riverside Regional Center in Newport News, Virginia, where because of the shipyards in those areas, those individuals have had considerable experience with asbestos related diseases.

Q. And Dr. Eugene Mark is at Harvard?

A. Yes, sir, at Masters of General Hospital in Boston.

Q. And Dr. Arnold Brody?

A. Dr. Brody is a Ph.d. research scientist who has done extensive work with asbestos related diseases and worked with me in animal studies at the National Institute of Environmental Health Science for almost ten years, and he's now moved to Tulane University.

Q. Keeping in mind and you went through yesterday with the Court, the controversy in the scientific community about whether it's asbestos itself or asbestosis, as a precursor and various spectrums in between that lead to causally connected lung cancer. Keeping that controversy in mind, do you have an opinion based upon a reasonable degree of scientific certainty as to whether or not

the lung cancer criteria contained in Exhibit 300, the stipulation of settlement, is fair and reasonable?

A. Yes, sir, I do.

Q. And what is that opinion, sir?

A. I believe that it is.

Q. And why is that, sir?

[Tr. 43] A. Well, first of all, lung cancers in my view are a dose response relationship to asbestos exposure. So that the —

Q. Explain that dose response for the record. I don't know that anyone has really gotten into that in any detail.

A. That means the higher dose, the more asbestos you're exposed to, the greater is your risk of developing disease. And that the association therefore, epidemiologically will be most clear in those who had the highest exposures, that is those patients who have asbestosis.

Cigarette smoking is obviously a very important co-factor in producing lung cancers, and in regard to cases of lung cancer occurring in nonsmokers, those are extremely uncommon in my experience. I've seen several hundred lung cancers in asbestos exposed individuals, I've only seen four that were nonsmokers that I felt that weren't contributed to asbestos exposure to a degree of medical certainty.

So the vast majority of the cases we're talking about that are going to be covered by this document will be lung cancers that occur in smokers or ex-smokers.

And the Surgeon General's report shows from 1990 that even though your risk of lung cancer goes down after you quit smoking, it never gets back to that of a lifetime nonsmoker even 20 or more years after you discontinue the habit.

So in terms of —

[Tr. 44] THE COURT: Excuse me, what never gets back?

THE WITNESS: Your risk of lung cancer never gets back to that of a nonsmoker. Lifetime nonsmoker.

So we're talking about individuals who have — were exposed to asbestos in this document and who get the disease lung cancer.

The information in the literature by and large indicates that for an individual who is a smoker or an ex-smoker that one needs to have asbestosis, to recognize a lung cancer as being asbestos related.

That there is some suggestion that increased asbestos levels may act as a surrogate, and I think we'll get to that at a later point and talk about that in more detail later, but that there is relatively weak scientific information to use that as a surrogate for exposure — as levels in the lungs as a surrogate for asbestosis in relating a lung cancer case.

And in my own personal view, the only cases of lung cancer that I would relate to asbestos exposure, that do not have asbestosis, would be those that occur in nonsmokers, which as I indicated, is a very rare circumstance.

In that regard, the document — the settlement agreement is overly inclusive by my own criteria in that individuals with pleural plaques alone and sufficient exposure of years in the trade, would qualify for compensation in this document, and there have been many such [Tr. 45] cases that I've seen in consultation in the tort system where I've written a report to the referring attorney, whether or not he was plaintiff or defense, that I said I could not relate such a case to asbestos to a reasonable degree of medical certainty.

So in that regard, I think that the — in fact, there are at least five different ways in this settlement that you can get compensated for lung cancer in an individual who's asbestos exposed.

One, is if you meet the clinical criteria for asbestosis in this document.

Secondly, you don't meet clinical criteria if lung tissue was resected or an autopsy is performed and you meet histologic criteria for asbestosis, then you're compensated.

BY MR. MOTLEY:

Q. You mean by that pathological asbestosis?

A. Yes. Histo — pathologic, pathologic, histologic, I use those terms interchangeable.

Q. How extensive does the document say the pathological asbestosis has to be in order to qualify?

A. It just says it has to be diagnoseable, and that includes the minimal lesion I referred to earlier, which is fibrosis, just around the airways —

Q. So —

A. — not involving extensively the lung substance, and with [Tr. 46] asbestos bodies in histologic sections.

Q. — so a person could go through life without ever having been diagnosed clinically of having asbestos, develop a lung cancer, have a lung resected, find minimal pathological asbestosis and still qualify?

A. Correct.

Q. Go ahead.

A. The third way that you can get compensated for lung cancer, is if the person meets the criteria for nonmalignant asbestos related pleural disease in the document. And such cases as those, who occur in smokers and ex-smokers, in my textbook, I would not be able to say it related to a reasonable degree of medical certainty. So I think that that's overly inclusive toward the plaintiffs.

The fourth way, if you don't meet any of those criteria, is if you have bilateral pleural plaques and sufficient years in the trade as indicated in the document, then you will qualify. And again, that's an area which in my textbook and in my testimony I have not been able to associate in the past to a reasonable degree of medical certainty.

Although, there is a new article in that regard by Dr. Hillerdal which suggests that that's pretty much right on target scientifically, the association with bilateral pleural plaque and lung cancer. And it just does meet probably, the [Tr. 47] minimal criteria that you can use to epidemiologically associate lung cancer with asbestos exposure.

Q. Excuse me, Doctor, I don't mean to interrupt you, but see if Exhibit 1204 —

MR. MOTLEY: And your Honor, I believe you have it in your book too, is the article by Hillerdal to which you just had reference so that the record will be complete.

THE WITNESS: Yes, sir.

BY MR. MOTLEY:

Q. And that's entitled, pleural plaques and risk for bronchial carcinoma, and mesothelioma, a prospective study by Gunnar, G-U-N-N-A-R, Hillerdal, H-I-L-L-E-R-D-A-L, is that correct?

A. Yes, sir.

Q. And by the way, was that — this article severely criticized by a Dr. Dorset Smith in an editorial that followed that?

A. Yes, it was.

Q. Go ahead, what was the fifth way?

A. The fifth way if you don't qualify by any of those criteria, you can still apply to the exceptional medical panel to see if you can demonstrate that there was comparable degrees of exposure to asbestos, and that might be an example for — may be a way, for example, if a patient had a lung cancer and a very high asbestos body or very high fiber count [Tr. 48] that for one reason or another, did not develop pulmonary fibrosis because there is variability from one person to another, as to whether or not they will get scars on the lung.

Then that person could apply to the exceptional panel, and five individuals on that panel, could then evaluate the total evidence available, the history of exposure, the radiographic pulmonary function test available, if they were done.

Pathologic information and asbestos fiber analysis, which include the laboratory who did it, the methods that were done, what they counted, what the results were and what control group they compared it to. And could then assess all that information to decide whether or not the case might still qualify as an asbestos related lung cancer, even though it did not meet the previously four criteria which I mentioned above, I think are overly inclusive toward the plaintiffs anyway.

[Tr. 49] Q. Doctor, do you understand that the exceptional medical panel can request or require additional testing be done?

A. Yes, sir.

(Pause in proceedings.)

MR. MOTLEY: Excuse me one second, your Honor.

(Pause in proceedings.)

BY MR. MOTLEY:

[Tr. 49] Q. Doctor, please turn to Page 324 of your book.

THE COURT: Exhibit number for the record?

MR. MOTLEY: 705, your Honor, I'm sorry.

Q. Do you have that there?

A. Yes, sir.

MR. BARON: 374?

MR. MOTLEY: 324.

MR. BARON: 24. Okay.

BY MR. MOTLEY:

Q. Would you explain that graph for the record, please?

A. Yes, sir. I think I mentioned this yesterday, is that we had studied 143 lung cancers, and divided them into 48 patients who had at least histologic asbestosis. Some of them had — many of them had clinically — clinical asbestosis as well.

Patients who had parietal pleural plaques, but did not have histologic asbestosis and there were 25 in that group, and 70 patients who had lung cancer with some history of asbestos exposure, but neither pleural plaque nor asbestosis.

And we analyzed the lung content for asbestos body and fiber counts in those particular cases, to compare the different groups. And what we found is that the patients with asbestosis, of course, had very high counts that averaged, as I mentioned yesterday, also 40,000 asbestos [Tr. 50] bodies per gram, but do extend down to as low as several hundred asbestos bodies per gram.

So we were interested in what was the 95 percent cutoff level or what is what we call the fifth percentile for asbestosis. So the dashed line in that graph is the fifth percentile for asbestosis, which means that 95 percent of our asbestosis cases fell above that dashed line.

We were interested in seeing how many of the cases of pleural plaques and of other lung cancers, how that related to the asbestosis

values. And what we found was several things, which I think are of interest.

First of all, I'll point out that in the epidemiology in the literature has had mixed results as summarized in Dr. Hillerdal's article, which was what, Exhibit 1204, I believe?

Q. Yes.

A. 1204, that some epidemiologic studies have shown an association between asbestos exposure and lung cancer with pleural plaques alone, and other have failed to show such an association.

And I think that this graph may indicate why. Because if lung cancer is due to asbestos exposure, the amount that you're exposed to, rather than to whether or not you've actually got the disease asbestosis, and that what one needs is levels of fibers or exposure that are equivalent to [Tr. 51] asbestosis to have a demonstrably increased risk of lung cancer. Then half of the patients with pleural plaques in this group would be asbestos related, half would not be asbestos related.

And that difference might be enough to keep any particular statistical study, epidemiologic study from reaching statistical significance, or it would result in some showing statistical significance and others not, because it's a borderline finding.

Dr. Hillerdal's study is in my opinion, the most complete and best controlled study and largest study of pleural plaques alone that has been reported so far. And in fact, Dr. Hillerdal is a world renown expert for studies in parietal pleural plaques. He did his Ph.D. theses on pleural plaque.

And this particular study, he followed several thousand patients for a couple of decades and found that when he had very strict criteria for pleural plaque, that is that they had to be bilateral. There had to be at least five millimeters of thickness or calcification that he could see, and there had to be no costophrenic angle blunting on either side.

With that strict criteria, he found that there was mild increase of lung cancer risk with pleural plaque alone, when he excluded asbestosis and when he controlled for [Tr. 52] cigarette smoking.

And what he found was about a 1.4-fold increased risk for pleural plaques alone. And that would indicate that that particular

group which has bilateral — I should mention that the group that I have here of 25 cases of parietal pleural plaques includes some cases of unilateral plaques which will not qualify under Dr. Hillerdal's study, and it probably includes some patients who had much less extensive plaques than Dr. Hillerdal indicated, and/or his entire group of patients who had bilateral pleural plaques. He only had a 1.5-fold increased risk. Now, that was with strict criteria for plaques.

If you included our cases with unilateral plaques and our cases with thinner plaques, it would not have met his criteria, then the risk, since those patients would have had on average a lesser dose, would be even less than the modest 1.4-fold increased risk which Dr. Hillerdal found.

Then the last group is the other group, and you can see that about 25 percent of the patients who had neither plaques nor asbestosis, with lung cancer, and some history of asbestos exposure, had asbestos body counts that exceeded those for asbestosis.

And first of all, there are no studies in the literature that has specifically addressed patients who lack pathologic asbestosis, who lack parietal pleural plaques and [Tr. 53] have lung cancer, to see if they have an epidemiologically statistically significant increased risk of lung cancer, when you control for cigarette smoking, and there's no evidence that that's the case.

So in other words, there's no epidemiologic evidence that people who meet the criteria in my other category, have an increased risk of lung cancer greater — other than that, that is attributed to by their cigarette smoking history.

And that even if you consider only those who have increased asbestos body counts, as I have indicated in this graph, there is at present no scientifically valid evidence that shows that asbestos fiber content in the lung tissue, including asbestos bodies, is an independent predictor of lung cancer risk when you control for asbestosis and control for cigarette smoking. So one would really need that information before you could use fiber counting to relate to lung cancer to asbestosis.

Nonetheless, I think the exceptional panel could cover some cases of lung cancer who had extraordinary levels of asbestos in

their lungs, and who for one reason or another did not meet the fibrosis criteria.

But I think that the criteria as they are in the settlement document, would include the vast majority of cases. As the settlement document stands, the criteria for [Tr. 54] the first line, I think, as you could call it, would include the vast majority of what I would consider to be asbestos-related lung cancers.

It includes some that I would say not be asbestos-related and provides a mechanism for cases that are questionable or border line to be at least considered for the possibility of compensation.

Q. Now, Doctor, you were here when Dr. Epstein was questioned yesterday about a report he wrote on a particular gentleman?

A. Yes, sir.

Q. Who did not have any evidence of asbestosis clinically or pathologically, yet he related that cancer to asbestos exposure, do you recall that?

A. Yes, sir.

Q. Had you been presented with that same information, what would your conclusion have been?

A. It's gets back to the same question of specificity versus sensitivity. The fact is that there is a 160,000 lung cancer cases, deaths in this country every year, and one of the best estimates we have from epidemiology that I've quoted in my book, is about 3,000 cases a year of lung cancer related to asbestos.

If you don't apply the strict criteria as present in this document, and you would include cases such as those — [Tr. 55] the one that you're referring to that Dr. Epstein described, then you would open the door to include all sorts of cigarette smoking-related cases that are not related to asbestos.

You might increase your sensitivity to 100 percent, but your specificity would be shot and I don't think that that's fair to the system, I don't think that it's fair to the companies.

Q. Well, Doctor, as an observer and a consultant over some time to both sides of the litigation in the tort system, as it relates to claims for asbestos and disease, do you have an opinion regarding whether this stipulation of settlement in its totality, if adopted by

the Court and affirmed by the Court's repeal, would represent an improvement over the manner in which you're familiar the tort deals with these sensitive medical issues?

MR. ROSENBERG: Objection, no foundation.

THE COURT: Grounds?

MR. ROSENBERG: A, it's beyond the scope of his expertise. He is being offered as an expert on medical issues. He is now being asked to contrast this stipulation of settlement with his experience in the tort system.

And secondly, there is no foundation that this witness is qualified to express such an opinion.

THE COURT: I'll sustain the objection on the basis [Tr. 56] of lack of foundation. And if there is a foundation laid, then I can decide whether his opinion is valuable to the Court under Rule 702.

MR. MOTLEY: I'll attempt to lay a better foundation and move on to another subject for right now.

BY MR. MOTLEY:

Q. Now, Dr. Roggli, over the course of the time that you have been involved in the tort systems efforts to resolve asbestos cases, have you heard asserted in the courtroom a defense called the cell — with respect to lung cancer, the cell-type defense, that is that only certain types of asbestos — excuse me — only certain types of bronchogenic carcinoma cell-types are caused by asbestos? Have you heard that at one time or another?

A. Yes, sir.

Q. Have you heard asserted in the tort system at one time or another that only lung cancers located in certain parts of the lung, that is the lower parts of the lung are asbestos-related?

A. Yes, sir.

Q. Have you heard asserted — we've already talked about the fiber-type defense.

Now, in the document, SP-300, have the settling parties left as a defense or as a confounding factor, or as a factor to be considered at all, the type of cell [Tr. 57] histologically in lung cancer?

A. No, that's foregone in this settlement.

Q. The sight of the tumor, that is where it's located in the lung?

A. No, that's not included in the settlement.

(Pause in proceedings.)

Q. You've discussed a lot about the asbestos and cigarette smoking and the relative contribution to lung cancer.

Sir, is there any evidence that there is any difference in the histological type of lung cancer caused by cigarettes as opposed to asbestos?

A. No. I've seen that defense used. I've seen it in cases where the patient had small cell or squamous cell cancer, the defense was it was caused by smoke. When the cases where it was broncho alveolar cell carcinoma, they said that type is rare and has not been associated with asbestos.

In cases of adenocarcinoma, I've seen it said that that is a scar cancer, and therefore is not related to asbestos, and that covers all of the cell types. So there' been defenses that have been built around all of the cell-types of lung cancer cases.

I've been involved in cases where it was alleged that it was — the case was a bronchogenic carcinoma, and although lung cancer has been associated, nobody has ever shown that bronchogenic carcinoma is related to asbestos [Tr. 58] exposure.

All of those defenses are eliminated and foregone in this settlement agreement. And there is no evidence that — there is no evidence — in my opinion, I think this should be eliminated because there is no evidence in my opinion and as outlined in my book, that there is any difference in cell type of lung cancers related to asbestos, as compared to those related to cigarette smoking.

Q. Now, sir, have you studied and followed in your professional career, the various efforts of the United States Government to control the use of asbestos, and in fact, to eliminate its use through outright banning?

A. Yes, sir, I have. In fact, the history of that is outlined in somewhat of a brief form in chapter two of my textbook.

Q. You indicated to the Court — you used the word dose response relationship, and the higher the dose, the greater the likelihood that a disease will occur and be related to asbestos, do you recall that?

A. Yes, sir.

Q. So what is your opinion of the effect, if any, of stricter government regulations beginning with the enactment of OSHA in 1972 and the initial banning of asbestos containing fireproof spray materials, and the banning of insulation products that contain more than one percent [Tr. 59] asbestos in 1975, on the opportunities for substantial disease causing exposures to asbestos in the '80s and '90s?

A. Well, my opinions on that, I think, are both related to — are related to theoretical considerations, to epidemiology, and to personal observations.

With theoretical considerations, and the understanding that asbestos is a dose response relationship, one would predict that the numbers of cases of clinically significant impairing asbestosis would decrease with stricter regulation of fibers in the work place.

And with the fairly close paralleling of lung cancer and asbestosis in populations, that lung cancer due to asbestos would also decrease with this regulation of fibers in the work place.

I think that correlates with epidemiologic studies. It shows that there is a dose response relationship for both asbestosis and lung cancer with respect to asbestos exposure, and also correlates with my personal observations, in that the number of cases — although the number of lung cancer cases which I've seen in consultation, may have stayed about the same.

The number of lung cancer cases which had histologically or clinically confirmed asbestosis, in my experience, has decreased in the past decade and a half that I have been looking at cases for asbestos litigation.

* * * *

[Tr. 61] THE COURT: I got confused about it, and I'm not convinced that it was leading. He just said are you aware of any studies that deal with the subject. That's how I viewed the question. If it was leading, I missed that.

But in any event, Mr. Motley, you're going to try it again. The objection is sustained just on clarity and complexity and possible inconsistency. How about that, Mr. Baron?

MR. BARON: I couldn't have said it better myself.

MR. MOTLEY: And compounding and confusing and convex.

BY MR. MOTLEY:

Q. Dr. Roggli, simply stated, sir, have there been studies that you're aware of in the very recent past few years which have attempted to determine whether or not there is a progression from the condition of pleural disease — start with that first — to a non-malignant asbestotic condition or an asbestos-related cancer?

A. Yes, sir.

Q. Pardon?

MR. BARON: Your Honor, I'm sorry, but I would object again unless he defines a non-malignant asbestotic condition as one being either qualifying or not qualifying, how it's impairing or non-impairing.

MR. MOTLEY: Under the terms of this agreement, your [Tr. 62] Honor, is what we've been talking about.

MR. BARON: Well, that's what I need to know.

THE COURT: It's not in the question. Try it again, Mr. Motley.

BY MR. MOTLEY:

Q. Dr. Roggli, you understand I'm referring now to the guidelines for compensation in the system that you've studied and testified about when I ask these questions, okay?

A. Yes, sir.

Q. Have there been studies in the recent few years which have attempted to determine whether or not people who were diagnosed at a certain time with pleural plaques only, over time progressed to where they had an impairing asbestotic condition or an asbestos-related cancer?

A. Yes, there have.

Q. And can you describe for the Court?

A. Well, we mentioned Dr. Hillerdal's study where he followed patients with pleural plaques alone over a period of a decade or two, and found that there was an increased risk of lung cancer, and there was also a tenfold increased risk of mesothelioma in those patients.

In addition, there was a study that was done and unpublished by Dr. Selikoff from Mt. Sinai where they studied a group of more than 1,000 insulators who had in 1963 a chest x-ray which showed pleural disease only, and followed those [Tr. 63] individuals for 27 years to see what happened to them.

And what they found in this group of insulators now, who had pleural disease only, no parenchymal disease by x-ray in 1963, is that 22 percent of those patients died of lung cancer, 18 percent died of mesothelioma, and seven percent died of asbestosis.

So that showed that almost half, a little less than half of patients who were insulators with pleural disease only, if you follow them for 27 years will die of an asbestos-related disease.

Q. So if Mr. Baron is quoted correctly in the record in this case in his opening statement to the Court, about deferral of pleural cases and he says pleural claims don't have to come in now, and that they could wait until they develop cancer which we all know they won't, is that scientifically accurate or not?

MR. BARON: Object. There's been no foundation. I wasn't talking about insulators.

MR. MOTLEY: Well —

MR. BARON: Which is very different than what he's just been describing.

THE COURT: People have said the insulators are special people because they have their high dose, I guess.

MR. BARON: Exactly.

THE COURT: In their face?

[Tr. 64] MR. BARON: Exactly. They face highest dose.

THE COURT: Well —

MR. MOTLEY: Well, what about Dr. Hillerdal —

THE COURT: I'll sustain the objection. We're not here to test Mr. Baron's — the accuracy of his opening statement. We know that when a lawyer makes an opening statement to a fact-finder that he can't prove, the fact-finder usually doesn't get too thrilled about that. Mr. Baron will have to live with that, like every lawyer does who makes an opening statement anywhere.

MR. MOTLEY: I know, your Honor. I just like to remind him of it sometimes.

BY MR. MOTLEY:

Q. Dr. Roggli, some of the other studies, did they deal with trades other than insulators?

A. Yes. Dr. Hillerdal's study covered a wide range of individuals with pleural plaques and only a relatively small percentage of those patients were insulators.

Q. And is there another study by Dr. Miller?

A. Yes.

Q. And did it cover more than just insulators?

A. Yes, sir.

Q. A final question I want to ask you and hopefully I can phrase this right, your Honor. I've been trying to do it for

* * * *

CROSS EXAMINATION

[Tr. 140] BY MR. ROSENBERG:

Q. Dr. Roggli, in the five ways that a person can qualify —

THE COURT: Talk about the fifth way, that's what you're asking about. Either get on it, or get off it.

MR. ROSENBERG: I'm going to get off it. Actually I'm going to get off it.

BY MR. ROSENBERG:

Q. I want you to consider all five ways that you've said, and I want to ask you this.

Will the person who have very heavy exposure to asbestos dust from occupational exposure to asbestos and who has a lung cancer,

will that person fit within any of the five ways that you qualify for money under the terms of this settlement?

A. Yes.

Q. And which way would it be?

A. The term that you used, very heavy occupational exposure, is one that probably would have different meanings to different people. And so it's difficult to pinpoint, but I'll tell you at least the way that I see it, and would understand this document.

One as I mentioned earlier, this is the question of sensitivity and specificity that you want to include the cases that are related to asbestos. And I think that the [Tr. 141] document by showing asbestosis and parietal pleural plaques and years in the trade, is a requirement of association with lung cancer, fits most of the scientific communities concepts in this area.

And that the lung cancer requirements in this particular case, that there are two — well, there is no way that any particular document can anticipate every possible case that would come up with any criteria that you've set up. So that there are possible patients who would fit into what I would consider a very heavy exposure to asbestos, who would not meet the criteria in the document, it would then be considered by the exceptional panel.

Two examples that come to mind would be a patient who had radiographic evidence that was strongly suggestive of asbestosis, and say for example 2/1, and bilateral — well, let's say unilateral pleural plaques. And had years in the trade and had a lung cancer, but had no tissue available, and who had pulmonary function tests which did not show the restriction.

And such a case would not meet the non-malignant criteria for asbestosis, but such a patient could then be considered by the panel to see whether or not there is sufficient evidence for asbestosis in the case, in spite of the patient having coexistent emphysema for example, which would still allow compensation. That would be an example of [Tr. 142] a patient for which no pathologic material was available, they could go to the exceptional panel.

An example of a patient where tissue was available, they could go to the exceptional panel, would be one that I indicated earlier. A patient who has a resection for a lung cancer, who has asbestos

bodies in histologic sections, who has a heavy burden of asbestos, but for particular reasons did not develop peribronchial or fibrosis or asbestosis.

That patient then could go to the panel for the question of does this patient have a very heavy exposure to asbestos as manifested by tissue asbestos burden, in spite of the fact that he does not meet the histologic criteria for asbestosis.

And that case, of course, would also have to not meet the requirements which would get it automatically in, that is a bilateral pleural plaques and years in the trade. But that case could then get to the exceptional panel.

Q. How about the man that just has heavy exposure to asbestos, none of those changes that you've talked about, nonsmoker, lung cancer, that's it. Does he get paid?

A. It says another exam I think that we referred to earlier of a patient who has lung cancer and a — with heavy exposure, and a nonsmoker, which if there was evidence of increased tissue asbestos burden, in my opinion, that would be related to asbestos and that I would [Tr. 143] push for that in the panel, realizing — that it's an exceptional panel — realizing it's a controversial area, and it may or may not get by a panel in that particular circumstance.

Q. Now, the editorial that you wrote some page — I'm sorry, was Exhibit 1201, is that correct?

A. Well, I believe so, yes.

Q. And that was in specific answer to Dr. Churg's editorial, is that correct?

A. Yes, sir.

Q. And Dr. Churg is of the opinion, and I believe he has testified by way of videotape in this court, not I believe, I know he has, and the Court has been provided with his transcript, but Dr. Churg is of the opinion that you cannot have a lung cancer attributed to asbestos in the absence of asbestosis, correct?

A. Yes, sir.

Q. And that is not your view, isn't that right?

A. I'm in essential agreement with that, with respect to patients who are smokers, who — or are ex-smokers. But I disagree with

him on the philosophy that it's the fibrosis that's the precursor lesion. I do disagree with him on cases who are nonsmokers.

Q. Now, it is your belief that the process of fibrogenesis and the process of carcinogenesis are two different things

* * * *

[Tr. 156] BY MR. BARON:

Q. Dr. Roggli, in your opinion, are there people who have mixed defects, in other words, they have asbestosis and then some other dust disease that will equalize out their pulmonary function test to read normal, even though they have severe disability?

MR. HOUFF: I object.

THE COURT: Overruled.

THE WITNESS: It equalize out total low capacity. It will not equalize out pulmonary function test to give a normal result of pulmonary function, no, sir.

BY MR. BARON:

Q. Well, their force vital capacity could be normal, could it not?

A. Force vital capacity would go down in either obstructive or restrictive lung disease.

Q. If they are cigarette smokers and have that?

A. If they are cigarette smokers and have exposure to asbestos dust, and have obstructive and restrictive lung disease, force vital capacity will be decreased by both and will probably be additive.

Q. Doctor, on Chapter 6 of your book where you talk about benign asbestos related pleural disease, it begins on Page 165.

A. Okay.

[Tr. 157] Q. You state that benign asbestos pleural related — excuse me, let's start it over. You state that benign asbestos related pleural disease are the most common pathologic and clinical abnormalities related to asbestos exposure. When you say the most common, does that mean that more than 50 percent of the people that have asbestos-related diseases have pleural only?

A. It's certainly the plurality. The question is, is it the majority. And a response to that would be a guess, but based on my own experience I would say probably a majority; definitely a plurality.

Q. A plurality of pleural?

A. Plurality of the pleural.

Q. Okay. And, Doctor, you have stated that there are four different forms of pleural disease: parietal pleural plaques, rounded atelectasis, diffuse pleural fibrosis and benign asbestos effusions. Are all four of those categories of diseases excluded from payment under the settlement stipulation?

A. Not entirely, no, sir.

Q. Which ones are included?

A. Parietal pleural plaques are included if the patient subsequently develops a malignancy.

Q. Okay. Well, assume with me that the claimant only has one of those four or any one of those four diseases. Are those

* * * *

[Tr. 163] THE COURT: Will there be any redirect?

MR. MOTLEY: I have one minute, your Honor.

THE COURT: Well, let's get it done. We've got to get the doctor out of here so he can do something else, if he wants.

REDIRECT EXAMINATION

BY MR. MOTLEY:

Q. Dr. Roggli, is there uniformity, that is, a unanimous voice of medical science on anything to your knowledge that you have experience with.

MR. BARON: Your Honor, I object. That encompasses every single item of medicine. He hasn't limited it at all.

MR. MOTLEY: Well, I don't intend to limit it.

THE COURT: Overruled.

THE WITNESS: It'll be hard for me to think of an area of medicine for which there is complete uniformity of agreement of diagnostic criteria.

BY MR. MOTLEY:

Q. Now, Doctor, in conclusion, would you look at Page 45 of the stipulation, please?

(Pause in proceedings.)

Q. This is in regard again to the exceptional medical panel and I'm looking at about midway down the sentence that reads, "In applying the standard, the panel may take into consideration all aspects of the exposed person's medical [Tr. 164] history and condition." Do you see that, sir?

A. Yes, sir.

Q. These circumstances that Mr. Baron went through with you where the results of a particular test may be skewed by the concomitant existence of two different disease processes, are those the kinds of things that the exceptional panel can take into consideration in deciding whether an individual in fact suffers from asbestosis?

MR. BARON: Your Honor, I object unless he asks whether it's his opinion as opposed to whether that's what it actually says because there's obviously a dispute over what it says.

BY MR. MOTLEY:

Q. In your opinion, are those the types of disputes or the types of circumstances that the exceptional medical panel could take into consideration in evaluating and assaying the merits of an individual's case for an asbestos-related disease?

A. It gets back again to the question of sensitivity versus specificity. If you set your — an example that was given of a pulmonary function test in a patient who had otherwise typical radiographic findings of asbestosis, one could easily conceive of individuals who had increased markers on chest x-ray due to emphysema who did not meet the functional requirements in this document because he had obstructive lung [Tr. 165] disease who did not have asbestosis but would be compensated if you relaxed the criteria that required restrictive disease to be present.

So in that circumstance, it provides a mechanism for the panel to evaluate and closely scrutinize a case that has concomitant obstructive disease to see if there is a balance of evidence that

supports a patient in fact has asbestosis which is causing his disability and his symptoms.

And I think that the exceptional medical panel provides the mechanism to assess such a case to make sure that you aren't overly inclusive and include every patient who has increased markings emphysema, a well-recognized entity in the pulmonary literature and that you don't exclude a patient with asbestosis who happens to also to have severe emphysema.

Q. One final thing, Doctor. If you — you stated there were 3,000 asbestos-related lung cancers over the next several years, correct?

A. Yes, sir.

Q. And that goes back a few years ago, too, correct?

A. Yes, sir.

Q. Would you have any explanation you could offer the Court medically or from what you studied in this document why the CCR over the last three or four years has only received 1,000 lung cancer claims per year?

* * * *

TESTIMONY OF JOHN FREEMAN

* * * *

[Tr. 108] MR. MOTLEY: Let me repeat the question that led to the discourse we've just had.

BY MR. MOTLEY:

Q. You have been made aware, as you've stated, of the allegations of impropriety surrounding the January 14th inventory settlement agreement, Exhibit 302A, correct?

A. Yes, sir.

Q. And you have studied that and for all the reasons, and I hope we don't have to repeat them again on the record, you have formed an opinion about those allegations, have you not?

A. Yes, sir.

Q. What is that opinion, sir?

A. The opinion is that the Ness, Motley firm has not entered into an unethical, improper, lock-out agreement with CCR in its dealings as to the disposal of the — or settlement of the Ness, Motley inventory cases or in any way related to the Georgine settlement, that there is no ethical impropriety, is specifically no violation of 5.6B.

That's my opinion.

Q. What is the basis for that opinion, sir?

A. The basis for the opinion —

THE COURT: He just gave it at length.

MR. MOTLEY: Well, he told us what he relied on, your Honor.

THE COURT: I assume.

[Tr. 109] THE WITNESS: I incorporated by reference my prior testimony.

(Laughter.)

MR. MOTLEY: I just wanted to make sure it was clear on the record.

THE WITNESS: Let me add this. That if you single out of this voluminous record and if you zero in on one specific paragraph of the document that is at the front of 302A, and that is the document dated January 14th, you can well make an argument that taking that language in isolation and not in the context which I see, that that language would support a charge that it impermissibly restricts counsel's right to practice.

However, when it is taken in the context of all that I have seen and read and heard in this courtroom, it is not an impermissible lock-out agreement and there is no ethical impropriety.

(Pause in proceedings.)

BY MR. MOTLEY:

Q. Sir, at some point in time, did Objectors Exhibit 050 on Opinion ABA, Advisory Opinion, come to your attention?

(Pause in proceedings.)

A. Yes, sir.

Q. And how was that brought to your attention?

A. It was brought to my attention by your firm and it came [Tr. 110] to my attention some time after the opinion was published.

Q. I'm —

THE COURT: That's the ABA Opinion of April 16, 1993?

MR. MOTLEY: Yes, your Honor.

THE COURT: ABA Formal Ethics Opinion 93-371?

MR. MOTLEY: Yes, sir.

THE COURT: Fine. I just wanted to get it on the record.

BY MR. MOTLEY:

Q. Were you consulted by us about that particular opinion?

A. I was — yes, I was.

Q. And what if anything did you recommend that we do?

(Pause in proceedings.)

A. I was at the time also made aware or around that time made aware of the language in the January agreement which I recognized

could be interpreted in isolation as a lock-out agreement which I came to understand did not fully reflect the parties' intent.

And I counseled the firm to enter into a mandatory language to more accurately reflect the understanding of the parties.

Q. Are you familiar with the attachment to SP-302A which is a June, 1993 agreement?

A. Yes, sir.

[Tr. 111] Q. And the — it says, "This agreement is executed by and between the Center for Claims Resolution, as sole agent for its members and Joseph Rice of the law firm of Ness, Motley hereinafter referred to as plaintiff's counsel individually and as agents for and on behalf of plaintiff counsel, this agreement supersedes all prior agreements by and between these parties which relate to procedures for handling future claims specifically including the agreement of January 14th, 1993."

Is that the language to which you have reference, sir?

A. No. The language to which I have reference —

(Laughter.)

A. — really — this is the agreement, you've identified the agreement.

Q. Okay.

A. But that isn't the language.

Q. It sounded pretty good to me.

(Laughter.)

Q. What did you have reference to there?

A. Specifically Paragraph 2.

Q. Okay.

MR. MOTLEY: Your Honor, do you have that in front of —

THE COURT: Paragraph 2 of the June agreement?

[Tr. 112] MR. MOTLEY: Yes, sir.

(Pause in proceedings.)

BY MR. MOTLEY:

Q. Sir, do you have an opinion based upon that degree of certainty that we've identified in the record as to whether or not the June, 1993 agreement with CCR violates any ethical rules and in particular Rule 5.6B?

A. I do have an opinion.

Q. And what is that, sir?

A. It does not.

Q. Why?

A. Because it's not a lock-out agreement by any way, shape or fashion. It calls upon counsel to use counsel's best professional judgment in advising its clients as to what counsel would consider to be an appropriate course of action. It leaves counsel free to represent its clients in the event the client would choose not to embark on that or follow that advice and it's just flat not a lock-out agreement, period.

Q. Sir, do you know whether or not — has it been brought to your — strike that.

Has it been brought to your attention whether or not an agreement similar to this has undergone judicial scrutiny?

A. Yes, sir. And that's — that would be Judge MacQueen's analysis in a West Virginia proceeding some time after this document was executed, June or July of '93.

[Tr. 113] MR. MOTLEY: Your Honor, this is SP-1028.

THE COURT: I have it. MacQueen is M-A-C capital Q-U-E-E-N, for the record.

MR. MOTLEY: Yes, your Honor.

THE COURT: I'm just giving the court reporter some help.

BY MR. MOTLEY:

Q. Have you reviewed Judge MacQueen's opinion, sir?

A. Yes.

Q. And what if anything of importance do you find that it imparts to you in regard to the issue of any ethical improprieties related to Rule 5.6?

A. Well, specifically his order which is part of 1028, SP-1028, has a specific finding starting in — at the beginning of Paragraph 4, reviewing the settlement agreement dated June 10, '93. That the agreement doesn't violate 5.6B of the West Virginia Rules and he goes on to explain that. I share his view.

Q. Do you also find in SP-1028 that the Court in addition to issuing a written order made a record, own record oral remarks regarding the matter of the allegation of unethical conduct involving the June, 1993 agreement?

A. Judge MacQueen did that according to this transcript.

Q. Does Judge MacQueen — have you reviewed that?

A. I've seen the transcript and I have reviewed it, yes, [Tr. 114] sir.

Q. And does it refer to the history of asbestos litigation?

A. He take — as I think is appropriate, analyzes in part this settlement in the context in which it arises which is asbestos litigation of — going back years. He analyzed it as well in light of the ABA Ethics Opinion, 93-371. And he takes the opinion that I take that there is no improper lock-out agreement.

Q. Do you find of any usefulness to yourself in forming your expert opinions of Judge MacQueen's statements about even the making of such allegations?

A. Judge MacQueen's entitled to his opinion. It's a free country and people are entitled to make whatever charges they want. I happen to share his view on the product and that is that there's no ethical impropriety, period.

Q. Did you see the language by Judge MacQueen that "I am astounded frankly that this question has ever — has even arisen"?

MR. BARON: Your Honor, that's leading.

THE COURT: I don't know what purpose that serves.

Sustained.

MR. MOTLEY: We move SP-1028 into evidence, your Honor.

MR. BARON: If it's not being offered for the truth of the matter stated therein.

[Tr. 115] MR. MOTLEY: Well, your Honor, it's a judicial order on the issue in question before the Court.

THE COURT: It's only for the truth of the fact it was issued and that Judge MacQueen has these views and that they are things which the witness has said customarily relied upon by a person in his position when making such an analysis. They certainly aren't binding on this Court. That's the only basis on which I'd received them is that they were issued. There may be 50 opinions out there that he hasn't found. Maybe I'll find some, I don't know. But this is standard fodder for these kinds of cases and I'll receive it for that limited purpose.

(Settling Parties Exhibit 1028 received in evidence. [sic]

BY MR. MOTLEY:

Q. Let me ask you this, Professor Freeman. In the course of your investigation, have you determined whether any court that handles asbestos cases has analyzed the June, 1993 Ness, Motley agreement and found it was a violation of Rule 5.6?

A. If there is such a court, I don't know about it.

THE COURT: Counsel, we're going to have a noon recess.

With respect to this afternoon, we're going to finish at 4:30 as we usually do. And I don't know that we have any pleasant plans to extend that time for arguments or other — other than to state the schedule for tomorrow. I [Tr. 116] think we should be prepared to leave the courtroom at 4:30. If we have other obligations, we might make those plans.

BY MR. MOTLEY:

Q. Professor Freeman, let's turn to a second issue and that is the contention that class counsel had an impermissible conflict of interest.

In your opinion, based on the degree of certainty that we have described, did class counsel have an impermissible conflict of interest in proceeding to negotiate the Georgine settlement by

continuing to represent present claimants as defined as persons who had cases in the litigation system?

A. In my judgment, there was no conflict of interest that would bar counsel from so acting.

Q. Why not?

A. Counsel was not required in order to enter into negotiations with CCR and entertain the possibility of a Georgine settlement to fire or dismiss or terminate its [Tr. 118] existing attorney-client relationships with its existing inventory of cases.

Counsel was entitled to explore other possibilities at the time it was representing cases in the litigation process. In the case of Ness, Motley, this was thousands of clients and thousands of cases. For Ness, Motley to fire or be required to fire or dismiss or discharge these clients and force them to start afresh with new counsel, not familiar with their cases whom they did not seek, to me would be the height of professional irresponsibility.

Ness, Motley would have to obtain from each of these clients consent and in my judgment Ness, Motley wouldn't have reasonable grounds for seeking that consent in the first place because purely the opportunity to obtain other employment or more lucrative employment in the same line, say, as class counsel to me is not a valid basis for seeking to terminate or dismiss an existing client who has come to you and entrusted that client's affairs to you. That just is not good cause to terminate the relationship.

Furthermore, to the extent that we are dealing here with pending cases, the custom is that for counsel to terminate representation in those cases, counsel needs to appear before the tribunal and move to be relieved as counsel and I cannot imagine judges across the country willing to allow Ness, Motley to shirk its responsibilities or terminate [Tr. 119] its obligations to existing litigants on the ground that it seeks to enter into negotiations with somebody like the CCR. That to me is absolutely uncalled for and not necessary at all.

So then the question is, can you become class counsel even though you have present cases along the same line or against the same defendant and the answer to that in my mind is certainly yes.

Q. And why is that, sir?

A. Because it happens. Counsel develops expertise in a certain area and may have the opportunity at some point to turn an existing case into a class action or undertake to represent somebody who would be a representative party for — in a class action and so long as the interest of the present client who may not be a class representative, may be an individual case, is protected as it needs to be by counsel and so long as the interests of the class are protected in what may turn out to be a class action lawsuit, as long as that happens, counsel is free to act.

Counsel can have multiple clients against a common defendant in multiple forums in multiple forms.

Q. Are you familiar with the line of cases commonly under the style *Cippollone*, C-I-P-P-O-L-L-O-N-E, *versus Liggett and Myers*?

A. I'm familiar with the cigarette litigation, yes, sir.

[Tr. 120] Q. And are you familiar with a decision by U. S District Judge Leckner (ph) on a motion by the lawyers who handled the *Cippollone* case to withdraw?

A. I'm familiar with his order denying their right — their request to withdraw on the basis of financial hardship.

Q. Have you looked at the deposition of Professor Crampton and Professor Coniak and the report that they jointly issued on January 31st?

A. Yes, I have.

Q. Sir, in your opinion, would the suggestion that Mr. Locks could have given his cases, present cases away to somebody else and then free to negotiate the futures class action as opined by Professor Crampton consistent with ethical standards of practice?

A. No. In my judgment, for Mr. Locks to do that or for your firm to do that would be highly improper to abandon those clients and leave them in the lurch that way.

Also, you could possibly negotiate a settlement with CCR. I think that that's irresponsible and unprofessional to suggest that.

Q. Are you familiar with Professor Coniak's suggestion that Ness, Motley could have tried every one of the 20,000 cases that we represent but not settled any of them and then it would have been

permissible for us to at the same time conduct negotiations with CCR for a futures settlement?

[Tr. 121] A. I believe it would be —

MR. HENDERSON: Excuse me. Objection, your Honor. I assume that's in the form of a hypothetical?

MR. MOTLEY: Yes.

THE COURT: Has to be. Sure.

MR. MOTLEY: Yes.

BY MR. MOTLEY:

Q. I asked the question.

A. I would believe it would be improper to insist or require counsel to try all an existing inventory of cases prior to entering into settlement negotiations. That would be a lock-in as opposed to a lock-out that would I think improperly restrain counsel's freedom of action and the client's freedom of action. Sometimes we know that many cases are settled.

(Pause in proceedings.)

Q. Sir, let me ask you a different question. Did class counsel have an impermissible conflict in settling the present cases while proceeding with the Georgine negotiations?

A. No.

Q. Why not?

A. Because class counsel had existing clients and had a fiduciary obligation to those existing clients to obtain for those existing clients what counsel considered to be the optimum recovery for those clients, whether that was by way [Tr. 122] of trying every case, trying some of them or settling.

If counsel reached the decision that it had a very good opportunity for those clients and an opportunity that clients wish to avail themselves of, it was counsel's obligation to go ahead and settle those cases.

At the same time, when counsel's negotiating as potential or prospective class counsel, counsel had an obligation to negotiate in good faith and reach the best result that it possibly could on behalf of the class yet to be formed.

And I don't see that there's any impropriety on either side of that.

Q. Do you know, sir, whether or not the — what we've come to call the inventory settlement of present claims is contingent upon Georgine being upheld by this Court and affirmed and thereby implemented?

A. It is not contingent.

Q. Did CCR's settlement position which the record reveals provided that CCR would not consider inventory settlements until some futures arrangements were probable, did that create in and of itself an impermissible conflict of interest?

A. I don't believe it did.

Q. Why not?

A. Well, for these reasons. First of all, that's CCR's [Tr. 123] position and that's their — that's their settlement goal and they're entitled to whatever position they want to take. The issue is what does that translate to in terms of the behavior of counsel and what does that translate to in terms of ethical propriety.

The record that I have seen and with which I am familiar in this case shows that the Ness, Motley firm for example received what a reasonable person could consider to be objectively — an objectively fair settlement for its existing inventory of cases. A settlement that's been reviewed by Professor Burbank, a settlement — numbers that have been supplied and talked about in this court and a reasonable person could conclude that based on historical averages, et cetera, the interests of those clients were well served.

A reasonable — a reasonable observer, I believe also could in evaluating the Georgine settlement and in evaluating the terms of the Georgine settlement as they've been presented in this courtroom, conclude that the Georgine settlement is fair, reasonable and adequate and provides valid and valuable con — consideration to the class members in the Georgine class.

And with that settlement standing on its own, and my position from day one as an observer and to some extent a commentator has been that there should be no linkage between [Tr. 124] these possible arrangements, that they should each be able to stand the

light of day on their own merits and be objectively fair and reasonable.

In the case of the — CCR's position, I know it's been voiced that there was a dealing on the presents in exchange for commitment as to the futures. That commitment translated to recommendations by counsel. I think that that was proper. It was — that position was taken by CCR in the light of a long history of asbestos settlements including inventory settlements and including court-facilitated pleural registries and I see this entire process unmarked by any taint of ethical impropriety in terms of conflict of interest or sell-out or whatever you want to call it.

Q. Did class counsel breach their affable — excuse me, your Honor — their ethical obligations to the Georgine class by not disclosing the fact of the inventory settlements to them at the time the inventory settlements were negotiated?

A. The answer is no.

Q. Why not?

A. Because there was no Georgine class at the time of the inventory settlements.

Q. Did class counsel have an obligation to disclose to their present clients the fact that they were negotiating the Georgine class action for future claimants?

A. No, they did not.

[Tr. 125] Q. Why not?

A. Because those are two separate, although to some extent simultaneous, pieces of representation. A lawyer is not obliged and in fact is prohibited from disclosing to Client A what the lawyer may be doing for Client B or intending to do or possibly be doing for Client B. And I don't believe that any disclosure was called for.

Q. Much has been made of the fact that the Complaint and stipulation of settlement were filed on the same day. And I believe that's been proven to be so. They in fact were filed on the same day. Does that simultaneous filing in your opinion indicate collusive or impermissible behavior on the part of class counsel?

A. No. What it indicates — the answer is no.

Q. Why not?

A. Because what it tells me is it's a settlement class action and to say that it's impermissible to have a settlement class action is to create an ethical wrong that I've never seen before. You have prepackaged bankruptcies but — and resolved almost simultaneously. The *Raymark-Wells* case was a settlement class action. This phenomenon can occur without ethical impropriety.

Q. Are you familiar with the other settlement class actions?

A. With the *Wells* case?

Q. With other than *Wells*?

[Tr. 126] A. There have been other cases where settlement has been — has occurred prior to class certification and there's commentary in the cases about settlement class action. You have Judge Russell's opinion in the *Aetna-Dalcon Shield* case where he seems to applaud settlement class actions.

Q. That's in the Fourth Circuit.

A. You've got the — Fourth Circuit case.

You've got the beef industry case where they talk at some length about settlement class actions.

Q. That's the Fifth Circuit?

A. It's either Fifth or Eleventh, I forget which way it was at the time the opinion was rendered. But certainly there's precedent for this. I've mentioned several times the *Wells* case involving your own clients.

Q. Does the fact that pleural claimants who have — who may have been unimpaired — let me strike that.

Does the fact that some of the Ness, Motley and Locks, Greitzer and Locks inventory settlements included pleural claimants who may have been unimpaired but received cash compensation whereas such similarly situated unimpaired pleural claimants received different rights but no cash under Georgine indicate that class counsel were under — acting on their impermissible conflict of interest when negotiating Georgine?

A. No, it does not.

[Tr. 127] Q. Why?

A. First of all, I want to clarify something. You said they received no cash. They received no cash immediately. They may receive cash down the road.

Now, let me explain my answer. The firm had an inventory of cases that it had on hand. It had claimants who had gone to Ness, Motley and the tort system or Greitzer and Locks, the same thing, and had a realistic expectation that their cases were going to be resolved in the tort system. And that means resolved either by a judgment or by settlement.

And in settling those cases on terms which were considered advantageous to those clients, certainly there's no impermissible behavior there, and the pleural-unimpaired, as I understand it, did receive consideration in the conventional way that they have traditionally been receiving it in the tort system with this exception.

In the tort system there had been pleural registries and there had been green cards in the past. For instance, one of Objectors' Exhibits is Mr. Fitzpatrick's article in our long contemporary problems where he references the experience of the ACF, the Asbestos Claims Facility.

Now, in the case of the ACF, what's interesting in that article is that he refers to 18,500 dispositions of asbestos cases by the Claims facility. Of those 18,500 — [Tr. 128] and this is in the tort system — of those 18,500, the numbers in his article, Footnote 3 in accompanying text, reflect 5,000 or so of those cases being disposed of by pleural registry or green card.

Which is to say that even in the tort system, deferral of a pleural unimpaired's claim was a recognized way of resolving that claim. It's not as if everybody who is unimpaired has always gotten paid in the tort system and in fact, the article reflects it in '88 half of the cases resolved by the ACF were resolved by green card or pleural registry.

Now, those weren't cases resolved by green card or pleural registry with class counsel or anything of the nature, that was just the free market at work.

What about the pleural unimpaireds under Georgine? To my understanding, the pleural unimpaireds under Georgine absolutely

are not relegated to a position where they don't get paid or have no rights, et cetera.

What they are receiving, whether you call it a bundle or basket of rights, however you phrase it, is tangible rights, so far as I'm able to determine, to any similar set of rights, green card, pleural registry, that deferred pleural unimpaireds have ever received in the tort system, with the right of double re-entry, waiver of the [Tr. 129] statute of limitations, et cetera, being key to that.

Reduced counsel fees, some assurance that the money will be there to pay them, a waiver of liability.

And, a reasonable person in my judgment could conclude that that is an attractive and indeed very valuable set of rights, and here's how I analyze it.

In the case of a pleural unimpaired, who is being treated in the tort system and gets cash, without any manifestation of disease, that pleural unimpaired upon receiving cash and giving a release to the settling defendant, becomes self-insured. They win the lottery and never get a disease.

They may get a disease, a very disabling or fatal disease, but they got paid early on and they're out of the system at least as to that defendant.

In the Georgine settlement, what you've got is CCR in essence being the insurer. With CCR standing ready with the money to pay these people, when, as and if they get ill, and qualify under the Georgine standard.

Now, I read Susan Oliver's deposition on the point of people coming back into the —

Q. You mean Christine Oliver.

A. Christine, I'm sorry. Christine Oliver's deposition, and she talked about a substantial percentage of pleural unimpaireds who later manifest serious disease. Dr. Roggli, [Tr. 130] I'm not — I wasn't here for his testimony, that's on the record. My understanding is that he gave somewhat similar testimony referring to a study by Dr. Selikoff.

The fact of the matter is, you've got Mr. Annas who was here, whose wife at one time was a pleural unimpaired, but who later

died of mesothelioma. In a sense she's kind of a part of this proceeding, at least the story about her is, and that testifies that it's not just a hypothetical possibility or a remote — kind of fictitious possibility that down the road people are actually are going to stand ready for these benefits? They are going to be available, some of these people, depending on your percentage to be paid.

And so I don't think you can say that there is improper disparity in treatment. There's a different emphasis between the pleural unimpaireds who get cash up front and those who have their rights preserved, with in essence an insurance policy down the road. To me that's a very valuable right. Class member vote thought it was a valuable. Class member Georgine thought it was a valuable right. Class member Annas thought it was a valuable right. The people who took the 5,000-plus green cards from the ACF thought it wa a valuable right. The Baron and Budd client who took the green card that's been talked about, Stolpa (ph) in this proceeding thought it was a valuable right. And a [Tr. 131] reasonable client and lawyer could think it's valuable.

I do think that the Georgine basket is better than even the green card or the pleural registry in fact by far.

Q. In conclusion, Professor Freeman, based on your entire review of the record as you've previously described it, in your professional background, do you have an opinion as to the overall ethical propriety taken in its totality of class counsels' conduct with respect to the negotiation and presentation of this matter to this Court?

A. Yes, I do.

Q. And what is that?

A. That it's superior, it's a professional performance, on all standards, competence, diligence, loyalty and particularly ethics.

Q. Any evidence of collusion?

A. Not that I know about.

MR. MOTLEY: Your Honor, Mr. Miller has a few questions, and I pass the witness to him. Thank you.

MR. MILLER: May I proceed, your Honor?

THE COURT: Yes.

BY MR. MILLER:

Q. Professor Freeman, do you know if your ethics opinions were ever passed on to Greitzer and Locks directly or indirectly?

[Tr. 132] A. I believe that they were.

Q. How do you know that?

A. Because my memorandum to Ron Motley, dated September 1, which is Objectors' 34, refers to seeking an expressed agreement with prospective co-counsel as to my recommendations. And in fact, those — this recommendation as to the ethical propriety and so forth was embraced in the document. And so I have — almost verbatim as to Item 2. And so I have to believe that since Mr. Locks and your firm signed off on the agreement, that they were aware of my advice.

THE COURT: The agreement is SP-300, the stipulation of settlement?

THE WITNESS: Yes, sir.

THE COURT: Thank you.

BY MR. MILLER:

Q. Professor Freeman, I'm going to draw your attention now to four letters concerning the Greitzer and Locks present inventories that are part of SP-302C and were previously moved into evidence. And the letters are the following:

The first is a letter of August 3rd, 1992 from Gene Locks to Kevin Gears (ph). Bates 530.

The second is a letter of October 26, 1992 from Balefsky, B-A-L-E-F-S-K-Y to Gears, Bates 545 and 546.

The third is a letter of December 10, 1992 from [Tr. 133] Locks to Gears, Bates 539 and 540.

And the last one is a letter of July 9, 1993 from Locks to Rooney, Bates 542 and 543.

Have you reviewed those four letters?

A. Yes.

Q. Do you have an opinion to a reasonable degree of professional certainty whether or not Greitzer and Locks entered into an unethical lock-out with CCR?

A. In light of the facts that I discussed previously, and in adding on this July 9th letter, signed by Gene Locks, clar [sic] — which states to clarify what we always agreed to and what was always our understanding, I do have an opinion.

Q. And what is that opinion?

A. That Greitzer and Locks did not intend to or it did not enter into an unethical lock-out agreement with CCR.

MR. BARON: Your Honor, I object and move to strike, because I think he's testified that his opinion is based in part upon the other items, including his conversations with lawyers from Greitzer and Locks. And unless that's straightened out —

MR. MILLER: Your Honor, he do not so testify, and I'm certainly willing to ask him in a little more detail what he based it on and then your Honor can have the full record.

THE COURT: He has not testified to any conversations with Greitzer and Locks. All the conversations [Tr. 134] were with the Ness, Motley —

MR. BARON: No, your Honor.

THE COURT: — firm.

MR. BARON: I believe previously he testified that he has visited with the lawyers from Greitzer and Locks and talked to them about this particular agreement.

THE COURT: He may have, but he didn't say he relied on it.

MR. BARON: I thought he just said that. I'm sorry. That he relied on all of the information he previously described.

MR. MILLER: If I may explain your Honor or ask the question?

THE COURT: Well, let's withdraw the question —

MR. MILLER: Thank you.

THE COURT: — and if you want to lay a little more foundation, and try it again, we'll see.

MR. MILLER: Okay.

BY MR. MILLER:

Q. Professor Freeman, would you please explain in a little more detail, but in summary fashion, the different items on which you relied for your opinion?

A. Well, first there is in the record the June 9, 1993 —

Q. You mean July 9?

A. Pardon me?

[Tr. 135] Q. July 9 I think you mean?

A. I'm sorry, July 9th, 1993 letter from Gene Locks to Mike Rooney, which I believe is also in the Objectors' Exhibit book.

And it states that "To clarify what we always agreed to, and what was always our understanding, we stated that our firm would use its best efforts to encourage, and would recommend that our future clients defer litigation against the CCR defendants until that claimant's medical condition satisfied the mutually acceptable medical criteria set forth in Carlough."

And it talked about, you know, we will make this recommendation in exchange for a totaling of the statute of limitation, and it goes on to say, "Unless in the exercise of our independent professional judgment, given some unforeseen circumstances, we conclude other for a particular client", and that's in evidence, and that is a major item that goes to the issue of the party's intent and the understanding of their prior agreements.

Now, I had testified previously that Mr. Fitzpatrick, when he was asked what kind of commitment, was talking about a recommendation. That's what his testimony was. It was in the record and I believe it was in the record on his direct on the first day of this hearing.

I also go back to what Mr. Rooney said about the [Tr. 136] parties not being intent or seeking to engage in any unethical behavior.

I also go back to what I said about what just leaps out of the stipulation to me, with the parties time and again referring to their desire that the Court conduct an inquiry into and find that their behavior is ethical.

And also, the provision on Page 97 of Exhibit 300, which leaves counsel free at all times to do whatever it needs to do in order to engage in ethical behavior.

I also take comfort, as I said before, in Judge MacQueen's evaluation of this. I take comfort in the evaluation of it by other professionals like me, including Professor Hazard, who is the dean of — in my judgment, the dean of Professional Responsibility Teachers In America.

Q. Are all these materials that you have just mentioned, materials of the type on which an expert in your field would customarily rely?

A. Absolutely.

Q. Based upon the materials you have just told us, what is your opinion regarding whether or not Greitzer and Locks entered into an unethical lock-out with CCR?

A. No unethical lock-out.

Q. Okay. And the reasons for that, if there are any, in addition to —

A. I rely on my prior —

* * * *

TESTIMONY OF CHRISTINE OLIVER

* * * *

[Tr. 96] Q. Dr. Oliver, define the term fibrosis for us, if you would, please?

THE COURT: As it applies to lung disease?

MR. BARON: As it applies to lung disease, right.

THE COURT: Thank you.

THE WITNESS: Fibrosis is a term that is synonymous with scarring. It is scarring.

MR. BARON: Might I stand here for just a moment, your Honor?

THE COURT: Sure.

BY MR. BARON:

Q. Dr. Oliver, in the diseases caused, the-non-malignant diseases caused by asbestos exposure, what causes the scarring or the fibrosis that you've just described?

A. It's not entirely certain, but it has to do with the interaction between the asbestos fiber and the tissue. This tissue may be either pleural tissue, or it may be parenchymal tissue.

And it's likely that the fiber causes an inflammatory response, which then recruits certain cells of the body, and the fibrosis or scarring occurs as a result of enzymes [Tr. 97] and mediate — or in all likelihood is related to the release of enzymes and mediators by these cells that react to the presence of the fiber.

Q. Okay. In the disease asbestosis, where do you most often see this fibrosis or scarring?

A. Most commonly looking at populations of exposed individuals, you see it in the pleura.

THE COURT: That's the so-called parenchymal disease?

MR. BARON: No.

THE COURT: Or not?

BY MR. BARON:

Q. Let's define the difference between the pleura and the parenchyma? I don't know how to spell parenchyma.

A. P-A-R-E-N-C-H-Y-M-A.

Q. All right. We've heard those two terms bandied about here, let's see if we can't get a good definition.

What is the pleura?

A. The pleura is the lining around the lung in simplest terms. It consists of mesothelial cells, and there are two types of pleura in the body. One is the visceral pleura, which is very tightly adherent to the lung parenchyma or the lung tissue.

The other is the parietal pleura, which lines the rib cage.

[Tr. 98] Q. From time to time, physicians might refer to the pleura as a sac. Is that an appropriate description, around the lung or not?

A. It's not one I would use.

Q. It's a lining of the lung?

A. Yes.

Q. Okay.

THE COURT: Outside lining, would that be fair?

THE WITNESS: Yes.

BY MR. BARON:

Q. Outside lining.

A. Yes. I mean you can think about it in some senses as like the peel of a grape.

Q. Ah, peel of the grape.

We are searching desperately for layman's terms in this case, Dr. Oliver, I can assure you. Now —

THE COURT: We'll use all of them.

MR. BARON: We'll use them all.

THE COURT: Whatever we can get.

BY MR. BARON:

Q. Lining of the — what did you say, the peel of the grape?

A. Yes.

Q. Okay. And what is the parenchyma?

A. The parenchyma is the lung tissue itself. It's the — well, it's the lung tissue itself. It's made up of [Tr. 99] intersticial [sic] tissue and the alveoli, which are the functional — the primary functional unit of the lung.

Q. Okay. And that would be the interior surfaces, is that a good way to put it?

A. Well, not — I wouldn't call it interior surfaces, although each alveolus has a surface around it, and there are hundreds of thousands of alveoli. It's the lung tissue —

Q. Okay.

A. — as opposed to the lining around the lung.

(Pause in proceedings.)

Q. And that would be grape —

A. Yes.

Q. — other than i' , peel?

A. Yes.

Q. Okay.

THE COURT: Just to get me back up-to-date before we started the definitions, Dr. Oliver, you said asbestosis fibrosis or scarring —

MR. BARON: That's what I'm getting right into.

THE COURT: — is seen most frequently where?

THE WITNESS: In the pleura.

MR. BARON: That's exactly what I was going to get into, your Honor.

THE COURT: I think she said that, and I wanted to —

[Tr. 100] MR. BARON: Okay.

THE COURT: — I note — that's where I got my terms backwards.

BY MR. BARON:

Q. Now, you said the most common place where you find this fibrosis or scarring is in the pleura in an asbestos case, is that correct?

A. Yes.

Q. All right. Now, how do you describe the different types of scarring that occur on the pleura?

A. The different types of scarring that occur on the pleura basically fall into two categories. One is the category of diffuse pleural thickening. The other is the category of pleural plaques.

Pleural plaques are areas, discrete areas of pleural thickening. The pleural plaques involve primarily the parietal pleura.

THE COURT: Could you tell us what parietal means, that definition?

BY MR. BARON:

Q. Parietal is which of the two pleuras?

A. Parietal is the pleura that lines the rib cage. And these two types of — these two pleural surfaces are separated by very small space, which is fluid filled so that they slide against each other.

[Tr. 101] Q. Okay. Now, how can a physician tell the difference between diffuse scarring of the pleura, and discrete scarring of the pleura, which are plaques?

A. Physicians can tell the difference primarily in one of two ways. The first is pathologically, that is if you have the opportunity to open up the chest and look and see what's in there, then you can tell whether — you can distinguish a parietal pleural plaque from diffuse pleural thickening.

Secondly, the chest x-ray allows distinction between pleural plaques and diffuse pleural thickening. It's often however difficult to make that distinction on chest x-ray, and in order to facilitate that distinction, the ILO system of classification has provided that in order to diagnose diffuse pleural thickening, what is required is blunting of or more of the costophrenic angles on chest x-ray.

Q. What is a costophrenic angle? That's a good one.

A. A costophrenic angle is like a trough. It's where the lung — the hemidiaphragm and the lateral rib cage meet.

Q. Okay. And when you say blunting, what does that mean?

A. Well, normally the costophrenic angle is sharp, and when there is blunting, it's not sharp.

Q. Well, why would it not be sharp?

A. There's like a meniscus that you can see in the costophrenic angle, and it cannot be sharp because there is scarring there, it can be blunted if there is fluid there.

[Tr. 102] Those are the two major causes of blunting. It can sometimes be blunted if the hemidiaphragm is pushed up from below for some reason.

Q. Okay.

A. But the major causes are scarring and fluid.

Q. Okay. Would that scarring he [sic] scarring in the parenchyma or scarring in the pleura?

A. The pleura.

Q. Okay. So blunting of costophrenic angle then results from scarring or fibrosis of the pleura?

A. It can result from that, yes.

Q. Does that scarring have to be diffuse, or could it also be discrete, which is what we've been calling plaques?

A. Well, in general, if blunting of the costophrenic angle is seen, it's considered to be diffuse pleural thickening and scarring that is responsible for the blunting.

On postmortem exam or at surgery, it might be possible at times to find that in fact it was a discrete plaque, but for the most part it's considered to be diffuse pleural thickening.

Q. All right. Another thing we need to get straight here, we're using two terms for pleural changes, diffuse and discrete. And the discrete one is also known as plaques, is that correct?

A. Yes.

[Tr. 103] Q. Now, when you say diffuse, what does that refer to?

A. That refers to a another type of pleural scarring. And it's exactly as it says, and that is diffuse pleural thickening tends to be diffuse as opposed to circumscribed. That is, it tends to continue longitudinally the lateral chest wall.

Q. Okay. And discrete or plaques, as we've referred to them, how do they appear?

A. They tend to be discrete or localized, and if you look at pleural scarring on chest x-ray, one way to think about it is the diffuse pleural thickening does tend to be more continuous. Whereas the discrete pleural scarring or pleural plaque has more of a lumpy bumpy appearance.

Q. Okay.

A. That's not always true, but in general that's a useful way to think of the difference.

Q. Okay. Now, Dr. Oliver, can you explain to us why it is that asbestos causes this fibrosis or scarring of the pleura?

A. Well, with regard to pleural plaques it's not entirely clear. What we do know is that these asbestos fibers probably migrate through the lungs, out into the pleural space. And once in the pleural space set up an inflammatory response of some sort that causes fibrosis or scarring.

Often what precedes the diffuse pleural thickening is actually a pleural reaction that involves fluid as well.

[Tr. 104] So that we know in at least in some cases of diffuse pleural thickening, there is a pleuritis, there is definitely an inflammatory response.

Q. Okay. When you say an inflammatory response, what does that really mean to us lay people?

A. Well, that means is that certain types of white blood cells are recruited to the area. And as I said earlier, this type of recruitment of cells and the release of mediators and enzymes by these cells, probably has to do not only with the fibrosis that we spoke about earlier, but also is what causes the inflammation, the inflammatory response.

It's like what happens if you step on a nail. White blood cells are recruited to the area and these white blood cells then start to

release certain substances which result in the redness that surrounds the area where you stepped on the nail.

Q. Does the inflammatory process come before the actual formation of the plaque or the discrete thickening?

A. Yes.

Q. Okay. And so would it be fair to say that the plaque is the end result of the inflammatory process?

A. Yes.

Q. And when the thickening is diffuse, what does that tell you about the inflammatory process that's been going on in the lung surfaces or the pleural surfaces?

[Tr. 105] A. Well, it — I don't know how to exactly answer that any better than I have already answered it. That is —

THE COURT: Dr. Baron speaking. Dr. Baron says there is a —

MR. BARON: No, Dr. Baron —

THE COURT: — connection?

MR. BARON: Well, no.

BY MR. BARON:

Q. Does that indicate that the reaction is more widespread?

A. Perhaps.

Q. Okay.

MR. MOTLEY: I think —

MR. BARON: Where is the towel, I'm ready to throw it in.

THE COURT: Dr. Baron was reversed by a superior.

MR. BARON: Okay.

BY MR. BARON:

Q. Dr. Oliver, in order for the asbestos fibers to reach the pleura, where do they have to go through?

A. The lung tissue.

Q. Okay. And when they pass through the lung tissue, do you have an opinion as to whether or not damage is created to the lung-tissue?

A. I think in all likelihood there is some damage in most cases, yes.

[Tr. 106] Q. Okay. Now, Dr. Oliver, have you had the opportunity to research the effects of this pleural scarring that is both diffuse or discrete, it is either diffuse or discrete on humans?

A. I've done research in the area of pleural plaques.

Q. Okay.

A. I have not looked at diffuse pleural thickening.

Q. Okay. In the area of pleural plaques, have you been able to form an opinion based on reasonable medical certainty as to whether people with pleural plaques develop a functional response in terms of their inability to do the things they used to be able to do?

A. In my opinion, yes, that does happen.

Q. Okay. And can you describe to his Honor the nature of the studies that you've done on that issue?

A. The studies that we have done have been looking at relationships statistically between the occurrence of pleural plaques and exposed groups and lung function. We've had the opportunity to do this both in railroad workers that examined cross-sectionally and also in a group of Boston public school custodians whom we've had the opportunity to follow since 1987.

With the — with regard to the study of railroad workers, we defined pleural outcome — pleural abnormalities,

* * * *

[Tr. 157] oncologist, is unnecessarily and for some individual unreasonably restrictive.

Internist can diagnosis lung cancer. Occupational physicians can diagnose lung cancer, surgeons can diagnose lung cancer.

Q. Okay. Do you have any problems with Subsection B, the exposure requirement or the latency requirement of 12 years?

A. The wording here is a little confusing to me. It says, "Exposure sufficient to meet the minimum requirements, occurring at least 12 years. I don't know if this means 12 years of latency. I don't know if this means that in 12 years of exposure occurred, and ended 12 years prior to diagnosis of the tumor, and they're different.

Assuming that — this means latency, I would say as I testified earlier, I think a latency of 12 years itself is not unreasonable. But there will be individuals who will fall outside of that 12-year latency, depending on the level of their exposure.

There are studies that have been done that have shown latencies as short as five years in individuals with high levels of exposure.

Q. Okay. Now, after going through the two sections there, A and B, have you read Subsection C, which are the medical criteria?

A. Yes.

[Tr. 158] Q. Okay. Doctor, do you have an opinion based on reasonable medical probability as to whether the medical criteria set out in the settlement stipulation will unreason — will exclude people with asbestos related lung cancer?

A. My opinion is that they will.

Q. And Doctor, do you have an opinion on how many such individuals might be excluded or will be excluded under these requirements?

A. Well, I testified — as I testified at my deposition, in my opinion, based on my direct experience with individuals who have had asbestos exposure, and lung cancer, requiring in addition either radiographic or physiologic evidence of asbestosis would result in excluding approximately 50 percent. I would say 45 to 50 percent of individuals that I have seen with lung cancer that I believe is causally related to asbestos exposure.

Q. And why would such individuals be excluded?

A. Because they do not have radiographic or physiologic — actually it's radiographic and physiologic abnormalities of the types set forth in this document.

Q. Doctor, do you believe that there is a sound scientific basis for the criteria that are set out under the lung cancer standard?

A. In my opinion, requiring that asbestosis be a co-partner of lung cancer is unreasonable.

* * * *

[Tr. 168] Q. Do you agree that the asbestos fibers when you inhale them, they're deposited into the lung and they start causing a mechanical injury to the cells and to the adjoining tissue upon that retention by the lung?

A. Yes.

Q. In other words, the injury itself starts in a matter of hours after the inhalation and retention of the asbestos fibers?

A. There is evidence to show that there are — there is a response particularly in the mucosa of the airways shortly after asbestos fibers are inhaled in animal models.

Q. So it may be a significant amount of time — we're talking about years before one would manifest an asbestos-related injury after exposure but the injury itself at a cellular level starts upon the retention of the fiber in a short period of time?

A. Well, I think it would be fair to say an injury manifested itself. I think it's unlikely that there is the injury, implying that there is one injury. I think it's probably a series of events.

Q. Okay. And whatever the injury, it has to develop for a number of years before it becomes manifest by the diagnostic tools that we have available including chest x-ray and pulmonary function tests?

A. Yes.

* * * *

[Tr. 210] (Pause in proceedings.)

MR. HOUFF: May I proceed, your Honor?

THE COURT: Mr. Houff, yes, sir.

MR. HOUFF: Thank you.

CROSS-EXAMINATION

BY MR. HOUFF:

Q. Doctor, good afternoon.

A. Good afternoon.

Q. Unlike Mr. Rice, you and I have never met before except just before you testified and at your deposition in this case, correct?

A. I believe so, yes.

Q. Okay. And we have not had dinner together?

A. No.

Q. Okay. Doctor, you are not board certified in pulmonary medicine, correct?

A. That's correct.

Q. Now, you have said that your definition of asbestosis includes a person who only manifests pleural changes, correct?

A. Yes.

Q. Now, in saying that, you are in substantial disagreement with a large and well respected authoritative body of medical literature which says that is not asbestosis, isn't that [Tr. 211] correct?

A. There are articles in the literature that indicate disagreement with that position — with my position.

Q. Well, do you agree that you are in substantial disagreement with a large and well respected authoritative body of medical literature which says that that is not asbestosis?

A. I would have to disagree with that statement as you made it, yes.

Q. Okay. Do you remember testifying in 1985 in the Santa Maria case?

A. Yes, I do.

Q. Do you recall that Mr. Cetrullo who was cross-examining you at that time, do you remember that?

A. I recall that he was cross-examining me, yes.

Q. Okay. And I'll be happy to show you —

THE COURT: Would you spell his last name for the record, please?

MR. HOUFF: C-E-T-R-U-L-O, your Honor. One L.

UNIDENTIFIED SPEAKER: Two L's.

MR. HOUFF: Okay. I won't quibble over an L.

THE COURT: What's the first letter in his word?

MR. HOUFF: It's C —

THE COURT: C.

MR. HOUFF: C as in Charles. Cetrullo.

[Tr. 212] THE COURT: Okay.

BY MR. HOUFF:

Q. I'll be happy to show you the excerpt from the transcript after I read it, but Mr. Cetrullo asked you on Page 4-151.

MR. BARON: I'm sorry, do you have a copy of the transcript?

MR. HOUFF: I have — yes.

(Pause in proceedings.)

BY MR. HOUFF:

Q. And it's beginning at Line 5. Mr. Cetrullo said, "In a sense you would say that person has asbestosis. You are in substantial disagreement with a large and well respected authoritative body of medical literature which says that is not asbestosis, do you agree with me?

"Answer: I would say that is correct."

Would you like to see it? I'll be glad —

A. Yes.

Q. Okay.

MR. HOUFF: May I approach, your Honor?

THE COURT: Sure.

(Pause in proceedings.)

THE COURT: Just stand back, Mr. Houff, and let the doctor reflect on the material, please.

MR. HOUFF: Certainly.

THE WITNESS: You've read it correctly.

[Tr. 213] MR. HOUFF: Thank you.

(Pause in proceedings.)

BY MR. HOUFF:

Q. Doctor, are you also familiar with the American Thoracic Society official statement, which appeared in 1986 regarding the diagnosis of non-malignant diseases related to asbestos?

A. Yes, I am.

Q. Okay. And that document indicates that the term asbestosis should be reserved for the interstitial fibrosis of the pulmonary parenchyma in which asbestos bodies or fibers may be demonstrated, correct?

A. That was their view, yes.

Q. Yes. And you disagree with that?

A. Yes, I do.

Q. Okay.

(Pause in proceedings.)

Q. Doctor, just to — and I don't want to belabor this point.

MR. HOUFF: Your Honor, may I approach the chart and question the doctor there briefly?

THE COURT: About the stuff that's written there?

MR. HOUFF: Well, no, I just want to flip it over and go into something a little different.

THE COURT: If you think it's important.

MR. HOUFF: Yes, sir.

* * * *

TESTIMONY OF ROBERT WAGES

* * * *

[Tr. 209] filed claims. I presume they did that because they felt that they were responsible.

Q. When you say numerous claims, do you have any better estimate than that?

A. Hundreds, I believe is accurate.

Q. Now, has the — I will get into this in more detail, but I — just to ask basically.

Has the OCAW taken a formal position regarding the fairness of the settlement before the Court here?

A. This settlement?

Q. Yes.

A. We've taken the position that it's not fair.

Q. And when did you formally take that position?

A. Sometime in January.

Q. Of this year?

A. January of this year, yes.

Q. Now, how did you first find out about this case, and by that I mean, the case originally known as Karlough and now known as Georgine?

A. A press release issued by Lane Kirkland.

Q. And approximately when was that?

A. Some time in October.

THE COURT: Spell the gentleman's last name for the record.

THE WITNESS: I'm sorry.

* * * *

[Tr. 230] A. Fairly regularly.

Q. Which papers do you read, sir?

A. Well, outside of the hometown paper which is the Denver Post I read as often as I'm in the office the New York Times, the Washington Post and the Wall Street Journal.

Q. Now, have you read the actual individual notification package approved by the Court in this matter?

A. Yes, I received a notice packet from someone in December.

Q. Of 1993?

A. Of 1993, yeah.

Q. Now, turning, I just want to ask a series of questions about notice, and in the papers that OCAW filed with the Court in January, OCAW expressed concern with notification. Now, why is it as a president of the OCAW you have some concerns about the notification in this matter?

A. Well, generally I have three basic concerns. One is that I don't believe it is humanly possible to give adequate notice to people who have gone through my union who have belonged to my union who were impacted by layoffs because we had a massive number of layoffs in the late '70s and early '80s with refinery closures. We don't maintain records of them. We don't maintain records of retirees on any systematic basis. We have no idea where people go after they pass through the union. I viewed trying to notify everybody potentially exposed as an absolute impossibility.

[Tr. 231] Q. Well, you're talking about layoffs. You mentioned the beginning. What is your current membership?

A. Current membership is about 100,000.

Q. And prior to these layoffs that you mentioned in answer to the previous question, what was the high point of your membership?

A. Well, at about 1977, thereabouts, it was about 180,000. I think our peak membership was about 185,000. May have been higher, but it was before my time.

Q. And do you have an estimate as to about how many OCAW retirees there are?

A. Well, retirees, retirees per se, no. Retirees and people laid off who've passed through, yeah, about 200,000.

Q. And why is it that you don't have records of the retirees and the layoffs?

A. The reason is we don't have the kind of system where we are the joint administer over a pension plan or a joint administer over

a welfare plan where everybody passes through you have some connection to. The union has a connection to the individual. In the industrial work setting, that just doesn't happen, it's not the real world. Employers pay the pension, employers carry the welfare plans. Unions on the industrial side for the most part don't. There are some that do, but for the most part, particularly with us, we don't.

* * * *

[Tr. 233] just a matter of fairness, I think that's wrong. I don't think you can expect people to intelligently make a decision today about circumstances that are going to perhaps bar them from an election somewhere down the road on circumstances that may exist down the road.

Q. What circumstances are you referring to?

A. Well, if they, you know, you've got a choice here in this settlement to be a member of the class or opt out. And those are — that decision is going to be governed by whatever your present day circumstances are. And I think it's very difficult when you're not injured, when you don't know if you're going to get injured what your circumstances are going to be, you know, 10 or 15 years down the road with respect to what your decision would be then, if in fact you become injured. It makes sense to me. I'm not sure it makes sense to you.

Q. Did the OCAW provide notification to its current members?

A. No.

Q. And why not?

A. I should qualify that by saying not in any formal sense.

A. number of our local unions did provide some notice. The reason the international didn't is that by the time we concluded officially, and that was after consultation with my international officers in early January, there was no way to [Tr. 234] notify them to get it done by the cutoff date.

Q. And you said that some of the locals provided some notification.

Do you know what — to your knowledge what that entailed?

A. Some of our locals here in Philadelphia for instance, we represent the folks down in the refineries, a couple of our locals, hand builder folks to the extent they had a retiree club. They tried to notify their retirees.

I think our local in Texas, our Port Arthur local took an ad out in the paper and published a letter signed by me, so that they could get all of the folks in the Jefferson County area to — it was a request to opt-out.

Q. In terms of the settlement itself now, Mr. Wages, have you reviewed the stipulation of settlement?

A. Yes.

Q. And have you formed views about some of the particular provisions of the stipulation?

A. I have.

Q. Let's go through them if we can.

Do you have any views as to the amounts of compensation available under the settlement?

A. We've concluded that the compensation amounts appear to be lower than what our people are experiencing in the tort system in settlements, including settlements of CCR.

* * * *

CROSS EXAMINATION

[Tr. 244] could be a significant issue in that case, especially in a mesothelioma case?

A. I could imagine someone could try to use that as an issue, yes.

Q. All right. Now, you also made — are you aware that under the stipulation of settlement that any issue about the chrysotile being a less dangerous has been waged by the CCR members who make the chrysotile fiber?

A. Absolutely. That's my understanding, yes.

Q. Okay.

MR. RICE: Your Honor, may I approach the witness and give him a copy of the compensation schedule (Inaudible)?

THE COURT: Is that Schedule B —

MR. RICE: Schedule B.

THE COURT: — Settling Parties' Exhibit 300.

MR. RICE: Yes, sir.

BY MR. RICE:

Q. Mr. Wages, I just want to make sure I understand what you were saying about the settlement values.

What is the source of your knowledge of the settlement values that OCAW members have gotten in settlements?

A. The ultimate source?

Q. The ultimate source?

A. The ultimate source is you.

[Tr. 245] Q. Thank you. Now, we're going to go into that in a few minutes.

Would you agree with me from the information that I provided to you, that in 100 — or almost 100 percent of the cases that your members have been paid within the minimum and maximum range listed in the ordinary compensation schedule there?

A. The minimum and maximum value range here?

Q. Yes.

A. Yes.

MR. BARON: Your Honor, I object unless he defines what types of claims, for what types of injuries and for what minimum or maximum range. This is too broad a question.

MR. WOLFMAN: I'll respond —

THE COURT: Well, the witness answered it and he's pretty knowledgeable. Objection's overruled.

Someone else can ask him that if they want to later. Maybe Mr. Wolfman.

BY MR. RICE:

Q. When you were discussing with Mr. Wolfman that your settlement history numbers may not be within the range, you're referring to what's labeled as the negotiated average value range?

A. That's what I thought I testified to.

[Tr. 246] Q. Okay.

(Pause in proceedings.)

Q. Now, you are aware from your experience in the asbestos litigation that in some jurisdictions cases get compensated at a greater value than in other jurisdictions?

A. Yes, sir.

Q. And you've told us that your membership works in the oil and chemical refineries and a lot of your members do that, right?

A. That's right. That's where part of them work.

Q. Right. And you're aware that in Texas the averages may be a little higher than they may be, let's say, in Philadelphia or in Boston?

A. Yes. Those variables exist.

Q. And they exist in the tort system?

A. Yes, they do.

Q. Now, dealing with the back-end opt-outs you talked to Mr. Wolfman about —

A. Yes.

Q. — you stated that you didn't believe that was much of an option. Do you know from any information what percentage of the historical cases have actually been tried with CCR?

A. Of all the cases —

Q. Of all the cases.

A. — that are filed?

* * * *

[Tr. 263] MR. ALDOCK: I show you what's been marked as SP-305, your Honor. This is a letter that's before your Honor in a yellow folder. It's been given to the objectors, and I'd like to give it to counsel. It's from Lane Kirkland and it's a Dear President letter dated October 29, 1993 with respect to notice that I believe went to this gentleman and all other presidents.

THE COURT: You may.

BY MR. ALDOCK:

Q. Have you seen that letter before, Mr. Wages?

A. I believe I have, yes, sir.

Q. You received it around on or about October 29th or shortly thereafter?

A. Yeah, in that time frame I'm sure.

Q. And it seeks your cooperation with regard to sending out notice with regard to the class action?

A. Correct.

Q. And it says that the labor movement in Lane Kirkland's view would provide an important service to union members by facilitating the circulation of the notice?

A. That's true, that's what the letter says.

Q. If that endorses the settlement in the second paragraph?

A. Yes.

Q. And the last paragraph says that this notice could be [Tr. 264] provided to union members and retirees for union publications or direct mail. If direct mail is used, the notice materials would either be mailed by the union or sent to a mailing house. All this would be confidential. The settling parties would pay all costs associated with this notice effort.

A. Yes, that's what it says.

Q. So you got that in October. Did you then subsequently get a letter directed to you personally with regard to the notice?

MR. ALDOCK: I'd like to show your Honor what's been marked as SP-306 in your Honor's yellow folder, distributed to objectors, a letter to Mr. Wages that doesn't appear to have a direct date on it.

BY MR. ALDOCK:

Q. Do you recall seeing that before, sir?

A. No, I don't.

Q. Do you believe that you didn't get it?

A. Do I believe I didn't get it?

Q. It's a letter addressed to you from the Court.

A. It may not have gotten to me because it has a Denver address. Our office isn't in Denver, it's in Lakewood. They quit forwarding about a year ago.

Q. Are you aware of numerous calls to your secretary on November 12th, and on November 17th with respect to that letter?

[Tr. 265] A. Calls to my secretary —

Q. Your secretary is named Ruthanne, isn't it?

A. Right.

Q. Does she get calls with respect to your response to that letter?

A. She may have.

Q. Did she tell you about it?

A. I don't recall whether she told me about it or my executive assistant, Dean Alexander, told me about it.

Q. So you're aware —

A. But I was aware that there were some phone calls made from the District Court, and that Ruthanne may well have cleared up the snafu over the address in that discussion, I don't know.

Q. And you're aware that someone was sent — was told to talk to your general counsel, Mr. Mooney, with respect to that notice and Mr. Mooney was sent a notice package for you?

A. Yes, since I did get a notice package, yeah.

Q. And it was mailed to Mr. Mooney on or about November 17th?

A. I don't know that.

Q. Is Mr. Mooney's address 255 Union Boulevard, Lakewood, Colorado?

A. Yes.

Q. I show you a mailing label to Mr. Mooney marked as SP-[Tr. 266] 309. Would that refresh your recollection of whether you believed Mr. Mooney would have gotten that?

A. With all due respect, sir, it doesn't refresh my recollection about anything.

Q. Is that the correct address for Mr. Mooney?

A. Yeah.

Q. That's a mailing label to him?

A. It appears to be.

Q. And you eventually got a notice?

A. I eventually got a notice.

Q. And if that label was dated the 17th, do you have reason to believe that was likely the way you got it and on the date on which you got it?

A. I suspect that that's a good deduction.

Q. And having gotten the letter which offered to provide copies of the notice in as many copies as you wanted to any list that you provided in any confidential way you want at the full expense of the settling parties, you elected not to send any copy to any of your members; is that correct?

A. Yes, that's right.

Q. Are you aware that 40 other unions elect — including the carpenters and including the paper workers — all sent notices in publications and otherwise some by direct mail, some in publications, to millions of members in total?

MR. BARON: Your Honor, I object. There's no [Tr. 267] predicate in the record for that. If he asks it as a hypothetical —

THE COURT: Mr. Aldock, can you respond —

MR. ALDOCK: It is in the record, your Honor.

THE COURT: Where is it?

MR. ALDOCK: It's in reports that have been filed with this Court, and Mr. Baron has a copy and it's — I'll have it marked as SP-310, Settling Parties Final Report On Implementation of Notice.

MR. BARON: Your Honor, the report is not subject to cross-examination, and it's not in the record in this particular hearing.

MR. ALDOCK: Miss Consella's (ph) deposition was taken with respect to this document.

THE COURT: I'm not sure it's admissible in evidence then. No one has convinced me that it is; therefore I'd like to proceed

cautiously. The mere fact you file something in court doesn't mean that it's admissible in evidence.

MR. ALDOCK: I would go further, your Honor, and say that it was the subject of a deposition of Miss Consella taken in this case by Mr. Baron.

MR. BARON: That's right, that's correct. Still that doesn't make it anything that is —

THE COURT: You expect that there's going to be evidence in the record of the materials set forth in Settling [Tr. 268] Parties 310 other than through this document?

MR. ALDOCK: They have offered the designations of Miss Consella at that deposition including matters that pertain to this document, your Honor, for your Honor's perusal. I believe also that this witness will not disagree with the contents of which I am asking him to identify.

MR. BARON: Your Honor, I cross-examined the witness and I think she disagreed with some of the numbers here. I certainly think there was a real question as to whether some of these things went out. I don't believe this record itself is independent proof that what it says in the record is true. So if he wants to ask it as a hypothetical, I have no objection, but he's asking it as if it was true.

MR. ALDOCK: I'm asking this witness if he is aware, your Honor, and I think he is.

THE COURT: Well, all right, you can start out with whether he is aware of this document, ever seen it before or any of the information in it.

BY MR. ALDOCK:

Q. Are you aware not of the document, Mr. Wages, but the fact that these unions, many of them, did exactly what you chose not to do which is to send the notice to their members?

A. I am aware that unions did it. I'm not aware of any of the specifics here.

Q. Are you aware that the carpenters did it?

[Tr. 269] MR. BARON: Objection unless he says what specifically.

BY MR. ALDOCK:

Q. Are you aware that the carpenters sent notice to their members of the court-approved notice in this case?

A. I don't know that.

Q. Do you have a list of the current members of your union?

A. Current membership list?

Q. Right.

A. Yes.

Q. Could you have given that to the settling parties for mailing or could you have mailed to that list, if you chose to?

A. I doubt it. We have a constitutional prohibition against giving out our membership list.

Q. Could you have mailed to that list at someone else's expense if you chose to do so?

A. Could I have?

Q. Yes.

A. The union, yes.

Q. Do you have a list of the people that have been screened for asbestos-related disease by your union?

A. Yes, we do.

Q. Is that in the thousands of people?

A. Yes, I believe thousands would be accurate.

[Tr. 270] Q. You think it would have been useful for those people to receive a copy of this notice so that they could make their own choice with regard to this matter?

A. Well, I determined that I wasn't going to do it and I didn't do it.

Q. Mr. Wages, as a reader of newspapers, were you in the United States in the first week and second week and the third week of December?

A. The second week and third week. Not the first week.

Q. Did you —

A. I was in Europe.

Q. Did you happen to see either the New York Times or the Washington Post's full-page ad on December 19th?

A. On December 19th? No, I was skiing in Steamboat Springs.

Q. Did you see the Denver Post full-page ad in the Parade Magazine on December 19th at Steamboat Springs?

A. Not on the 19th. I didn't read a paper that day.

Q. Mr. Wages, are you aware that no member of the CCR has been held liable and paid a punitive damage award in the history of the CCR?

A. No.

MR. ALDOCK: No further questions, your Honor.

TESTIMONY OF ROBERT HATTEN

* * * *

[Tr. 26] Q. And have you been at a lot of meetings where plaintiffs attorneys — where the asbestos litigation was discussion on a national scope?

A. Yes. It would be discussed in the bankruptcy committee meetings. It would be discussed in the ALG meetings that Ron motley would have. It would be discussed in co-counsel meetings that Ron Motley would call.

From time-to-time there were special meetings. The plaintiffs bar met regularly and discussed these matters regularly.

Q. Throughout your 20 years or so in the asbestos litigation, have you become very familiar with the law firm of Ness, Motley?

A. Yes, I have.

Q. Would you tell us in your view what law firm or law firms have been the most active firms in litigating the liability of asbestos manufacturers from the beginning to the current time?

MR. BARON: Your Honor, I object on foundation.

THE COURT: Overruled.

THE WITNESS: The most active litigating firm in the national has been the Ness, Motley firm. They have co-counsel relationships to my knowledge in virtually every state in the Union. And so I would say that there really isn't a close second in terms of the most litigious group in [Tr. 27] the nation.

BY MR. RICE:

Q. What about the firm that represents the most individual victims in the country?

A. Again it would be the Ness, Motley firm.

Q. You told us earlier what the asbestos litigation group was. Has that group continued to function continuously since the early 1970s, to your knowledge?

A. Yes, it has.

Q. And has that group from-to-time called meetings to discuss national issues and to present various problems on liability or the issues in asbestos?

A. Yes.

Q. In the early 1970s when that group was started, do you know who was selected as chairman of the group?

A. Ron Motley.

Q. Since at least 1978, has anyone to your knowledge ever served as chairman of the asbestos litigation group other than Ron Motley?

A. No.

Q. Now, you've told us about the involvement of Greitzer and Locks, you've told us about Ness, Motley.

Were there in fact other law firms that have made significant contributions to the asbestos litigation?

A. Yes. From the very beginning, Tom Henderson has made

* * * *

[Tr. 88] MR. HENDERSON: Objection, your Honor.

THE COURT: Sustained.

BY MR. RICE:

Q. What was the reaction — what did the bar do? What were the plaintiffs doing in exchange for that concern, or in response to that concern?

MR. BARON: Objection, foundation.

THE COURT: Sustained.

BY MR. RICE:

Q. What were you and Mr. Glasser and your other co-counsel doing in response to that concern?

A. That did not concern us.

Q. Why did it not concern you?

A. It did not concern because since the mid-1980s, we had not filed pleural cases or tried very hard not to, and this was an issue that was an issue to other plaintiffs counsel. It was not an issue to us.

Q. All right. Mr. Hatten, I want to turn with you to the Georgine negotiations.

When did you first learn that some people were trying to negotiate a resolution with the CCR to the asbestos crisis?

A. Well, in the summer of 1992 is when I first learned that Gene Locks was negotiating with the CCR relative to some potential global resolution.

[Tr. 89] Q. Tell us how you found — you discovered that, and what you did? Limited to that time frame, the summer of '92?

A. Some time in July of 1992, I received a phone call from Gene. He asked me to come to Philadelphia and to have a discussion with Gene and members of the CCR to comment upon a proposal that was being made concerning what the medical criteria were or would potentially be for a settlement that was being contemplated with the CCR.

Q. Did you come to Philadelphia?

A. Yes, I did.

Q. Did you have a meeting, and where was that meeting?

A. I went to Gene's home and I found John Aldock there, and David Beers and Gene was there, and it seems to me like there was one other person there.

And they presented two or three or four-page document to me that related to medical criteria, and they wanted to know my reaction to it, what I thought about it, and they wanted to know what I thought other plaintiffs counsel might think about that criteria.

Q. Did you make comments to them and give them reaction?

A. I reviewed it and I didn't like it, and I criticized it. And we engaged in a debate about it for about an hour.

Q. Was that a friendly debate?

A. It was not particularly friendly, but it was frank, robust —

[Tr. 90] Q. You said Mr. Beers was there, right?

A. Yes.

Q. Did you debate with Mr. Beers?

A. Yes.

Q. Do you want to describe what that experience was like for us?

A. He —

Q. What happened after your debate with Mr. Beers in your discussion?

A. I expressed my view that the proposal needed significant change, and that I didn't agree with a lot of things that were in it. I made my feelings known, and I expressed the view that I didn't think the plaintiffs bar generally would accept what was in that proposal.

And having said my peace and had my argument, I took Gene's wife out to dinner and I left Gene to continue the discussion. I got back about 11:30 that night, he was still talking to the defendants, and I went on to bed and got up the next morning and flew back to Newport News.

Q. Had the — when you returned around 11:30 that night, was the nature of the exchange that was taking place between Mr. Locks and the representative CCR any different or was it any friendlier?

A. They were talking about — I don't know what they were talking about to tell you the truth. I —

[Tr. 91] Q. Okay.

A. Gene told me that the negotiations were — well, I didn't want to know.

Q. Okay.

A. I stayed out of whatever the discussion was. I had been asked about what they wanted me to comment on. I made my comment and I wasn't invited to participate in anything else.

Q. And you returned to Newport News the next day?

A. Yes.

Q. All right. Now, after that meeting with Mr. Locks and the CCR representative, when was your next contact with anyone concerning the CCR global discussions?

A. In September of that same year, 1992, I received a call from Ron. Ron at that time advised me —

THE COURT: Mr. Motley, you mean?

THE WITNESS: Yes, I'm sorry, your Honor. It's been a first name —

THE COURT: He's Ron to everyone in the world except to Judge Reed.

MR. RICE: Some people call him other things, Judge.

THE WITNESS: I apologize, your Honor.

Mr. Motley called me, asked me to come to South Carolina, that he wanted to make a presentation to some of his co-counsel, again to get our comments on matters that he was discussing with the CCR.

[Tr. 92] So I went to South Carolina. I believe a number of other people joined me there at your office in Charleston.

BY MR. RICE:

Q. When you say other people, were these other attorneys?

A. Yes.

Q. Did you know those attorneys from past experience in the asbestos litigation?

A. Some I knew, some I didn't. Richard Scruggs I met for the first time, he was from Mississippi was there. Danny Cupid from Mississippi was there. Gary Kendall from Virginia was there, he's my co-counsel in Virginia, or I'm his co-counsel, whatever.

And those were the lawyers that I can remember off the top of my head who were there.

Q. Tell us what happened during that trip to Charleston?

A. In the morning, you made a presentation to us of about an hour, in which you outlined the things that were being negotiated with the CCR, and you outlined the medical criteria, and you asked for comment and criticism by the group. There was —

Q. Did I receive comment?

A. You did indeed.

Q. Did I receive criticism?

A. Yes, both. And we made a number of suggestions of things that we didn't like, things that we thought out to be [Tr. 93] improved, and people made various comments about it.

Q. Was the document and the materials, the medical area that we discussed in Charleston in late September, early October 1992, significantly different than what you had discussed in the summer of 1992 in Philadelphia?

A. The medical criteria had been substantially improved, but I still didn't — there were still a number of things about it that I and others didn't like.

The other portion of the agreement, proposed agreement at that time, I hadn't heard any of before, so it was all brand new information to me. That I didn't know anything about.

Q. Now, other than the meeting with the attorneys to discuss the proposed agreement, did you meet anyone else at that meeting and discuss the CCR global discussions at that time?

A. Yes. I met Professor Freeman who was introduced to me as an ethics professor from the University of South Carolina. And the group of us went to lunch with him, and talked to him about the ethical issues that we could think of that might come up from this type of an action.

I think Charles Patrick of your office accompanied us to lunch, and Professor Freeman expressed the view in that luncheon —

Q. Don't tell me what he said, just —

A. Okay.

[Tr. 94] Q. Was there an open and full discussion that day with the plaintiffs attorneys that we invited in of the CCR negotiations and global discussions?

A. Yes.

Q. And there was exchange of information, both —

A. Yes.

Q. — criticism and support?

A. Yes.

Q. Now —

THE COURT: We're going to take a break, Mr. Rice.

MR. RICE: Okay.

THE COURT: 15-minute recess.

(Recess, 11:07 o'clock a.m. to 11:26 o'clock a.m.)

THE COURT: Welcome back everybody. Mr. Hatten, please be seated.

BY MR. RICE:

Q. Mr. Hatten, I think we finished our discussion about your visit to Charleston, and the meetings in Charleston.

When was the next time you attended a meeting where the subject of the CCR global discussions took place?

A. I had a very large meeting in Miami Beach, the Coconut Grove Hotel, I believe in November 1992.

Q. Was this what we call an ALG meeting?

A. Yes.

[Tr. 95] Q. And was it combined with what's referred to as the Ness, Motley co-counsel meeting?

A. Yes, it was.

Q. Can you give the Court some estimate of the number of lawyers that were present at that meeting? Plaintiffs' attorneys representing plaintiffs' victims?

A. There was a very large conference room, and my best estimate would be that it exceeded a hundred lawyers.

Q. And did you attend that meeting?

A. Yes.

Q. And do you know who called the meeting?

A. I think Ron Motley called the meeting.

Q. All right. Were there attorneys there from all over the country?

A. Yes.

Q. At that meeting, during your attendance, was there full explanation of what the discussions were with CCR and what the proposed settlement consisted of?

A. Yes.

Q. Was there exchange of information back and forth among those making the presentation and those in attendance listening to the presentation?

A. Yes. There was a comprehensive presentation, followed by extensive questioning.

Q. How long did that discussion take place, do you recall?

[Tr. 96] A. A number of hours.

Q. From your being present at that meeting, from your 10 years plus experience in this litigation, from your personal involvement with the attorneys that were present at that meeting, your personal experience with them, what was your perception of the reaction of the plaintiffs' bar that was present at the Miami meeting in November of '92 to the CCR settlement agreement?

A. My perception that there was a very broad based large majority of lawyers there, who supported and welcomed the agreement.

Obviously, in a group that size, it was not unanimous. But there were far fewer people that spoke in opposition to the plan than those who supported it. And there was a general sense of relief that finally something was happening.

There had been a great of frustration in the MDL, and this was viewed by most according to my perception as a good thing.

THE COURT: Excuse me for interrupting, but did you leave out the fact of who was at the meeting. A hundred lawyers, but who — other than them being plaintiffs' lawyers.

BY MR. RICE:

Q. Well, through your experience in the litigation over the [Tr. 97] last 20 years, the attorneys that were present at that meeting, and the law offices that were represented, do you have an estimate as to what percentage of the existing volume of asbestos cases were represented at that meeting?

MR. BARON: Your Honor, foundation, objection.

THE COURT: Well, first of all, we'll find out if he's able to do it at all. Answer yes or no to that, and then we'll see. The objection's overruled, just for a yes or no answer.

THE WITNESS: Yes.

MR. RICE: And could you tell us —

THE COURT: How did you reach that conclusion? Lay the foundation if you can.

BY MR. RICE:

Q. And how did you reach the conclusion — well, from time to time in the asbestos litigation, in your involvement with the MDL, was there a necessity to gather some information about where the cases were filed and who had the cases, and what law firms represented what percentage of the people?

A. Yes. In the MDL, Judge Weiner had asked all the lawyers in federal court to file affidavits of how many cases they represented and where they were.

He had asked also for affidavits of both federal cases and state cases that people had. So there had been discussion from time to time as to where all the cases were, [Tr. 98] and who had most of the cases, and based upon working with the plaintiffs' bar, there was a general — I had a general understanding of who had the large blocks of cases and where the cases came from.

Q. And in the work you had done in the bankruptcy committees, was that information also supplied in general terms?

A. That's correct. And it was repeatedly said that those steering committees in the bankruptcies and the steering committee of the MDL represented 75 percent or more of the cases nationwide. Or if they didn't directly represent them, they represented them in co-counsel relationships, and I have had that caveat.

Q. All right. So Mr. Hatten, what is your bottom line opinion as to what volume of the current litigation was represented at the Miami November '92 meeting?

MR. BARON: Objection, foundation.

THE COURT: Overruled.

THE WITNESS: Based upon the people who were there and the number of people who were there, all of whom were plaintiffs' counsel, from all over the United States, I thought that that room probably represented 85, 90 percent of the cases. That was simply my perception, but based upon what I had understood.

BY MR. RICE:

[Tr. 99] Q. In addition to that volume of the existing cases being represented at that meeting, were there representatives from most, if not all of the jurisdictions in the country that you're aware of that have asbestos litigation?

A. Yes.

Q. You told us you attended that meeting and you were in the meeting, right?

A. Yes.

Q. There's been a representation made in this case that at some during that meeting there was some type of statement made to the extent that you ought to file all your cases now to avoid being treated as futures. Do you recall anything like that being discussed?

A. No.

MR. BARON: Your Honor, I talked with Mr. Baron during the break, and he had some concerns about his out-of-town witness. I spoke with Mr. Hatten and this is a convenient stopping place and we have no objection if Mr. Baron wants to take his witness out of turn. Mr Hatten's agreed, he could be here tomorrow morning if necessary.

MR. BARON: No, your Honor, that's not what I wanted to do.

THE COURT: Are you finished with his direct with him before we —

MR. RICE: No, sir, I have not. But I had agreed —

* * * *

TESTIMONY OF ROBERT HATTEN

* * * *

[Tr. 8] THE COURT: You may. It doesn't look like the same paper. It's the different thing.

BY MR. RICE:

Q. The document I just handed you, would you tell us what that is and tell us the connection between that and 218?

(Pause in proceedings.)

THE COURT: First identify what it is and —

BY MR. RICE:

Q. Mr. Hatten, would you do that since you have the only copy?

THE COURT: — it's very unusual that you don't give it to other counsel. It may be a minor matter but ...

THE WITNESS: On April the 23rd, 1993, Fred Baron had copied me with some pleadings that he had filed in this action and he had asked for my comments and my views.

And I had responded to his letter asking for my views with this letter.

BY MR. RICE:

Q. So your letter of May 4th is in response to Mr. Baron's letter of April 23rd?

A. Correct.

Q. What was the point you were getting across in the letter to Mr. Baron in your view?

A. Well, there are a number of points that I was trying to make in the letter.

[Tr. 9] Q. Would you share them with us, please?

MR. BARON: Well, your Honor, the letter speaks for itself.

THE COURT: Bear with me just a second.

It's a brief letter, let me read it to myself since I haven't before.

(Pause in proceedings.)

THE COURT: I read the letter. And your question is what point was he trying to make with the letter?

MR. RICE: Yes, sir.

THE COURT: And the objection is the letter speaks for itself.

Objection sustained. The letter couldn't be any clearer to me.

BY MR. RICE:

Q. Mr. Hatten, would you tell us what you meant by irresponsible lawsuits?

A. Yes. I made an allusion to it yesterday in the fact that there were thousands of lawsuits that had been filed since the late 1980s in the state and federal courts for people that had unimpaired changes on their chest x-rays that were arguably caused by asbestos exposure that I didn't think should be in the tort system at all.

They were the result of indiscriminate screenings in which people had screened thousands of workers and once the [Tr. 10] screen was done, then those lawyers effectively triggered statutes of limitations for thousands of people that had minimal changes on their chest x-rays and therefore were forced to get into the tort system.

And so I was expressing a view that I had expressed many times before that the plaintiffs' Bar needed to file their claims with more discretion and better judgment. And they had not been.

Q. Did you review the medical criteria of the stipulation of settlement when you reviewed the document generally?

A. Yes.

Q. And was the medical criteria that you reviewed in the January 15th, 1993 stipulation significantly different than the medical criteria that you had discussed in the Charleston, South Carolina meeting?

A. Yes. The criteria that were in the final agreement were different from the criteria that — they were substantially different from the criteria that I had seen the first time in July of 1990 to Gene Locks' house. They were substantially different from the criteria that I saw in Charleston and they were substantially different from the criteria that I saw in Miami. There were changes.

So it was a much improved document over where it had begun and every time I looked at it — I mean in the four times I had an opportunity to see it, it had changed each [Tr. 21] expanded it to the tort system in general.

And as Mr. Rice will know that it's Mr. Hatten's practice to —

THE COURT: All right. Form of the question is flawed, the objection is sustained. Redraft if you want.

MR. RICE: Mr. Hatten —

THE COURT: Recraft.

BY MR. RICE:

Q. — in your experience, tell us what your views are about the trade-off within the Georgine settlement as it relates to the pleural unimpaired claims?

A. All right. There are a number of substantial benefits to those persons that have unimpaired pleural changes in my opinion from the tort system.

First of all, in most cases in the tort system, if you bring a claim for pleural injury and you later develop cancer, then that claim is going to be barred by your earlier claim for an unimpaired pleural condition.

So you are forced to base your entire damages upon the speculation that you might get cancer in the future, and in many jurisdictions that evidence is not admissible.

And so you have a minimal damage case that you are forced to try even though you may get a very serious disease in the future and die of it. I've had cases, for instance, that were defensively filed in the early 1980s because of the [Tr. 22] statute of limitations in Virginia that required them to be filed, where people had a pleural disease, settled for a pleural disease and then five years later got mesothelioma. And they couldn't come back, they were out of luck in the tort system.

So the settlement provides an opportunity for a person with pleural change to actually come back twice. If they only have pleural change, they can come and get compensation when they

have asbestosis, they get a limited release, and then they can come again if they get cancer.

Secondly, the statute of limitations on these claims is told, so there is no prejudice to these people from the delay.

Thirdly, when they do contract a disease, one of the significant factors that will be preserved in this agreement is the historical value that would have applied for people with asbestosis or cancer in the jurisdiction where they live. That will be available to them in the future.

Whereas right now, if they simply had a pleural case and took a green card, there would be no expect — there would be no way to predict what they would get in the future.

Another major advantage is, if these people get sick in the future and get asbestosis or get mesothelioma, all of the defenses that we've had to put up with in the tort system, except the medical condition and the exposure [Tr. 23] evidence, all of those defenses are waived. To me that's worth a lot.

And every case now in the tort system, for instance in Virginia, and I think in a majority of states, state of the art is a defense, and lots of other defenses. Liability is never a given, it's something you have to prove, so a waiver of those defenses in the future.

The fact that this settlement is going to define what that future liability is, I think gives that person greater security that the assets will be available to pay him in the future than at the present time.

The agreement provides for a ten-year commitment, a ten-year written contract, and that's a substantial period of time for these funds to be available, and I think it enhances the financial security of the defendants in the case.

The fact that if they get sick, the numbers will be historical and it will be a limited release. I'm trying to think of other things that may be in there. And those are some of the things that come to mind. I may have left some out, but...

Q. You made the comment that —

A. One other — one other thing is that if they get sick in the future and they get a diagnosis that meets these criteria, they don't

have to worry about the defendants coming with a doctor who will contradict their doctor.

[Tr. 24] So long as they have a reasonable doctor who is a qualified pulmonary specialist, and their diagnosis meets these criteria, they don't have to worry about a battle of experts in the courtroom.

And I guess lastly is the enormous savings of costs that are available to the client from this deal, if he gets sick in the future. The transaction cost of the trial, and my experience has been that an individual trial will normally cost a minimum of $20,000 and a minimum of two weeks to try for one plaintiff.

There will be reduced attorneys fees so he'll be able to keep more of the money that he does get in the future. And on the medical diagnosis, he doesn't have to worry about some professional witness coming in and saying that his doctor who is a pulmonary specialist is wrong if the diagnosis meets certain recognized criteria.

So I think there are great benefits in this that are not available in the tort system, and the present remedy for anybody in the tort system right now, is simply a green card. And a green card simply postpones into the future indefinitely what that person may be able to accomplish. And then all of the uncertainties, all of the costs, all of the delays of the tort system are simply postponed for that individual.

And one final thing. Under this system if you [Tr. 25] qualify, you get your money very quickly, in six months under this agreement or less. That's a substantial improvement over the present tort system. So it gives him a certainty that if he does qualify, you know, he'll get paid.

There are lots of benefits here that are unavailable in the tort system, and in my opinion are a bundle of opportunities and rights that simply don't exist now in the tort system.

MR. BARON: Your Honor, I move to strike.

THE COURT: Grounds.

MR. BARON: There was no explanation as to what law he was referring to when he made his comparisons. There wasn't a

description of whether he was talking about the law of 50 states, the law of Virginia, or what it was he was describing.

It was just a general description without reference to any state law, and the law varies from state-to-state on all of these issues, and so it provides no relevant information.

THE COURT: Motion is overruled. Cross-examine on it, plus the witness himself said it varies in certain states, said it's so in his own testimony

BY MR. RICE:

Q. Mr. Hatten, you mentioned in part of your comments, the

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BEFORE THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

MDL-875

[Caption Omitted]

**PLAINTIFFS' RESPONSE TO
MDL-875 ORDER TO SHOW CAUSE**

SECTION I

This Response is being submitted by the firm of Wilentz, Goldman & Spitzer, P.C., on behalf of its own clients and on behalf of the clients of the law firms of Weitz & Luxenberg, P.C.; Peter G. Angelos, Esq.; Ness, Motley, Loadholt, Richardson & Poole, P.C.,; Maples & Lomax, P.A.; and Henderson & Goldberg, P.C. The parties and actions represented are as follows:

Wilentz, Goldman & Spitzer:

- D. New Jersey — 17 actions/142 plaintiffs
- S.D. New York — 7 actions/7 plaintiffs
- 3,000 plaintiffs in New Jersey and New York State Court Actions

Weitz & Luxenberg, P.C.:

- E.D. New York — 2,000 plaintiffs
- Manhattan Supreme Court — 2,000 plaintiffs

Peter G. Angelos, Esq.:

- D. Maryland — 113 actions
- State of Maryland — 11,000 plaintiffs

Ness, Motley:

- In excess of 20,000 federal or states cases in more than 40 jurisdictions.

Maples & Lomax, P.A.:

- Mississippi State Cases — 1,100

Henderson & Goldberg, P.A.:

- N.D. Iowa (East) — 5 actions/5 plaintiffs
- N.D. Iowa (West) — 2 actions/2 plaintiffs
- S.D. Iowa — 1 action/1 plaintiff
- D. Maine — 59 actions/59 plaintiffs
- D. Maryland — 171 actions/171 plaintiffs
- E.D. Michigan — 18 actions/18 plaintiffs
- W.D. Michigan — 9 actions/9 plaintiffs
- N.D. New York — 109 actions/109 plaintiffs
- W.D. Ohio — 122 actions/122 plaintiffs
- M.D. Pennsylvania — 24 actions/24 plaintiffs
- W.D. Pennsylvania — 216 actions/216 plaintiffs
- N.D. West Virginia — 2 actions/2 plaintiffs

New Jersey State Council of the International Sheetmetal Workers Association

Systems Council International Brotherhood of Electrical Workers (New Jersey)

International Union United Automobile, Aerospace and Agricultural Implement Workers of America (NY; NJ; Penn)

United Union of Roofers, Waterproofers and Allied Workers
Local Union 30-30B

White Lung Association of New Jersey

SECTION II & III

This Response is limited in its scope to the issue of whether mandatory pleural registries should be established as a dispositive technique to clear the backlogged federal asbestos docket in the event an MDL transfer takes place. In the interest of brevity and judicial economy, we have attempted to coordinate this Response with other members of the plaintiff's bar. Thus, the specific issue of MDL transfer will be addressed by other plaintiff's counsel in their response to this Court's Order to Show Cause.

SECTION IV

In light of the indication by the Judicial Panel on Multidistrict Litigation that it will consider the institution of mandatory pleural registries as a dispositive technique to clear backlogged asbestos dockets, the parties submitting this Response add the following response concerning that issue.

PRELIMINARY STATEMENT

In its most recent visit to asbestos litigation, the Judicial Panel on Multi-District Litigation (the Panel) has invited comment concerning the use of mandatory "pleural registries" as a "dispositive technique[ ]" to solve the backlog of cases in federal asbestos litigation. *In re Asbestos Products Liability Litigation* (No. VI), Docket No. 875, at 2, reprinted in *Asbestos Litigation Reporter* (February 1, 1991) at 22430. Presumably, this technique would be used to remove from the active court docket actions instituted by victims of asbestos exposure who have developed some form of pleural disease. These victims would not be permitted to sue for damages unless their condition worsened from pleural disease to some other asbestos-related disease accompanied by some arbitrary threshold disability rating. Plaintiffs submit this brief in opposition to any such plans.

Plaintiffs are not unaware of the plight of the federal courts to manage a docket burdened by backlogged drug cases, other federal criminal cases and complicated civil matters. Plaintiffs further recognize that recently enacted statutes have spawned new areas of civil litigation and have added to the already overburdened federal docket. Recognizing too that the asbestos litigation may appear to be fertile territory to which the federal bench may look to begin to

reduce its docket, plaintiffs nevertheless urge the Panel to recognize that this complicated dilemma is multi-caused and should not be "solved" by the judiciary by wiping away the rights of thousands of innocent victims of the defendants' asbestos products.

A notion implicit in the proposed use of a mandatory pleural registry is that, as a matter of law, plaintiffs with pleural disease have not sustained any damages for which a remedy is warranted. This notion, however, is mistaken. The asbestos manufacturers have, themselves, presented a most forceful argument that asbestos fibers cause injury to lung tissue almost immediately after they are deposited in the lung, damaging cells and adjoining tissue. That position is buttressed by the continually mounting medical research concerning the functional and pathologic injury sustained by pleural disease victims.

POINT 1

PLEURAL DISEASE CONSTITUTES AN INJURY FOR WHICH THOSE AFFLICTED ARE ENTITLED TO COMPENSATION

The law is well settled that in order for a plaintiff to prevail in any tort action, he or she must demonstrate that defendant's tortious conduct proximately caused some damage or injury. *See* W. Prosser, *The Law of Torts* § 30 at 143 (4th ed. 1971). As a remedy for damages sustained as a direct result of defendants' wrongful conduct, plaintiffs are entitled to recover an award which provides some rough compensation for their losses. *See Dobbs on Remedies* § 3.1 at 136 (1973). These compensatory damages may be broken into two categories: (1) general damages, which compensate the plaintiff for any physical injury, alteration, pain, disability, suffering and emotional distress; and (2) special damages for the economic losses a plaintiff may sustain as a result of a defendant's wrongful conduct. *See In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Hawaii 1990).

The law is equally clear that general damages are available to any person who suffers a legally recognized injury, which is the proximate result of another's wrong. *Dobbs on Remedies* § 3.1 at 135 (1973). The principal question raised by the Panel's suggestion to create a mandatory pleural registry is whether asbestos-induced

pleural disease falls within the realm of injury which is "legally recognized," and, therefore, compensable.

As will be hereinafter set forth, those individuals afflicted with pleural disease suffer physical and emotional injury which the law recognizes and for which they are entitled to be compensated. *See Powell* v. *Ward*, 643 F.2d 924 (2nd Cir. 1981), *cert. denied*, 454 U.S. 832, 102 S.Ct. 131, 70 L.Ed. 2d 111 (1981). Even if this Panel is reluctant to find pleural disease compensable as a matter of law, it should *not* find that such injuries are *not* compensable as a matter of law. The issue is one of fact, and given the substantial evidence supporting the plaintiffs' position, this panel may not invade the province of the trier of fact. *Howell* v. *Celotex Corp.*, 904 F.2d 3, 5 (3rd Cir. 1990)[1]

No precise definition of the term "injury" exists in the context of "personal injury." A. Kanner, *Emerging Conceptions of Latent Personal Injuries in Toxic Tort Litigation*, 18 Rutgers L.J. 343, 351 (1987). However, the generally accepted notion is that one has suffered an injury where the individual has experienced an invasion of one's interest in personal physical security, producing a harmful effect. *Id.* at 348 (citing *Restatement Second of Torts* § 7 (1977)); *see Id.* at 351.

There is little question that each plaintiff with pleural disease has experienced an invasion of his or her interest in personal physical security. As a result of the defendants' tortious actions of manufacturing and selling deadly asbestos and asbestos-containing products, the plaintiffs have been exposed to asbestos fibers which they have inhaled and which have caused physical damage to the pleural lining of the plaintiffs' lungs. *See* color surgical photographs of lungs afflicted with pleural disease, attached hereto as Exhibit B.[2]

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[1] Juries in a number of jurisdictions have found pleural disease to be a compensable injury. *See* examples of Exhibit A.

[2] The light area depicted in the photographs represents pleural thickening.

There is little question that this invasion of asbestos fibers into the plaintiffs' personal physical security produces a harmful effect. In the context of this litigation, the asbestos producers continually argue that because many individuals with asbestos-related disease do not appear functionally abnormal upon the administration of simple and crude pulmonary function testing, they are not injured and therefore not entitled to compensation under our system of justice. This is so, even though the individuals so affected continually maintain complaints of shortness of breath. *See* Point I.A.I., *infra*, concerning the effect of pleural disease on lung function. It is interesting to note, however, that when many of these same companies instituted litigation to maximize their insurance coverage for asbestos disease claims, the story told in terms of whether the so-called non-impaired individuals are "injured" was quite different.

According to the asbestos producers own *Proposed Findings of Medical Facts* attached hereto as Exhibit C, filed in the California insurance litigation, asbestos fibers deposited in the lung "cause mechanical *injury* to cells and adjoining tissue." *Id*. at 14. "This mechanical *injury* occurs within minutes or hours of the deposition of asbestos fibers in the alveolar region of the lung and continues for as long as asbestos fibers remain in the lung." *Id*. at 15.

The pathogenesis of asbestos disease as described by the asbestos companies further indicates that *injury* occurs long before a patient becomes symptomatic. The deposition of asbestos fibers in the lung results in the "*damaging* of digestive enzymes" and causes "toxic substances" to be released "which *eat away* at the surrounding tissue." *Id*. at 19. According to the asbestos producers, a majority of the medical experts believe that:

> *(I)njury* and the onset of fibrosis occur soon after the initial deposition of asbestos fibers in the lung of an occupationally exposed worker..." *Id*. at 21. "Countless asbestos fibers permanently retained in the lung during the occupational exposure continue to cause *injury* and elicit a fibrogenic response." *Id*. at 26. ... "There is no real dispute within the medical community over the fact that *injury* and fibrosis resulting from occupational exposure to asbestos continue to progress indefinitely following the cessation of exposure. *Id*. at 30 (emphasis added).

The asbestos companies further admit that the reason workers injured by asbestos exposure do not immediately exhibit abnormal findings on administration of simply pulmonary function tests is not because the lungs have not been injured, but because the lungs have a considerable reserve capacity all of which must be destroyed before noticeable symptoms become evident. In fact, when the same issue was raised with Owens Corning Fiberglas (OCF) by their own employees, OCF explained:

> Even if asbestos causes scarring in the lungs and the doctor diagnoses asbestosis based on history, chest x-ray, lung function tests, and listening to the lungs, the lungs have a great deal of reserve capacity. Until this reserve capacity is used up, a person could have no symptoms and be able to work or exercise normally.[3]

Because of the lungs' reserve capacity, "an otherwise healthy individual can actually function normally with one entire lung removed. ... Similarly, an adult can lose the function of at least a third, and probably half of the individual alveolar/capillary gas exchange units constituting the lung parenchyma without experiencing any noticeable symptoms or presenting any clinical measurable signs." *Id*. at 8-9. In other words, up to 150 million of the 300 million aveoli that comprise the totality of the lung, may be destroyed by asbestos exposure before crude pulmonary function tests will detect such destruction. *See Id*. Similarly, Dr. Craighead, a medical expert who frequently testifies on behalf of the asbestos industry, approximates that *15 to 25% of the lung is destroyed before asbestos disease is even evident on x-ray*. *See* January 23, 1991 deposition of John E. Craighead at page 16, attached hereto as Exhibit E.

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[3] *Questions and Answers Concerning Asbestos*, Prepared by D.J. Billmaier, M.D., after question and answer sessions at the Owens-Corning Fiberglas, Berlin, New Jersey plant (Final Draft Nov. 28, 1978), attached hereto as Exhibit D.

As a result of the presence of these asbestos fibers in the lung, the plaintiffs unquestionably have experienced a dramatic pathological change within their pulmonary systems, including, in the case of victims of pleural disease, marked scarring of the pleura. Although research into the effects of these pathological changes have been considered on the cutting edge of medical knowledge, *Wright* v. *Eagle-Picher Industries, Inc.*, 80 Md. App. 606, ___, 565 A.2d 377, 380 (1989), there is now a substantial and rapidly growing body of medical evidence that pleural disease is not only a visible pathological alteration of the pleural surface, but that it also causes or is associated with physical disabilities such as (1) decreased pulmonary function, (2) an altered immune system, (3) an increased mortality rate and (4) emotional distress due to fear of developing cancer or dying from an asbestos-related disease in the future. In addition the to general damages associated with pleural disease, plaintiffs also experience special damages resulting in economic and financial loss.

A. GENERAL DAMAGES

1. Pleural Disease Impairs Pulmonary Function

The increasing prevalence of asbestos-induced pleural abnormalities as compared to parenchymal changes in many industrial populations studied in recent years and the accumulating evidence that pleural fibrosis does detrimentally affect pulmonary function and its clinical correlate, shortness of breath, has prompted recent investigations into the effect of pleural fibrosis on pulmonary function. Thus, despite the previously fragmented nature of the information on pleural asbestosis, recent studies have confirmed that asbestos-related pleural disease, without x-ray evidence of parenchymal involvement is independently associated with restrictive pulmonary function.

In a recent study, Dr. David A. Schwartz, *et al.*, demonstrated that asbestos-induced pleural fibrosis was independently associated with pulmonary function impairment, including reduced lung volumes, decreased diffusing capacity for carbon monoxide and diminished lung compliance. Affidavit of Dr. David A. Schwartz, at 1-2, ¶¶6-7, attached hereto as Exhibit F. Thus, asbestos-induced pleural fibrosis can cause respiratory symptoms in persons whose simple pulmonary function tests *appear normal*. *Id.* at 2 ¶10.

Dr. Schwartz's position is strongly supported by his study of sheet metal workers. After evaluating 1,211 sheet metal workers, Dr. Schwartz reached the following results. Three hundred thirty-four of the 1,211 sheet metal workers were diagnosed as having pleural fibrosis. Of that 334, 260 (78%) had circumscribed pleural plaques and 74 (22%) had diffuse pleural thickening. Considering only those with normal parenchyma (no roentgenographic evidence of

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TESTIMONY OF SAMUEL DASH

* * * *

[Tr. 172] BY MR. RICE:

Q. Good afternoon, Professor Dash. Would you —

A. Good afternoon.

Q. — tell the Court where you are currently employed and what your current position is?

A. Georgetown University Law Center at Washington, D.C., professor of law and director of the Institute of Criminal Law and Procedure.

Q. How long have you been at Georgetown University Law [Tr. 173] Center?

A. Since 1965.

Q. Would you briefly tell us the various courses that you take primary responsibility for teaching at Georgetown Law Center?

A. Professional responsibility, criminal procedure, criminal law, and a seminar in Congressional investigations.

Q. I want to go back and briefly talk about your educational background if we could.

Would you tell us where you got your undergraduate degree and when you received that?

A. Temple University here in Philadelphia in 1947.

Q. And then you went to law school after that?

A. I went to Harvard Law School. There was a period of time when I was in the service and I came to finish at Temple University and went to Harvard Law School and graduated with a JD degree in 1950.

Q. What was the Harvard Voluntary Defenders?

A. Harvard Voluntary Defenders was a student group that I founded in 1949 to provide some basis of representation for indigent defendants then being represented by the Voluntary Defenders of Boston who had very little resources and aides and I was able to recruit a number of Harvard Law students to assist them in that.

It has since become a major clinical program at [Tr. 174] Harvard where the students now practice under court practice rules in the court.

Q. Professor Dash, when I use the term "the private practice of law versus the academic area of law," do you understand what I mean?

A. Yes, I do.

Q. I want to focus on the time period after you received your degree from Harvard in law. Did you enter the private practice of law?

A. I did. There was an initial period I was a teaching fellow at Northwestern University Law Center, but from there I went to the Justice Department, the United States Justice Department in the appellate section of the criminal division and from there I came back to Philadelphia as chief of the appeals division of the District Attorney's Office.

Q. All right. Let's talk about some time frames.

A. All right. In 19 — I was in Washington in the Justice Department in 1951.

Beginning in 1952, which was the beginning of Richardson Dilworth's term as District Attorney, I joined the District Attorney's Office here as an assistant district attorney, chief of the appeals division.

Q. Here in Philadelphia?

A. Here in Philadelphia. I began first assistant district attorney I believe some time in 1954 and I became District [Tr. 175] Attorney by appointment of the Common Pleas Court Judges to fill the vacancy when District Attorney Dilworth ran for mayor in 1955. And I served out that term.

Q. All right. During your 1951-1956 time frame, did you actively participate in the private practice in appellate work?

A. Yes. I'm not — it was private practice but on behalf of the Commonwealth of Pennsylvania.

Q. Right. Could you give us an estimate of the number of cases that you personally during that period of time handled in the appellate courts in the Pennsylvania area?

A. I would say about 2,000.

Q. Now —

A. I also tried a number of cases before I became first assistant in the Quarter Sessions Court as an assistant district attorney and I would say dozens of trials.

Q. Okay. Now, in 1956 you made a career move. What did you do?

A. In 1956, I left the DA's Office and became a partner in a law firm known as Blank and Rudenko. It's since changed its name and had many more lawyers but I became a partner there. And stayed at Blank and Rudenko as a partner until 1958 when I joined with another lawyer, Abram J. Bremlevy (ph), to form a partnership here in Philadelphia known as Dash and Levy and we primarily practiced as trial lawyers in criminal cases.

[Tr. 176] Q. And during that period of time, can you give us an estimate of the number of cases that you actually tried or participated in the trial on?

A. I would say it had to be in the dozens. We were very active. Most of our clients came by referral from Philadelphia law firms that didn't handle criminal cases and since I had been District Attorney, I was trusted to be able to handle them and I used to handle quite a large number of trials of criminal cases.

Q. Right. Then approximately 1963 or so you made another career move?

A. In 1963, I was asked by the City of Philadelphia, a group of public welfare groups and the Mayor, to head up the city's poverty program. The Ford Foundation was giving a large sum of money and the Federal Government was to experiment in a — in developing North Philadelphia from a various point of view of not housing but social programs, law programs and I became the director of what was then called the Philadelphia Council for Community Advancement. And served a board that was made up of both city officials and health and welfare officials.

And I continued to do that until 1965 when I was invited by Georgetown University Law Center to join their faculty as a full professor.

Q. All right. And you did go to Georgetown at that time?

A. Yes, I did.

[Tr. 177] Q. What was the D.C. Judicial Conference Project on Mental Disorders?

A. At the — that project was a project of the D.C. Judicial Conference headed up at that time by Chief Judge David Bazlon (ph) to make a study of how the court system and the law system was handling mentally ill people.

And I was asked by Chief Judge Bazlon to direct a staff of lawyers to serve the conference by looking into community mental health facilities, the St. Elizabeth's Hospital in Washington, and come up with recommendations which we made then at each meeting of the Judicial Conference of the District of Columbia Circuit and all of our recommendations were adopted by resolution and this took about four or five years and there was grant money to support us from the National Institute of Mental Health.

Q. Now, when you began teaching at Georgetown Law Center in 1965, did you give up the trial work as an attorney and concentrate on appellate work and teaching?

A. Well, yes. My responsibilities and duties as a law professor is to the school and to my students and taking on a trial would interfere with that responsibility, so I continued my active role as a lawyer in addition to being a professor by consulting with law firms and accepting appellate cases and being very active in the American Bar Association.

[Tr. 178] Q. Right. But you did not do any more what I'll call —

A. No more trial cases.

Q. — jury trial work?

A. No.

Q. From 1965 to the current time, have you continued to routinely and regularly handle appellate work in the various courts around the country?

A. Yes, I have, in both state courts and courts of appeals and in petitions for certiorari to the Supreme Court.

Q. And what Bar Associations are you currently an active member of?

A. The Pennsylvania Bar Association, the Philadelphia Bar Association, the Illinois Supreme Court Bar, the District of Columbia Bar and a number of federal courts and district courts.

Q. Right. Now, overlapping —

A. And the Supreme Court of the United States.

Q. Overlapping your teaching responsibilities at Georgetown, have you taken on additional work in the area of the practice of law that is not in front of a jury or an appellate court but doing other consulting work?

A. Well, more than — well, yes. I've been asked by a number of Congressional committees to consult on various issues of ethics and various issues of procedure in the legislature.

[Tr. 179] I was asked by Senator Sam Irvin in 1972 — 3, excuse me — in January of 1973 to become chief counsel and staff director of the Senate Watergate Committee and I served in that capacity which was basic — and I took a leave of absence from the Law Center — which was basically being a trial lawyer in a legislative arena.

And I've taken on since similar positions. In 1983, I was asked by the president of the senate of Puerto Rico to supervise and train their staff to conduct a major senate investigation of Puerto Rico involving a political murder that involved the government of Puerto Rico. And I was asked by the senate — and that was in 1983 till 1992.

And in 1985, I was asked by the senate of Alaska to head up and become chief counsel of the impeachment committee to impeach the governor of Alaska, since I've been involved in a number of international inquiries and investigations, and consultations.

Q. Throughout your — let's go back to the 1973-74 time frame when you were chief counsel and staff director to the U. S. Senate Select Committee on the Presidential Campaign. We'll refer to it as the Senate Watergate Committee. Would that be fair?

A. Yes.

Q. Did you develop any experience in the area of collusion during that investigation?

[Tr. 180] A. Well, I would say that — yes. The answer's yes to that and much of our investigation and research and staff work was done in matters involving collusion of a criminal or quasicriminal or civil matter during the Watergate investigation.

Q. Now, during 1976, I understand that you were involved in the investigation here in the Commonwealth of Pennsylvania. Can you tell us what that was about?

A. Yes. I was asked — at that time, there was a special prosecutor had been appointed to investigate police corruption in Philadelphia and it ended up where he wasn't fired but he had to leave office because the general assembly of Pennsylvania ended his budget, so he was starved out of office in a real sense.

And since the funds that had paid for that special prosecutor came from federal funds, there had to be an investigation or an evaluation and I was appointed by the Attorney General of Pennsylvania to come to Philadelphia and investigate the cause of the demise of that special prosecutor and I conducted a six-months investigation here and wrote a report that was widely publicized.

Q. And what is the National Association of Criminal Defense Lawyers?

A. That is today a very major national organization of lawyers who practice criminal defense law. It probably is one of the most prominent and powerful Bar Associations in [Tr. 181] the country. In 19 —

Q. Did you have any role in the 1950s —

A. Yes.

Q. — with that association?

A. Yeah. In 1958, while I was practicing defense law here in Philadelphia, it occurred to me that defense lawyers all over the country were basically loners, practiced quite differently than commercial lawyers in big firms and that there were all kinds of questions concerning their ethics, professional responsibility and there was a lot of negative image with regard to them.

I decided to meet with a number of very prominent defense lawyers and I founded the National Association of Criminal Defense Lawyers in 1958 and in the beginning we primarily were attempting to develop the image of the defense lawyer as a lawyer like any other lawyer representing clients and I led seminars on professional responsibility and ethics and all other kinds of ways in which we could upgrade both the lawyers themselves and their image.

Q. Did you subsequently become president of that national organization?

A. Yeah, I became president of it the second year. I was vice president the first year.

Q. Professor Dash, have you been asked to get involved in some foreign countries in matters that involve the [Tr. 182] investigation of corruption, collusion and ethics?

A. Yes. I've been a member of the board of the National Association of Criminal — excuse me — of the International League for Human Rights which is frequently called upon to investigate human rights abuses and corruption in government.

And in, I would say 1972, I was asked to go to Northern Ireland where a tragic incident, called Bloody Sunday where British paratroopers had shot and killed and wounded a number of young Catholics in the bog site area, and it was my job to observe that, work with Lord Widgery (ph) who had been conducting an inquiry and write a report. That was in 1972.

Shortly afterwards in the same year, I was sent to the Soviet Union to intercede in a number of the dissenters, the trials, and to make myself known and I was able to bring back and rescue Valerie Chaletesi (ph), a disciple of Mr. Sakarov (ph), and to at least make a number of contacts with people in the Soviet Union and write a report.

Somewhere in 1980 I was sent to Chili [sic], because a number of human rights workers had been exiled and they had their case up on appeal. And I was able to observe the appeal and discuss the matters with the Justice of the Supreme Court of Chili [sic], and it ended up with that Court reversing the order of exile and allowing these union rights [Tr. 183] workers to stay.

Q. Have you had occasion to be asked to come to or to go to or been permitted, I guess would be the fair way to say it, to be permitted by the South African Government to get involved in a matter in South Africa?

A. Yes. In 19 —

Q. Would you tell us briefly about that?

A. — in 1985, I initially was invited to be a keynote speaker on issues of ethics and criminal law reform before a reform group in South Africa.

And while there, while meeting the secretary of justice in my capacity as a board member of the International League of Human Rights, I requested a meeting with Nelson Mandela in Polsmore (ph) Prison. And this was quite unusual, but I became the first American with cabinet approval to be able to meet with him, and I spent two hours with him, interviewing him and determining what his vision was for the future of South Africa.

And as a result of that, I briefed the officials of South Africa afterwards, wrote an article in the New York Times Magazine section, and continued to mediate and have been informed by South African officials and Nelson Mendela himself that I played a significant role in his release from prison.

Q. Throughout your career in the — maybe not in 1990s, but [Tr. 184] let's talk about the '70s and '80s, were you — did you have any role in education through the judge advocate general's offices?

A. Yes. Actually it began somewhere in the 1960s and it went all the way through the '70s. I had been very active in panels of the ABA, and in all other types of professional organizations in giving lectures on professional responsibility and ethics. It was very early. I believe I was one of the early lawyers who saw the necessity, not only with the bar itself, but with the public to really focus on the image of lawyers and their duty of responsibility to their clients and to the public.

And I was asked by the judge advocate general's offices of the Army, the Navy, the Marine Corp and the Air Force at different times to lecture to the jag (ph) lawyers in their particular areas, and

I did. And the Navy jag actually videotaped my lecture and sent it over — all over the world to jag officers wherever they were.

Q. And what generally was the nature of the lectures that you were asked to give?

A. Basically it was bringing home to these jag lawyers their role as lawyers and their duties to their clients, and all of the issues that I would teach at Georgetown University Law Center on professional responsibility. The duty of fiduciary responsibility, the duty of lawyer, confidentiality and all [Tr. 185] — and avoiding of conflicts of interest. All of the things that were very important for a lawyer, whether he's an Army, Navy, Marine lawyer or a lawyer in commercial practice or criminal practice.

Q. Professor Dash, in addition to the consulting work you've told us about, have you been active in the American Bar Association?

A. Yes.

Q. Would you tell us briefly how you got involved and what you've done in the American Bar Association —

A. Well, I was —

Q. — as it relates to professional responsibility and ethics?

A. — well, much of these — the various committees all involved professional responsibility and ethics. I did become chairman of the criminal law section of the American Bar Association.

In addition, I was appointed to the — in 19, I think 84, the standing committee of ethics and professional responsibility of the American Bar Association, which is the highest standing committee of the ABA, that has the only responsibility in the ABA to interpret definitively the original canons of ethics of the ABA, the code of professional responsibility, and finally the model rules of professional conduct. And I served in that capacity for six [Tr. 186] years.

I have served on a number of other committees, as chair, but most of those had to do with the administration of criminal justice.

Q. Throughout your career have you been asked to be a guess [sic] lecturer at any educational seminars where lawyers were there to be further educated and brought up to date on the — in the area of ethics and professional responsibility?

A. Yes. On numerous occasions. With American Bar, I have been invited regularly and just recently at the mid-year meeting in Kansas City to lecture on ethics and professional responsibility.

I have lectured before state and local bars on the same subject. I have participated and continual educational programs.

I have been asked by large corporations, such as Citibank to lecture to their in-house lawyers on professional responsibility and ethics.

And just last fall, I was an endowed lecturer of Haustra (ph) on a — sort of an anniversary program they had on ethics and professional responsibility.

Q. Have you from time to time since 1974 been asked to participate in further studies and reviews of what we have come to know as the Watergate incident?

A. Well, continuously the issue comes up because it was a [Tr. 187] major event. A tragic event in American history, and I have participated in various anniversaries of it constantly speaking at forums on the constitutional issues as well as the ethical issues, the Government ethical issues at various forums and universities, government agencies, civics groups.

Just recently, five colleges up in New England, Amhurst [sic] and Hampshire of Mount Julio, University of Massachusetts, one other, all got together in a consortium and I spoke to them on the issues of government ethics that came out of the Watergate issues and the separation of powers issues.

I've also been teaching ethics and professional responsibilities as I said for 35 years.

Q. Have you ever been requested by the Pennsylvania Bar Endowment to do a investigation into wiretapping and electronic eavesdropping?

A. Yes. In 1958, or closer to '59, I was asked to make — and at that time, it was the very first investigation, national investigation of electronic surveillance, and wrote the book as a result of it called the Eavesdroppers, which was the very first documentary that alerted the bar, the courts, and the public of electronic surveillance techniques. And, as a result of that book, I testified in Congress, the Safe Streets Act of 1968 was enacted and the Supreme Court

cited the book in reversing its *Olmstead* decision and placing [Tr. 188] wiretap electronic surveillance under the Fourth Amendment.

Q. Professor Dash, throughout your career, have you authored books?

A. At times. I've written three books, and I'm in the midst of writing another book. I've written articles, but more recently, I've spent my time instead of writing Law Review articles, I have been writing testimony before Congress, opinions and consultation advises to the Attorney General, and other statements that I have made which I can have a much more direct impact in reform in the ethics area.

More recently, the Attorney General has issued a proposed rule that would severely change Rule 4.2 on the Rules of Professional Conduct, and allow federal prosecutors to communicate with represented defendants.

And I was appointed by the Attorney General to be part of a working group to review that, and when we couldn't really agree on the Attorney General stepping back from that, I was appointed by the ABA just recently to write a long series of comments challenging that.

And I've been working also very closely with the Conference of State Chief Justices who also oppose the interference by the Attorney General in the administration of ethical rules by State Supreme Court Justices or State Supreme Courts.

So I've spent a lot of my time in that kind of [Tr. 189] writing and in that kind of consultation, rather than what is generally called a traditional law review writing.

Q. Did you also serve as a consultant to the National Association of Attorney Generals?

A. Yes, I have. And that was back in 1971, where I was invited by the National Association to help define the office of Attorney General, and help write the book for them, which is the fairly basic book that they now use, which sets forth both the responsibilities and role of a state attorney general.

Q. Professor Dash, have you received any specific awards in the area of legal ethics?

A. I received an ethics award from the University of Judaism in California. That's the old Warren award, and all kinds of plaques and things that lawyers do get when they speak.

Q. Including some honorary —

A. Honorary —

Q. — degrees?

A. — three honorary degrees. One at Georgetown, one of the — rarely does a university award its own faculty, but I was awarded from Georgetown an honorary degree. Temple University awarded me an honorary doctor's degree in law, and Fairchild University.

Q. Just so we stay current, Professor Dash, when was the last time you argued an appellate case in the State of [Tr. 190] Pennsylvania?

A. December 6th, I argued before the Third Circuit — of 1993.

Q. And when was The [sic] last time you actively participated in teaching law students in the area of legal ethics and professional responsibility?

A. Well, I would say just a matter of weeks.

Q. You're still ongoing teaching at Georgetown?

A. I'm still an ongoing professor, full-time professor and one of my regular courses is professional responsibility.

MR. RICE: Your Honor, at this time we would offer SP-902, which is a copy of Professor Dash's curriculum vitae as an exhibit.

THE COURT: Settling Parties' 902 is received in evidence.

(Settling Parties' Exhibit 902 received in evidence.)

MR. RICE: Your Honor, at this time we would offer Professor Dash as an expert in the field of legal ethics, professional responsibility and collusion.

THE WITNESS: May I state for the record that I have no water, your Honor?

THE COURT: You have none?

THE WITNESS: I have no water.

THE COURT: Well, I'll just call Harry Grace in and [Tr. 191] he'll come and get you some. Unless someone else wants to do it.

THE WITNESS: I'm sorry.

THE COURT: That's all right. I'm sorry we didn't have it. I better check mine.

The offer of Professor Dash be allowed to express opinions in the areas of legal ethics, professional responsibility and collusion, in accordance with Rule 702 et seq of the Federal Rules of Evidence, is accepted and Professor Dash will be permitted to testify in those areas.

MR. ROSENBERG: In that case I have no questions on voir dire your Honor.

THE COURT: Okay. I didn't know there were any.

MR. ROSENBERG: I don't. I'll save it for cross-examination.

BY MR. RICE:

Q. Professor Dash, you have been in court several days of the last few weeks?

A. Yes, I was in court since Tuesday of this week, and then prior to the last week, I was in court most of the preceding week.

Q. Okay. And you were here yesterday when we had the hearing concerning the rebuttal testimony?

A. Yes.

Q. And you understand that we're going to be focusing on [Tr. 192] some fairly narrow points, and —

Q. Yes, I do.

Q. — I want to try to listen to the question and focus in on those narrow areas that we're going to address.

First, I want to lay a little foundation. To the best of your recollection, when is the first time you and I met?

A. The first time that you and I met I believe was some time maybe in April or May, after we had had telephone conversations and correspondence, of 1993.

Q. Right. When I contacted you in April — or when I contacted you in 1993, what did I request you do?

A. You asked me to consider becoming an ethics expert and consultant to you with regard to what was then called the Carlough class action.

Q. And what did you request me to do at that time?

A. At that time I requested you to fill me in on quite a few facts. To send me all of the documents, including the stipulation of settlement, the Complaint, the Answer and any other materials that I would need to be able to preliminarily form a basis to respond to your request.

Q. Did I send you a few sheets of paper?

A. You sent me a lot of paper, and have continued to, and I did analyze everything that you gave me at the time. And I do recall that I did, either by telephone — I think by [Tr. 193] telephone to tell you that I had read enough and seen enough that I believe that at least for the time being, that I would be willing to be an expert witness on your role and the role of class counsel in both the Carlough class action settlement and also the negotiations and settlement for the inventory settlement that preceded it.

Q. Subsequent to my sending you the materials, and you getting back to me that you'd be willing to participate, did we then set up a meeting?

A. Yes, you did.

Q. And have we met on more than one occasion since April of '93?

A. Yes, we have.

Q. Can you tell the Court approximately how many hours you and I have spent either together or by phone dealing with what's now known as the Georgine class action?

A. You and I together I would say had to be about maybe 25 hours or so.

Q. And —

A. Some of them were long meetings together, and often long phone calls.

Q. — in addition to meeting myself, have you met with other persons from my firm and other persons from Mr — with Mr. Locks —

A. Yes, I —

[Tr. 194]

Q. — concerning this case?

A. — yes, I have.

Q. And what's the total amount of time that you believe you spent in consulting with us in the matter?

A. I would say it would be close to 150 hours.

Q. Now, when we met in Washington in the —

A. I believe it was in May.

Q. Okay, May of '93. Do you recall meeting at that time or shortly thereafter Mr. Locks?

A. Yes, I think Gene Locks was at the same meeting in May with you.

Q. When we started meeting, did we have general discussions about what would take place in a class action and how it would proceed?

A. Yes. You were initially asking me to review everything, first to determine whether what you had done so far complied with the rules of ethical conduct, and then you were asking me to advise you with regard to continuing in that role, particularly in areas such as notice and in following out your responsibilities as class counsel, particularly since you were presenting the class action before the Court under Rule 23 and would have to be making a good faith argument as to its fairness and also as your adequacy of counsel, and I was to advise you on those steps.

[Tr. 195] MR. BARON: Your Honor, we object and move to strike on the basis that he's clearly going to be testifying on conversations that he had with Mr. Rice and on information provided to him in oral conversations with Mr. Rice and other class counsel whom we have not been permitted to depose.

THE COURT: I don't think he's been asked to report on those conversations. I view this testimony as routine testimony of how

an expert got informed about the case. What he relies upon is provided for in the Rules of Evidence and he'll have to disclose that. If he does, we'll find out whether there are things that are regularly relied upon by experts like we've been doing with all of them.

MR. BARON: Yes, your Honor, and if he relies upon things such as his conversations with Mr. Rice, all of that should be stricken because of our inability to question Mr. Rice to determine the veracity of those issues.

THE COURT: Well, the objection is overruled. I could make a long speech about how your experts met with a whole lot of people and no one deposed those people either.

MR. BARON: Well, no one did, but people at least had the opportunity to, your Honor. We have attempted to depose class counsel on numerous occasions.

THE COURT: It's a rubric which has no relevance to this particular witness' testimony, and the objection is overruled.

[Tr. 196] BY MR. RICE:

Q. Professor Dash, from the — I'm going to refer to it as the spring of 1993 throughout the balance of 1993, did I continue to send you materials that were filed with the Court at your request?

A. Yes. You continuously kept me current on both motions, on replies to motions, orders and decisions of the Court, depositions — all things as they were occurring that you believed or at least that I was asking for and that you were complying with my request that I should have to continue to review these facts in order to be able to form an opinion and to keep advising you.

Q. At some point in time did you understand that depositions were being taken in this case?

A. Yes, I did.

Q. Did you request and have I provided you depositions for your review?

A. Yes, you did. Yes, I did request and you did provide those kinds of depositions that would be most helpful to me.

Q. And in addition to reviewing, did you read those depositions?

A. Yes, I did.

Q. And without going through them and specifically in all of them, did you read depositions of representatives from the CCR?

[Tr. 197] A. Yes, I did.

Q. And some of the class representatives?

A. Yes, I did.

Q. And some of the experts that were being proffered for testimony at trial?

A. Yes, I read the depositions and the testimony and saw most of the testimony of all of the opposition experts, and I read all of the testimony and depositions of the Settling Parties' experts.

Q. In addition to reading the depositions, did you request the opportunity to review the actual trial testimony of those same persons?

A. Yes, particularly the experts.

Q. And in addition to reviewing the transcripts of the trial proceedings or the hearing proceedings, did you actually physically appear in court and observe the testimony of Professor Cramton and Professor Koniak?

A. Yes.

Q. Were you here throughout their testimony?

A. Yes.

Q. And Professor Coffee, excuse me.

A. Yes.

Q. I want to focus with you on a few specific issues now, okay. You told us that you served on the ABA Standing Committee on Ethics and Professional Responsibility. I [Tr. 198] believe the time frame was 1984 to 1990; is that correct?

A. Yes, that's true.

Q. And as a member of that committee, did you become familiar with the procedures, the policy and the implementation of the policy of that committee?

A. Yes, I did. It's a small committee. There are about eight members on the committee, and each of us has the responsibility to

write opinions similar to the formal opinion 93-371. I wrote a number of such opinions. I also participated in the writing and editing of dozens of other opinions and the discussions of the committee as to what — in what cases we would agree to write opinions on and what our policy was, and this policy had been formed years before and we were merely carrying it forward. I became very familiar with the policy of the Standing Committee of Ethics and Professional Responsibility as to when they would write and release a formal opinion.

Q. Approximately how many requests for ethical opinions would that committee receive in a year's period of time?

A. I would say hundreds. They come in either by — in writing, they come by the phone. There's a staff that monitors the phone requests, but there are written requests that come in by lawyers from all over the country setting forth some sort of a factual request for an opinion.

Q. Now, the model rules or the code, the predecessor code, [Tr. 199] you told us that you've taught in the military setting, you've taught in the classroom setting, you've dealt with it in the legislative setting. Did the rules in the code change in any of those settings?

A. No. The rules themselves applied to all settings, but how they are applied and how they are interpreted obviously differs in individual fact situations and contexts.

Q. Does the ABA Standing Committee attempt to respond to each and every inquiry made of them for an ethical opinion or an advisory opinion?

A. Well, no. The —

Q. What is their policy about when they will issue —

A. They do not respond by writing a formal or informal opinion on every request that they receive. The policy of the Standing Committee of Ethics and Professional Responsibility is that if the request sets forth facts that is clearly answered by the rules themselves or by decisional law or prior ethical opinions, they will not write a new opinion, but they will direct the person requesting to the rule or to the decision or to the prior opinion. Only in situations where the fact situation as interpreted by the Standing

Committee to make it unclear and make it unlikely that a lawyer trying to act ethically would be able in that factual situation to correctly apply the Rules of Professional Conduct do they make the decision that an [Tr. 200] opinion is necessary to clarify the ethical rule in that factual situation. They call it a formal opinion and it is then published in order to assist and guide lawyers in that way. So we're the — that fact situation does not permit the ethics committee itself, which has the primary responsibility of interpreting the rules, to decide whether it can be that clear for lawyers generally.

Q. Would it be fair to say that they would not write opinions unless the area was gray?

A. Either gray —

MR. ROSENBERG: Objection.

THE COURT: Sustained, it's leading. Strike the answer.

BY MR. RICE:

Q. If the ABA committee issues a formal opinion, is there any general inference you can draw from the fact that they responded to an inquiry?

A. Based on my participation on that committee and my knowledge of the policy, whenever the ABA Standing Committee on Ethics and Professional Responsibility issues a formal or informal opinion, I can conclude that is the determination by the Standing Committee that the factual situation upon which they're opining is not clearly answered by the professional rule and it needs their guidance to lawyers on how to act in the future.

[Tr. 201] Q. Now, in the summer of 1993, early summer I guess, did you have the — did I make a request of you to review the ABA opinion 93-371?

A. Yes, and you sent it to me.

Q. And did I send you some additional documents at the same time?

A. At that time you sent me the January 14, 1993 settlement agreement involving the present inventories and the June 11th, 1993 revision agreement.

MR. ROSENBERG: Your Honor, I have an objection at this time to any further questioning in this area. Anything that goes beyond the offer, the offer yesterday was that Professor Dash was going to testify about how the ABA Standing Committee works based upon his knowledge and what in his view the meaning of the issuance of a formal opinion is. At this point it is my belief that there is an intention on the part of counsel to get into a discussion of whether the June 11th or January 14th — I believe June 11th agreement is in violation of 5.6B. That I submit is not a proper issue for rebuttal, since both ethics experts who have testified on behalf of the Settling Parties have addressed the issue squarely and have testified in their opinion that it did not violate the rules, which of course we don't agree with, but that's the testimony. So I object to this line of questioning at this point.

[Tr. 202] THE COURT: Mr. Rice, your response?

MR. RICE: Your Honor, I believe that the proffer we made yesterday and the deposition that we talk about, this was in the area. I turn to the transcript of yesterday, page 313, where Mr. Motley stated on line 6, "The effect of the American Bar Association opinion letters and the process that underlies the issuance of opinions regarding ethical matters, Professor Dash will testify about the June 11th, 1993 Ness, Motley agreement and the effect of the ABA opinion and what it means for the ABA to issue that opinion, and that's where we're going. In addition, last night at the deposition Mr. Baron on page 60 of the deposition went back into that same area. "Let's go to the effect of the ABA opinion letter on the June 11th, 1993 Ness, Motley agreement, in particular the effect of the ABA Opinion Number 93-371." And that's exactly what we're dealing with, which is what we proffered yesterday and what he was deposed on last night.

MR. ROSENBERG: Your Honor, my position is not that the proffer doesn't say that. I believe it's exactly what the proffer says. My position is that anything that goes beyond Professor Dash's introduction of new material into this case is not rebuttal. Everything that has been testified to with regard — all the issues about whether the June 11th agreement is ethical or not ethical, whether it violates any rules or violates any opinions has all been addressed in their case in chief. The only issues that have not been addressed in their case in chief, and the only issue that I've not —

and the issue that I have not objected to is Professor Dash's knowledge of how these opinions are written, and I think we're at the end of that road. To at this point now have Professor Dash testify about the same old substance of evidence that this Court already has is not rebuttal, and I object to it on that ground.

THE COURT: Any other response?

MR. RICE: From myself, your Honor?

THE COURT: Yes.

MR. RICE: I believe the question I was asking before the —

THE COURT: No, response to Mr. Rosenberg.

MR. RICE: Right, is we're dealing with the effect of the policy of the ABA as it relates to the June 11th, '93 agreement. And that's what we're dealing with and that was the next question and that's where we are.

THE COURT: No, my question to you — I'm asking you if you have any response to Mr. Rosenberg's statement.

MR. RICE: I don't believe that any further response other than we're within what we understood the Court to rule on yesterday that it was proper rebuttal to put that in context of the ABA opinion and the effect of that in light of the testimony.

[Tr. 204] THE COURT: All right. You're not responding to just what he said, I think you ought to know that. I don't think so.

I'm not going to cut it that close. I'll allow the testimony. I don't know whether it's true rebuttal or not. This is not a trial of a case, I'm going to say it for the 15th time. I have some latitude, it's a non-jury proceeding. I'm interested in what he has to say. It may be useful to both sides once he's cross-examined. I don't know where it's going to come out, but there's been adequate notice of it under all the time circumstances we've had, and I think it's fair to proceed and I so rule.

BY MR. RICE:

Q. Professor Dash, based on your experience as a member of the ABA Standing Committee, your knowledge of the policy, your review of the 93-371 opinion and review of the June 11th, 1993 agreement, do you have an opinion concerning the response of

Ness, Motley in revising its prior agreement and replacing it with the June 11th, 1993 agreement?

A. Yes.

Q. Would you tell us what that opinion is, please?

A. My opinion is that the ABA formal opinion, 93-371, raised some questions concerning the language of the January 14, 1993 agreement but clearly because of the interpretation I give to this opinion was also evidence that lawyers could [Tr. 205] differ on what that agreement meant and needed this opinion to clear it up. The fact that shortly after this opinion was released and published that the class counsel revised the January 14th, 1993 agreement, actually superseded it, through the June 11th agreement, and it's my opinion that was an effort of class counsel even though they may have disagreed with the opinion of the ABA to conform as much as they possibly could to the ethical opinion and conduct themselves in accordance with the way the ABA Standing Committee said lawyers should. So I see this as an ethical response by lawyers once having been given an opinion by the Standing Committee of Ethics and Professional Responsibility.

Q. Professional Dash, I want to turn your attention to another matter now. I believe you were in the courtroom when Professor Koniak testified. I want to call your attention to her testimony that basically went that the AFL-CIO had no place in serving a monitoring role in the Georgine settlement. I ask you first, sir, do you agree or disagree with that statement?

A. I disagree with it.

Q. And would you tell us from your review of the facts of this case your knowledge and experience in the field of ethics and professional responsibility, is there anything inappropriate or unethical with the monitoring role to be served by the AFL-CIO in this case?

[Tr. 206] A. It is my view that class counsel, particularly when there has been some question raised as to their so-called dual role and monitoring function acted appropriately in bringing into the settlement agreement a function and role of the AFL-CIO, a union to which a-large number of class members belonged and would have a very important interest in this claims — new claims

administrative program to monitor and actually sit on the shoulders of the class counsel. I can see nothing inappropriate. It can only have salient effects in the proper administration of this claims program.

Q. Professor Dash, in your opinion, was the inclusion of the AFL in the monitoring or watchdog role that was added by class counsel in any way go to the issue of — or to support the allegation of inadequacy of class counsel?

A. No. I would say the other way around. I think it demonstrated that class counsel was doing everything it could to ensure that there was a kind of monitoring role for a major union that had as its best interest, a large number of the class.

And it would seem to me that even though there were other members of the class who were not members of that union, they would derive the benefit of that particular monitoring role. So I would think that far from showing inadequate representation by class counsel, it demonstrated [Tr. 207] an effort by class counsel to carry out its fiduciary responsibilities to its members, to its clients.

Q. I want to focus on the third area at this time. You also were here when Professor Cramton testified, and I believe you've also reviewed his testimony, is that correct?

A. Yes.

Q. And do you recall that he testified about four conflicts in which offered opinion concerning class counsel. And, the fourth one that he focused on was a conflict due to the lawyers having an economic interest in the case, do you recall that discussion?

A. Yes, I do.

Q. All right. First I ask you sir, do you agree with Professor Cramton that because of class counsels' economical interest, that this represents an impermissible conflict of interest?

MR. PYLE: Objection to the form of the question. don't believe they — unless he cites the specific line, I don't believe Professor Cramton said that that was an impermissible conflict of interest which is a term of art that I'm sure this witness understands, between conflict of interest and impermissible conflict of interest. So think a line and page cite is needed.

THE COURT: There may be some importance to that, but do we have a citation, Mr. Rice?

[Tr. 208] MR. RICE: Your Honor, the discussion took place on the 15th of March in the a.m. on Page 119 through 121.

THE COURT: Why don't we —

MR. RICE: I have an extra copy of those pages for the Court.

THE COURT: I can find them also, but why don't we just give those to the witness, and then we'll be all right.

MR. RICE: We'll do that.

THE COURT: At least we'll have what you want to talk about.

MR. RICE: Yes, sir.

THE COURT: I don't know whether it will include everything that is necessary, we'll find that out.

MR. RICE: 15, a.m.

THE COURT: Do you have that, Professor Dash?

THE WITNESS: Yes, I do, your Honor.

THE COURT: Mr. Rice, with the use of these papers for a specific reference, you may proceed.

MR. RICE: Okay.

BY MR. RICE:

Q. I'm calling your attention to this area of Professor Cramton's testimony.

Are you familiar with this?

A. I am familiar with this testimony. I've read it recently and I just looked at it again, and I think I can respond to [Tr. 209] it.

Q. All right. Would you please tell us whether you agree or disagree with Professor Cramton's testimony there in this area?

A. I disagree with it, and for the following reasons: Professor Cramton did speak of impermissible conflicts of interest, but he grouped the final impermissible conflict into what he called four separate conflicts of interest.

I believe the very first one he said was a concurrent conflict between the present clients and the future clients.

He then said another conflict was the dual role that class counsel was playing in monitoring and also accepting class members as clients.

A third one he said was the conflict between the obligations to a third-party, which I believe he meant to be and said was CCR, that was limited, he said, the ability to represent the class members.

And the fourth one, he said was that the lawyers, the plaintiffs, counsel in the inventory settlement as class counsel to the class had a financial conflict of interest and then he focused on what he meant by financial conflict of interest and he said the fees that they would earn.

The fees they would earn from the settlement of an inventory settlement, and the fees that they would earn, [Tr. 210] contingent fees in representing individual members of the class and filing claims under the Georgine class settlement.

And then I think what he was doing was that putting all these things together, he was saying this all worked up to a very large impermissible conflict of interest.

Although I don't believe that he was weighted each one the same. On this final one that you've asked me about, his statement and his belief and opinion that a lawyer gets into a conflict of interest with his client because of the fee the lawyer will earn, is I think a very strange conclusion and statement. I have never seen it anywhere in either an ethical opinion, a court case or in any of the literature.

It would seem to me that if that were true, every lawyer who represents clients for a fee, and if what he means, contingent fees and all lawyers who represent clients on contingent fees are disqualified from representing their client, because the very fact that they're going to become enriched by the fee, prevents them from loyally representing their client. So that has to be wrong under the model rules because the rules provide for fees, provide for contingent fees, and assume that lawyers will be professional and even though they're getting paid money, that that in and of itself should not limit their representation.

The — from my opinion and my knowledge of the rules [Tr. 211] of professional responsibility and conduct, that the only types of conflicts that involve lawyers' personal financial interests are ones in which the lawyer has a financial interest in the business itself or the subject matter of the representation, has a stake in it. That's the situation where the lawyer could not fully consider the interest of the client because his own personal financial interest in that subject matter interferes.

But I've never, never heard, read or seen a situation where the fact that the lawyers' going to get a fee can in any way be considered a conflict.

Q. Professor Dash, in your opinion, is there anything unethical, inappropriate or evil about the class counsel in a class action receiving a fee for its work if awarded by the Court?

A. No. Not at all.

MR. BARON: Your Honor, I didn't get up quick enough. I don't think he's been tendered as an expert on evil.

THE COURT: I don't —

THE WITNESS: May I respond, your Honor? Professor Koniak said she was not, but I think I've dealt in my investigation through the years with quite a bit of evil.

(Laughter.)

THE COURT: The motion to strike the word evil from [Tr. 212] the question and answer is denied. I don't believe that's issues before the Court either, but it doesn't taint the testimony. It doesn't require surgical removal of that word. I don't think anyone's claimed anyone's evil in this case, nor is there that issue before me as a matter of law. I haven't been wounded by listening to that word.

BY MR. RICE:

Q. Professor Dash, I want to call your attention to the transcript in front of you that's dated March the 17th, 1994, p.m., Page 196, 197, Koniak direct.

A. I have before me — did you say March 17, 1994?

Q. Yes. P.M.

A. P.M., I see it.

Q. Can you take a moment and review that? Okay?

A. Yes.

Q. All right. I want to focus with you on the testimony that Professor Koniak gave concerning the notice and the development of the notice.

A. Yes.

MR. RICE: Page 196.

THE WITNESS: Yes, I have it.

BY MR. RICE:

Q. Okay.

THE COURT: Excuse me, counsel.

(Pause in proceedings.)

[Tr. 213] THE COURT: I would usually go a little longer, but I have a mini emergency I have to take care of, nothing personal, but we'll take a 15-minute recess. It will be our afternoon recess hopefully.

(Recess, 2:55 o'clock p.m. to 3:15 o'clock p.m.)

THE COURT: All right. Welcome back, everybody. we'll proceed. Please be seated.

We're working on Professor Koniak on direct, March 15th, 1994, Pages 196 to 197.

MR. RICE: Correct, your Honor.

THE COURT: Is that where we were?

MR. RICE: We're talking about notes.

BY MR. RICE:

Q. Professor, I want to refocus on where we were. And I want to deal with the Court's implementation of the notice plan or the substance of the notice plan. I only want to deal with what Professor Koniak said about the role of class counsel in developing the notice, okay?

A. Yes.

Q. And that's what we're here to deal with.

Do you have personal knowledge as to the involvement of class counsel in the development of the notice?

A. Yes, I do.

Q. Would you tell the Court about that?

A. From the very beginning that class counsel met with me, [Tr. 214] and discussed the professional responsibility that they had in representing the class, the subject of notice as to class members was uppermost in my mind and I emphasized that since — in this particular innovative settlement that would involve both known members and unknown members, literally thousands of them and some who were unimpaired but called pleural plaque cases who may not have symptoms, that it was very important that the notice in this case that would be presented to the Court for approval was as broad a notice and as meaningful a notice as class counsel could develop so that it would reach as much as humanly possible everybody who should be reached who then would be on notice to respond back to class counsel.

Q. Then —

A. And primarily I was interested in the fact that since this had an opt-out provision, that anybody who might be — everybody should be notified so that they would have an opportunity to fully weigh the pros and cons of the — of it and opt out if they wished.

Q. And during the summer of 1993 and the early fall of 1993, do you know from your own knowledge whether or not Mr. Motley and myself were dealing with development of the notice and the plan of —

A. Yes, I do, because there was constant discussion with me and requests for my advice on it. I gave that advice. There [Tr. 215] were a number of hours of discussion.

When the so-called notice package had been developed by the consultants in this matter, at my request, Mr. Rice, you brought it to me and had me review it and I did review it and I did indicate that it contained the kind of notice that I felt that should be presented to the Court, that these were the things that I thought ought to be in it.

And all my discussions were with class counsel and very active discussions.

Q. And do you recall meetings taking place where Mr. Locks, Mr. Motley and myself met with you going over the notice and where we developed information to give back to others —

A. Yes, I do.

Q. — about the notice?

A. And that was very true that such information was developed and my understanding was it was to go back and be part of as input into the notice package.

(Pause in proceedings.)

Q. Now, just so we put it in context. You told us at the beginning of our consultation with you that you were not an expert in class action, is that correct?

A. Yes.

Q. And so we did not ask you to get involved or to review anything concerning the implementation of the notice and stuff of that nature?

[Tr. 216] A. That's true.

Q. Okay. Professor Koniak's inference that class counsel was inadequate because they were not involved in developing the notice, is that true from your own personal knowledge?

A. From my personal knowledge, it's not true.

(Pause in proceedings.)

Q. I want to turn with you to the materials in front of you dated March the 15th, 1994, a.m. — strike that. That's not the right one.

I want to talk to you about yesterday's witness, Professor Coffee. You were here and heard Professor Coffee, is that correct?

A. Yes.

Q. You went through some of your background for us earlier today. I ask you, sir, do you believe that you have dealt with extensively and developed extensive expertise in the area of collusion?

A. Yes. Both by my teaching, my being a prosecutor, both federal and state, my being an investigator on matters that involve

collusion. I think I've had extensive experience with that concept in law and in fact.

Q. Do you recall yesterday observing and listening to Professor Coffee's testimony in the definition of collusion and the application of that definition to this case?

A. Yes, I did hear him testify to that.

[Tr. 217] Q. And do you agree with the definition of — or Professor Coffee's definition of collusion?

A. I disagree with his application of the definition. My recollection is that he referred specifically to Black's Law Dictionary definition and somewhat widely used that definition. Primarily I focused on his reference and acknowledgment that the definition whether it's from Black's or any legal definition of collusion, in criminal or civil matters, must involve an agreement to engage in fraud or deceit.

My disagreement is his testimony that collusion, that includes fraud and deceit, did not require any evidence of intent, a scienter or mens rea of subjective intent.

His testimony was, his opinion was that it could only be an objective set of facts and I concluded from his testimony that he was basically saying that negligence alone by a lawyer could involve collusion. I disagree with that. I know nothing in the law or any application of any concept of collusion in cases, civil or criminal or ethical, where a lawyer can negligently be involved in collusion.

Such concepts as fraud and deceit require at least general intent. There doesn't have to be specific evidence of the intent such as a confession or a document that says I intend, but there must be sufficient evidence upon which a jury or court can infer that there was such an intent and [Tr. 218] that intent should be knowingly.

The rules of professional conduct whenever they deal with issues of fraud or deceit by a lawyer, always have within it the word "knowingly." And knowingly has been interpreted to mean willfully and intentionally engaging in that conduct with knowledge of all the circumstances.

And therefore, I do disagree that you could have, as Professor Coffee testified, collusion with fraud and deceit without any proof of subjective intent.

Q. Professor Dash, does fraud and deceit require intent?

A. Yes.

Q. And are fraud and deceit essential elements of collusion?

A. Yes, under all the — all the definitions I've seen in collusion.

Q. Professor, do you have an opinion about whether — or based on your knowledge, your experience, your education, your dealing with the area of civil collusion, criminal collusion, your observing the testimony here and your reviewing the testimony in the transcript, do you have an opinion about whether class counsel acted in collusion with anybody else in order to bring about this stipulation of settlement?

A. Yes, I do have an opinion.

Q. What is that opinion?

A. My opinion is there's no evidence that I have seen, and [Tr. 219] I've read all the testimony and the transcript, the depositions, and I have seen no evidence in the record before this Court that would lead me to conclude there's any evidence of collusion, fraud or deceit on the part of class counsel.

Q. Professor, when you do consulting work for law firms or attorneys or others, do you routinely charge for your time?

A. Yes, I do.

Q. And are you charging for your time that you've —

A. Yes, I am.

Q. — consulted with us in this matter?

A. Yes, I am.

(Pause in proceedings.)

Q. Let me ask you to turn with me to the final area I want to talk about, the March 16th, 1994 transcript, Page 81, 82 of Profession Cramton.

(Pause in proceedings.)

Q. Do you have that in front of you?

A. Yeah, I see it. It's a very poor copy, but I think I can read it.

Q. Do you need a better copy?

A. Yeah. It's hard for me.

(Pause in proceedings.)

A. A little better. It's darker.

(Discussion off the record.)

[Tr. 220] A. Yes, I've read it.

Q. Okay. You've told us that you've been involved in the practice of law since 1950 and the teaching of law and professional responsibility for over 35 years.

Tell us about your involvement with the ABA standing committee on ethics, your teaching in the area of ethics —

MR. ROSENBERG: I'm going to object to the review of Professor Dash's resume and ask that he ask a question.

THE COURT: I think it's well taken. Mr. Rice, you don't have to give a speech, just ask questions.

BY MR. RICE:

Q. Professor, Professor Cramton testified that historical background is not relevant to an analysis of ethical issues. From your experience that you set forth for us earlier, do you agree or disagree with that testimony?

MR. ROSENBERG: Excuse — I'm sorry, Mr. Rice. I have a — just a request for the line and page of that quotation.

MR. RICE: Page 81, the answer given to the question was, "That's right," and I have to —

MR. ROSENBERG: Page 81, what —

COUNSEL: 15.

MR. RICE: 16.

MR. ROSENBERG: 16, Page 81.

COUNSEL: I'm sorry, what line?

[Tr. 221] MR. RICE: 6 — 15.

(pause in proceedings.)

BY MR. RICE:

Q. Do you see what I'm referring to?

A. Yes, I do.

Q. All right.

THE COURT: It's the question starting at Line 10 and the answer finishing at Line 18.

MR. RICE: Right.

BY MR. RICE:

Q. Looking at that area, I'd ask you, sir, do you agree or disagree with Professor Cramton that the historical background is relevant to the ethical issues? Do you believe it's relevant or irrelevant to the ethical issues?

A. I think it's very relevant particularly as I understand his testimony, and having just read it again, that he includes in the historical background with regard to this particular case, the asbestos litigation crisis that led to the Rehnquist Commission report and recommendations, the MDL show cause order and all of the things that led up to the initial meetings between CCR and plaintiffs' counsel.

It is my opinion that rules of ethics, the — now talking about the rules of professional conduct are guides to lawyers and do not change in class action suits or mass tort suits but they are guides that have to be interpreted in the [Tr. 222] context of the fact situation in which lawyers are acting.

Lawyers must make judgments and it's their judgments that count in terms of whether or not they're violating rules. And there's no automatic application of Black Letter Rules of Ethics such as a computer where you put it into a computer and it comes out with an answer. You must take what the — you must take the context in which the lawyers are acting in determining whether the lawyers are acting professionally and ethically.

And therefore, I would believe that Professor Cramton is absolutely wrong that they're irrelevant. That they're very relevant in this case and would guide an expert in ethics in judging whether the lawyers acted ethically or not. And that context has to be taken into consideration.

MR. BARON: Your Honor, I object and move to strike. The section on Page 81 that he's referring to merely says that Professor Cramton didn't read the Rehnquist Report, period, because he couldn't understand how the Rehnquist Report was relevant, period.

(Pause in proceedings.)

MR. BARON: The question was asked, "You've not heard of it, let alone read the so-called Rehnquist Ad-Hoc Committee Report?

"Answer: That's right. I have to confess I haven't gone back to read some of that historic background because [Tr. 223] I'm not sure how it bears on the conflict of interest question, period."

(Pause in proceedings.)

MR. BARON: I don't believe — I believe he's taken the answer completely out of context, your Honor.

THE COURT: Well — Mr. Rice, do you have any response?

MR. RICE: Your Honor, number one, this is exactly what we read to the Court yesterday in the argument when we were presenting the argument about rebuttal, but also I believe that reading that in fair context and reading the follow-up question that he's saying that he didn't pay any attention to the historic stuff, that it shouldn't be paid any attention to by anyone because it was irrelevant.

And we believe that that's proper rebuttal to that is to put it in context.

THE COURT: Well, it's up to me to decide whether Professor Dash's observation is accurate in light of the testimony. I'm not going to strike it out. Maybe when I compare what he says to this, I'll agree with you, maybe I'll agree with Mr. Rice, I don't know yet. But if that's his interpretation of what the testimony was, that's his interpretation. It's faulty. It doesn't have any weight.

MR. BARON: Well, my argument was that's not what the testimony says. That's not the point that he made.

[Tr. 224] THE COURT: That's argument. The motion's overruled.

BY MR. RICE:

Q. Professor Dash, taking in your knowledge, your experience, your involvement, your review of the public filings on this case, and the information that you reviewed from the transcript and the depositions that have been offered and the observations you've made in court, do you have an opinion as to whether or not the conduct of class counsel in the historical background that was presented and the facts that were presented was ethical conduct?

MR. ROSENBERG: Objection. Now, that goes beyond the scope of the proffer. He was proffered specifically on the issue of whether it's necessary to consider historical conduct in evaluating ethical behavior. He was not proffered on the issue of whether having now considered the historical conduct, the behavior is ethical or not and in fact was not examined in his deposition —

MR. RICE: I'll withdraw the question. They tell me that they want to go home today sometime.

MR. ROSENBERG: I'm not finished with my objection.

(Laughter.)

COUNSEL: Come on, he hasn't won one all day. Let him win this one.

(Laughter.)

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

SETTLING PARTIES'
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DATED: May 16, 1994

* * * *

47. The medical requirements in the Stipulation to qualify for compensation are, by contrast, more stringent than those required under the law of most states to present a jury issue in an asbestos claim. As explained in the Proposed Findings of Fact, there are two aspects to the medical requirements. First, there are a series of requirements which are essentially quality control requirements. In this category are requirements such as that chest X-rays be read by a certified B-reader, and that diagnoses be made by physicians who are board-certified in certain specialties. P.F.F. ¶ 96. The second aspect to the medical criteria are a set of requirements which are designed to qualify for current cash compensation only those class members with some sort of asbestos-related breathing impairment or asbestos-related cancer. P.F.F. ¶ 108. Thus, the fairness of both of these aspects to the medical criteria must be evaluated.

48. The quality control aspects to the medical criteria are plainly reasonable. The Settling Parties presented several medical experts who explained why, for example, the B-reader requirement is needed to ensure consistent and accurate reading of the chest x-rays. P.F.F. ¶ 162. These medical experts also explained why the quality control requirements set forth in the medical criteria are workable and will not be burdensome for class members. *Id.* at ¶¶ 106, 152, 154, 161-62. Indeed, few objections to these quality control measures were made. *Id.* at ¶ 106. Even the primary medical expert

* * * *

BACK-END OPT-OUT
MESOTHELIOMA CASES

Three-Year Case-Flow
Analysis

# of cases seeking entry each year	Delay for Applicants Applying at Beginning of Year 2[1]	Delay for Applicants Applying at Beginning of Year 3[1]	Delay for Applicants Applying at Beginning of Year 4[1]
14(2%)	Approx. 1 year (No backlog)	Approx. 1 year (No Backlog)	>2 years (Backlog 1 case)
28(4%)	Approx. 2 years (Backlog 14 cases)	>4 years (Backlog 28 cases)	>5 years (Backlog 43 cases)
42(6%)	Approx. 4 years (Backlog 28 cases)	>6 years (Backlog 56 cases)	>9 years (Backlog 85 cases)
56(8%)	>5 years (Backlog 42 cases)	>8 years (Backlog 84 cases)	>13 years[2] (Backlog 127 cases)
70(10%)	>6 years (Backlog 56 cases)	>11 years (Backlog 112 cases)	>17 years[2] (Backlog 169 cases)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT OF MICHAEL T. WARD

Michael T. Ward, being first duly sworn, does depose and state as follows:

1. I am an attorney at law and a member in good standing of the bars of Delaware, Maryland and Virginia. I have been an attorney in the Law Offices of Peter G. Angelos for the last ten years. Recently I have worked extensively on the case of Dr. Richard E. Blanchard, who I have met with personally on many occasions, including, but not limited, to representing him in his discovery and *de bene esse* videotape depositions taken on June 27, 1994 and July 6, 1994 respectively. The facts stated below are based on my conversations with Dr. Blanchard and/or upon his sworn testimony;

2. Dr. Richard E. Blanchard is a 61 year old periodontist who was diagnosed with malignant mesothelioma on February 8, 1994 based on a needle biopsy performed at the DePaul Medical Center in Norfolk, Virginia. That diagnosis has since been confirmed by pathologists at Brigham & Women's Hospital and the Mayo Clinic.

3. Dr. Blanchard was exposed to asbestos in the summers of 1952 and 1953, when he worked at Newport News Shipbuilding & Drydock as a pipefitter's helper to earn money for college, and from April through July of 1962, when he was on board the U.S.S. Sierra as a dental officer during a FRAM overhaul of the ship at the Norfolk Naval Station shipyard at Portsmouth, Virginia. Dr. Blanchard has identified, *inter alia*, Armstrong and Ruberoid pipecovering and cement as products applied by asbestos workers in his immediate vicinity during the summer of 1953 and Ruberoid pipecovering as a product applied in his vicinity in 1962. In addition to the plaintiff's identification of asbestos products for which CCR members Armstrong World Industries, Inc. and GAF Corporation are responsible, there is ample evidence incriminating other CCR members, including C.E. Thurston which distributed and/or installed asbestos materials applied plaintiff's vicinity.

4. Dr. Blanchard, who has been a leading periodontist in the Tidewater area of Virginia since 1964, earned $409,583.96 in salary and $30,000 in profit sharing in 1993. Prior to developing mesothelioma, he planned to work until age 70, as documented by the records of his financial planner. Dr. Blanchard has now reduced his work load due to the increasing symptoms from his mesothelioma and will soon have to retire. In addition to the extraordinary loss of salary and other compensation, the operation of the buy/sell agreement with his partner will result in a substantial loss given the historic and projected growth of the practice.

5. Prior to developing mesothelioma, Dr. Blanchard was in excellent health. He is a life time non-smoker who exercised regularly and carefully watched his diet. His mother lived to the age of 99.

6. Dr. Blanchard will be survived by his 37 year old wife and 4 adult children from his first marriage, all of whom will have substantial claims under Virginia's wrongful death statute.

7. Prior to the opt out deadline of January 24, 1994, Dr. Blanchard had no notice or knowledge of the *Georgine* class action. Specifically, he did not receive any direct mailing regarding the class action and did not see any broadcast or published notice of the class action. Except for the summer of 1952 and 1953, Dr. Blanchard has never been a member of a labor union and, therefore, never received any notice of the class action through such bodies.

8. Prior to the opt out deadline of January 24, 1994, Dr. Blanchard had no knowledge that he had sustained any injury from his exposure to asbestos.

9. The undersigned has discussed the terms and conditions of the *Georgine* class action settlement with Dr. Blanchard, who has requested the undersigned to take all possible steps to have his case opted out of the class action settlement.

/s/ MICHAEL T. WARD

[Jurat Omitted]

AFFIDAVITS IN SUPPORT OF CARGILE MEMORANDUM IN OPPOSITION TO CCR MOTION FOR PRELIMINARY INJUNCTION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT OF JOHN SOTERIOU

I, John Soteriou, declare:

1. I have personal knowledge of the facts contained in this affidavit, and, if called as a witness, am competent to testify to these facts.

2. I live in San Carlos, California.

3. I have been employed as a plumber since 1960. Throughout my years of employment, I have engaged in the new construction and remodeling of commercial buildings where I was exposed to the removal and installation of asbestos pipe insulation and other asbestos-containing materials, including asbestos cement pipe.

4. I was not diagnosed with mesothelioma until April 1994. Prior to my diagnosis, I was not aware that I had mesothelioma or any asbestos-related disease.

5. I did not opt out of the *Georgine* v. *CCR* class settlement.

6. I did not file a lawsuit against any asbestos defendant for my own asbestos-related injuries prior to January 15, 1993.

7. I filed a lawsuit in Alameda County Superior Court for my asbestos-related injuries on May 13, 1994.

/s/ JOHN SOTERIOU

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT OF HAROLD HANS EMMERICH

I, Harold Hans Emmerich, declare:

1. I have personal knowledge of the facts contained in this affidavit, and, if called as a witness, am competent to testify to these facts.

2. I live in Santa Clara, California.

3. From April 1942 to April 1943 I worked for Western Pipe and Steel Company as a machinist on board ship during the new construction of ships. I worked in the engine and boiler rooms and worked around large amounts of asbestos. From 1950 until 1968 I worked for California Water Service supervising the cutting and installation of asbestos cement pipe.

4. The doctor first suspected I had mesothelioma in February 1994. However, I was not definitely diagnosed with mesothelioma until June 17, 1994 when a biopsy was performed and the biopsy tissue was analyzed. Prior to my diagnosis, I was not aware that I had mesothelioma or any asbestos-related disease.

5. I did not opt out of the *Georgine* v. *CCR* class settlement.

6. I did not file a lawsuit against any asbestos defendant for my own asbestos-related injuries prior to July 6, 1994 at which time I filed a lawsuit in Alameda County Superior Court for my asbestos-related injuries.

/s/ HAROLD HANS EMMERICH

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

AFFIDAVIT OF THOMAS COREY

I, Thomas Corey, declare:

1. I have personal knowledge of the facts contained in this affidavit, and, if called as a witness, am competent to testify to these facts.

2. I live in Napa, California.

3. I was an electrician employed at Hunters Point Naval Shipyard from July 1943 to May 1945 and from February 1947 to July 1973, and at Mare Island Naval Shipyard from July 1973 to October 1984. I worked aboard all types of navy vessels, installing, repairing, and testing electrical systems throughout these ships, including work within engine and boiler rooms. Throughout my career, and on a continual basis, I was occupationally exposed to asbestos-containing insulation products used on board ships.

4. I was not diagnosed with mesothelioma until June 1994. Prior to my diagnosis, I was not aware that I had mesothelioma.

5. I did not opt out of the *Georgine* v. *CCR* class settlement.

6. I did not file a lawsuit against any asbestos defendant for my own asbestos-related injuries prior to January 15, 1993.

7. I filed a lawsuit in Alameda County Superior Court for my asbestos-related injuries on August 8, 1994.

/s/ THOMAS COREY

[Jurat Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

REPLY MEMORANDUM OF THIRD-PARTY PLAINTIFFS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON COUNT I OF FIRST AMENDED THIRD-PARTY CO-COMPLAINT AND IN OPPOSITION TO THE CROSS-MOTIONS OF THIRD-PARTY DEFENDANTS

* * * *

insurers suggests that under the circumstances this notice was untimely.[29] *See Mighty Midgets, Inc.* v. *Centennial Ins. Co.*, 416 N.Y.S.2d 559, 563 (N.Y. 1979) (timeliness of notice not determined "simply by how long it was before written notification came forth" but rather by "what was a reasonable time in the light of the facts and circumstances of the case at hand;" the "crucial" question is "the reason [the policyholder] took the time it did").

In addition, as noted in the Producers' Memorandum, it is not clear how the notice provisions of the policies should be applied to the circumstances of this extraordinary settlement. The notice provisions cited by the insurers call for notice of a claim when asserted or in some cases for notice of circumstances "likely to

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[29] The full complement of insurers whose policies were potentially implicated by the Settlement was not identified until late December. The determination of which policies could be called upon depended upon a definitive evaluation of the likely cost of the Settlement and on the finalization of the Producers' shares. In addition, the process of locating and reviewing several thousand policies dating back to the 1930s, identifying policies that would be unavailable because of exhaustion or because of the demise of the insurer, and identifying successors to original insurers, took many weeks to complete. *See* Murray Decl. ¶¶ 3-6.

result in a claim." *See* Ins. Mem. at 78-79.[30] Although the result of the eventual Stipulation of Settlement was a class claim, it was not a claim of the usual kind. It was instead the claim of a settlement class, the settlement of which did not resolve any previously asserted claim. *See* Producers' Mem. at 47-48. The Settlement was in substance an agreement structuring the future resolution of as yet unasserted claims. The requirements applicable to asserted claims or to the settlement of such claims cannot reasonably apply in the same way to such a *sui generis* agreement.[31]

2. The Insurers Were Not Excluded From the Settlement Process

The insurers also argue that they were deprived of their right to control the defense and settlement of the underlying claims and of their related right to avoid coverage of any "voluntary payment" agreed to by a policyholder without their consent. *See* Ins. Mem. at 72-77. Put in its boldest form, their contention is that "[u]nder the policies, [the insurer] alone has the right to make settlements as it 'deems expedient.'" Md. Cas. Mem. at 45. The less extreme contention is that these rights were breached by the alleged exclusion of the insurers from the settlement process.

Even if the insurers were not disqualified from control of the defense and settlement by their conflicting interest, it is obvious that, if the insurers had conducted the settlement negotiations, there neither would nor could have been a settlement. In the first place, class counsel fearing premature disclosure would not have negotiated with the insurers. Second, with their internal differing

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[30] The insurers assert that notice was required "as soon as it because [sic] apparent that a class action suit might be filed," Ins. Mem. at 79 (emphasis added), but the cited language of their policies does not support that assertion.

[31] In response to this point, the insurers say that "most policies require the insured to provide notice not only for a 'claim' but also of any 'occurrence' or 'injury' or 'loss' that is *likely to result in a claim against the insured*." Ins. Mem. at 78 (emphasis in original). But the prospect of a futures class settlement was not an "occurrence" giving rise to any new liability, much less an "injury" or "loss."

interests, it is impossible to imagine the insurers agreeing among themselves — and with the Wellington insurers who are not parties to this proceeding as well — on negotiating objectives and a coherent strategy with the requisite flexibility. Third, as shown above, no insurer had as strong an interest as the Producers in achieving a comprehensive settlement. Indeed, the insurers'

* * * *

(10) No. 96-270

Supreme Court, U.S.
FILED
DEC 16 1996
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners

v.

GEORGE WINDSOR, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

When the parties to a putative class action enter into a settlement, must the district court nevertheless pretend that every legal and factual issue in the case will be contested, and ignore the existence of the settlement, in determining whether class certification is appropriate under Federal Rule of Civil Procedure 23.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioners in this case are Amchem Products, Inc., A.P. Green Industries, Inc., Armstrong World Industries, Inc., Certainteed Corporation, C.E. Thurston & Sons, Inc., Dana Corporation, Ferodo America, Inc., Flexitallic, Inc., GAF Building Materials, Inc., I.U. North America, Inc., Maremont Corporation, Asbestos Claims Management Corporation, National Services Industries, Inc., Nosroc Corporation, Pfizer Inc., Quigley Company, Inc., Shook & Fletcher Insulation Company, T&N plc, Union Carbide Corporation, and United States Gypsum Company. The other parties to the proceeding and petitioners' parent companies and nonwholly owned subsidiaries are set forth at Pet. App. 292a-317a.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 83 F.3d 610. The opinion and order of the district court granting the preliminary injunction (Pet. App. 67a-87a) are reported at 878 F. Supp. 716. The opinion and order of the district court approving the settlement and certifying the class (Pet. App. 88a-276a) are reported at 157 F.R.D. 246.

JURISDICTION

The judgment of the court of appeals (Pet. App. 277a-282a) was entered on May 10, 1996, and a timely petition for rehearing was denied on June 27, 1996 (Pet. App. 283a-288a). The petition for a writ of certiorari was filed on August 19, 1996, and was granted on November 1, 1996. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RULE INVOLVED

Pertinent provisions of Federal Rules of Civil Procedure 1 and 23 are set forth as an addendum to this brief.

STATEMENT

This case involves the settlement of a nationwide class action encompassing hundreds of thousands of individual asbestos personal injury claims and more than one billion dollars in prospective settlement payments. The court below characterized the settlement as "arguably a brilliant partial solution to the scourge of asbestos that has heretofore defied global management in any venue." Pet. App. 18a.

The Third Circuit nonetheless vacated the settlement. It held that where the parties to a putative class action enter into a settlement, the court must pretend that the settlement does not exist and apply the class certification criteria of Federal Rule of Civil Procedure 23 "as if the case were going to be litigated." Pet. App. 19a. The district court thus must decide whether to certify a class in a hypothetical case, rather than in the case actually before it.

This peculiar approach is flatly inconsistent with the language, history, and purposes of Rule 23. The plain terms of the Rule focus the certification inquiry on the *actual* status of the proceeding. The history establishes that the Rule was meant to reject the very sort of abstract and impractical approach embraced by the court of appeals. And the clear purposes of the Rule — which was designed to advance interests of efficiency, economy, and fairness — will be frustrated by the decision below. It is hardly surprising, therefore, that the Third Circuit's approach has been rejected by every court of appeals to consider the question and by numerous district courts. The Third Circuit's rule, if endorsed by this Court, would require a radical change in long-settled class action practice, would make numerous beneficial class action settlements impossible, and would burden courts and litigants with a vast increase in litigation.

1. ***Background and Settlement Negotiations.*** This lawsuit and its settlement arose out of the nation's well-documented asbestos litigation crisis. Hundreds of thousands of cases have been filed; some 150,000 cases are pending in federal and state courts today; and new cases continue to flood the courts at a staggering and even accelerating pace (in 1995 alone, over 50,000 new claims were filed against some asbestos defendants). See SEC Form 8-K, Owens Corning Corp., June 20, 1996, at 4-5.

The Judicial Conference Ad Hoc Committee on Asbestos Litigation, appointed by Chief Justice Rehnquist, found in 1991 that "the situation has reached critical dimensions and is getting worse." It summarized the nature of the problem as follows:

> [D]ockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Report at 3, quoted in *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 419 (J.P.M.L. 1991).

The Judicial Conference Committee further concluded that "[t]he transaction costs associated with asbestos litigation are an unconscionable burden on the victims of asbestos disease," citing a RAND Corporation finding that, "of each asbestos litigation dollar, 61 cents is consumed in transaction costs * * *. Only 39 cents were paid to the asbestos victims." Report at 13 (footnote omitted). These tremendous costs diminish the funds available to compensate future plaintiffs: "[u]nfairness results because of the excessive transaction costs and the finite resources available to pay meritorious claims. This situation demands immediate remedy." *Id.* at 14.

Moreover, as courts have recognized, the "[r]esults of jury verdicts are capricious and uncertain" in asbestos cases — to the point where "asbestos litigation often resembles the casinos 60 miles east of Philadelphia, more than a courtroom procedure." *In re School Asbestos Litig.*, 789 F.2d 996, 1001 (3d Cir.) (citation omitted), cert. denied, 479 U.S. 852 (1986). As the district court found, the tort system's severe problems in handling asbestos claims continue unabated today. Pet. App. 240a.

Against this background, the parties to the asbestos litigation were repeatedly urged by the federal judiciary and other concerned parties to seek an "all-encompassing" settlement. Pet. App. 111a, 270a-271a. In 1991, at the request of eight district judges, the Judicial Panel on Multidistrict Litigation ("MDL Panel") transferred all federal asbestos personal injury cases to the Eastern District of Pennsylvania for pretrial proceedings in hopes of fostering settlement of the "asbestos mess" (771 F. Supp. at 424). After that transfer, leaders of the plaintiffs' asbestos bar and counsel for all of the major asbestos defendants tried to achieve such a settlement (Pet. App. 113a).

When those efforts deadlocked, the twenty companies that are petitioners here decided to "continue the discussions" with

the co-chairs of the plaintiffs' MDL Steering Committee, who had been elected by the committee members and appointed by the district court (Pet. App. 113a, 115a). As the district court found, the defendant companies began negotiations with these counsel "based on their reputation and experience in the asbestos litigation," and because they "had and have the knowledge and credibility necessary to negotiate on behalf of future asbestos victims in any global settlement effort." *Id.* at 179a.

The negotiations themselves were "difficult, lengthy, and time-consuming," and "protracted and vigorous" (Pet. App. 116a, 118a), continuing for an entire year (*id.* at 115a). "The negotiations included a substantial exchange of information" between class counsel and the twenty defendant companies, including "confidential data" showing the defendants' historical settlement averages, claims numbers, and insurance resources. *Id.* at 116a-117a. "Virtually no provision" of the settlement "was not the subject of significant negotiation," and the settlement terms "changed substantially" during the negotiations. *Id.* at 116a. In the end, the negotiations produced a settlement that, the district court determined based on its detailed review of the process, was "the result of arms-length adversarial negotiations by extraordinarily competent and experienced attorneys." *Id.* at 271a; see generally *id.* at 109a-118a.

2. ***The Terms of the Settlement.*** The 106-page settlement as finally negotiated covers all persons who have been occupationally exposed to asbestos products supplied by petitioners but who had not filed their own asbestos personal injury lawsuits before this case was initiated, a class that includes hundreds of thousands of persons. Pet. App. 268a. The settlement establishes medical criteria that qualify a claimant for compensation if he or she develops an asbestos-related cancer or breathing impairment (such as asbestosis). *Id.* at 120a-136a. For people who meet those criteria, the settlement waives all defenses and provides immediate

monetary compensation that varies with the severity of the condition and tracks prior tort system settlements by the defendant companies. Pet. App. 136a-139a. Claims for compensation will be resolved by a claims resolution system in far less time than in the tort system, and with far lower transaction costs. *Id.* at 268a. In the first ten years alone, the settlement will pay out up to $1.3 billion to as many as 100,000 class members. *Id.* at 269a.

There is another important benefit offered by the settlement to class members who meet the medical criteria for immediate compensation. In the tort system, over 90% of asbestos lawsuits settle with the plaintiff executing a "full" release, whereby the plaintiff "releases all claims for any future asbestos-related injury, including [any subsequently developed asbestos-related] cancer." Pet. App. 155a.[1] Under the settlement, by contrast, a claimant who, for example, receives compensation for asbestosis will receive additional compensation if and when cancer develops. *Ibid.* The district court found that this right to additional compensation is "of great benefit to class members." *Ibid.*

Class members who do not meet the medical criteria receive non-monetary benefits that, as the district court found, have "significant value." Pet. App. 174a. These benefits include (1) tolling the statute of limitations, such that class members "will no longer be forced to file premature lawsuits or risk their claims being time-barred"; (2) waiver of defenses to liability; (3) payment of their claims, if and when they become sick, pursuant to the settlement's compensation standards, which avoids "the uncertainties, long delays and high transaction costs [including attorneys' fees] of the tort

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[1] In some States, moreover, a claimant who sues on a non-malignant claim may not subsequently sue for cancer. See, *e.g.*, *Gideon* v. *Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136-1137 (5th Cir. 1985) (applying Texas law); *Joyce* v. *A.C. & S., Inc.*, 785 F.2d 1200, 1203-1205 (4th Cir. 1986) (applying Virginia law).

system"; (4) "some assurance that there will be funds available if and when they get sick," based on the finding that each defendant "has shown an ability to fund the payment of all qualifying claims" under the settlement; and (5) the right to additional compensation if cancer develops. *Id.* at 172a-73a. This package of benefits, the district court found, compares favorably to the tort system, "where non-impaired claimants usually settle their claims for small amounts and a full release of all claims for any future asbestos-related injury, including cancer." *Id.* at 175a.[2]

As the district court concluded, the settlement terms establish the kind of claims resolution system envisioned by the Ad Hoc Committee appointed by Chief Justice Rehnquist to study the asbestos litigation crisis. Pet. App. 112a, 270a. The settlement also has been endorsed as fair and reasonable by the AFL-CIO and its Building and Construction Trades Department, which represent a "substantial percentage" of class members. *Id.* at 247a. The AFL-CIO has a role in monitoring implementation of the settlement. *Id.* at 158a.

3. ***Initial District Court Proceedings.*** The complaint in this case, styled as a class action under Fed. R. Civ. P. 23(b)(3), asserted present causes of action for all class members. For those who had already manifested an asbestos-related disease (such as asbestosis or cancer), the complaint asserted various causes of action and sought money damages for that disease. For those who had been exposed to asbestos but who had not yet manifested any asbestos-related disease, the complaint asserted causes of action for medical monitoring,

[2] The non-impaired class members who receive these benefits fall into two groups: those whose asbestos exposure has resulted in cellular injuries that can be seen on chest x-rays, but have not resulted in physical impairment ("pleural" claimants), and those who have suffered cellular injuries that are not visible on x-rays ("exposure-only" claimants). See Pet. App. 127a-129a; *Carlough* v. *Amchem Prods.*, 834 F. Supp. 1437, 1454-1455 (E.D. Pa. 1993).

emotional distress, increased risk of cancer, and conspiracy, and sought both money damages and medical monitoring. *Id.* at 95a.[3]

The district court conditionally certified the class for settlement purposes only. Pet. App. 96a. Subsequently, the court approved a plan to give notice to the class. *Georgine* v. *Amchem Prods., Inc.*, 157 F.R.D. 246, 314-336 (E.D. Pa. 1994). Class members were informed of the terms of the settlement and were afforded an opportunity to opt out of the class. Pet. App. 218a-219a.

The district court also held that it had subject matter jurisdiction over the lawsuit (834 F. Supp. at 1456-1462). The court first rejected the objectors' claim that the non-impaired plaintiffs lacked the injury in fact required by Article III. *Id.* at 1446-1456. Relying on numerous precedents, it held that "exposure to a toxic substance constitutes sufficient injury in fact to give a plaintiff standing to sue in federal court" (*id.* at 1454 (footnote omitted)).[4] This is particularly true for persons

[3] Numerous States recognize these causes of actions. See, *e.g.*, *Burns* v. *Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. App. 1987) (medical surveillance); *Deitsch* v. *Tillery*, 833 S.W.2d 760 (Ark. 1992) (emotional distress); *Potter* v. *Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993) (fear and medical monitoring); *Meyerhoff* v. *Turner Constr. Co.*, 210 Mich. App. 491, 495 (1995) (medical monitoring); *Ayers* v. *Jackson Township*, 525 A.2d 287 (N.J. 1987) (medical monitoring); *Askey* v. *Occidental Chem. Corp.*, 477 N.Y.S.2d 242 (N.Y. App. Div. 1984) (medical monitoring); *Lavelle* v. *Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476 (Ohio C.P. 1987) (emotional distress); *Simmons* v. *Philadelphia Asbestos Corp.*, 543 Pa. 664 (1996) (medical surveillance); *Hansen* v. *Mountain Fuel Supply*, 858 P.2d 970, 980 (Utah 1993) (medical monitoring).

[4] *Id.* at 1452-1458 (citing, *e.g.*, *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 74 (1978); *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1434 (2d Cir. 1993), cert. denied, 510 U.S. 1140 (1994); *Helling* v. *McKinney*, 509 U.S.

exposed to asbestos, the court found, in view of the medical evidence that such exposure immediately produces physical harm to lung tissue. 834 F. Supp. at 1454-1455.[5]

The objectors further contended that non-impaired plaintiffs could not in good faith allege damages in excess of the $50,000 jurisdictional amount. The district court disagreed, holding that "the kind of factual injuries alleged by the [non-impaired] plaintiffs—physical, monetary, and emotional injuries—plainly support a claim of more than $50,000."[6]

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25 (1993)); see also Pet. App. 94a n.2 (citing *In re UNR Industries*, 20 F.3d 766, 770 (7th Cir. 1994), cert. denied, 115 S. Ct. 509 (1994)).

[5] The district court also rejected the objectors' claim that this action fell outside Article III because it was a "feigned" or "collusive" suit. See 834 F. Supp. at 1462-1466. Citing numerous precedents, the court found that the plaintiffs and the defendants "are true adversaries" whose interests are "profoundly adverse to each other," and that the proposed settlement "represents a compromise of a genuine dispute." *Id.* at 1465. The court went on to hold that the case is not moot because "the proposed settlement * * * is contingent on the approval of the court." *Ibid.*

[6] *Id.* at 1459, citing, *e.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d at 1434; *In re A.H. Robins Co.*, 880 F.2d 709, 723-725 (4th Cir.), cert. denied, 493 U.S. 959 (1989); *In re Joint Asbestos Litig.*, 129 B.R. 710, 793-794 (E.D.N.Y. 1991), aff'd in pertinent part & vacated on other grounds, 982 F.2d 721, 734 (2d Cir. 1992), modified on other grounds, 993 F.2d 7 (1993). Some objectors renewed their claim of an insufficient amount in controversy, arguing that the testimony of the non-impaired named representatives renounced their claim to present compensation. The district court, however, found that these plaintiffs had simply testified "to the effect that they support the deferral of compensation to themselves and other non-impaired class members." Pet. App. 93a-94a n.2. The district court thus rejected the objectors' contention, stating that "the fact that a plaintiff settles his or her claim for less than the jurisdictional amount, or chooses to defer receipt of cash compensation, does not deprive a federal court of diversity jurisdiction." *Ibid.*

Every aspect of the proposed settlement was sharply contested by the objectors. The district court permitted extensive pre-hearing discovery and held a five-week hearing on the fairness of the settlement; the propriety of class certification, including the adequacy of the representation of the class; and the other issues raised by the objectors.

Five months later, the district court issued a thorough decision, including more than 300 specific findings of fact (Pet. App. 103a-223a), rejecting the objectors' contentions and holding that (1) the requirements for class certification are met in light of the parties' settlement (*id.* at 223a-233a); (2) class counsel had no conflict of interest and provided vigorous representation of the entire class (*id.* at 249a-262a); and (3) the settlement is fair (*id.* at 115a-176a, 234a-248a). The court also reaffirmed its prior holdings that it had subject matter jurisdiction and that the notice to the class satisfied Rule 23 and due process (*id.* at 93a & n.2, 263a-267a).

4. ***The Class Certification Determination.*** Rule 23 establishes two sets of inquiries that a district court must undertake before certifying a class action. The first, contained in subsection (a), applies to all class actions and directs the court to assess whether "the class is so numerous that joinder of all members is impractical"; "there are questions of law or fact common to the class"; "the claims or defenses of the representative parties are typical of the claims or defenses of the class"; and "the representative parties will fairly and adequately protect the interests of the class." The second set of inquiries, contained in subsection (b), varies depending upon the type of class being certified. Here, the class was certified under Rule 23(b)(3), which requires a court to find "that the

questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The district court found that each requirement was satisfied.

a. ***Numerosity.*** The court found that "[a]lthough the exact size of the class is unknown, it is undisputed that there are many tens of thousands of class members." Pet. App. 103a. "Given the size of the class," the district court concluded, "joinder of the class members' claims would be impracticable." *Id.* at 225a.

b. ***Predominance of Common Questions.*** The court concluded that the commonality element of Rule 23(a) and the predominance element of Rule 23(b)(3) were satisfied because

> [t]he members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system. Whether the proposed settlement satisfies this interest and is otherwise a fair, reasonable and adequate compromise of the claims of the class is a predominant issue for purposes of Rule 23(b)(3).

Pet. App. 226a.

c. ***Typicality of the Representative Plaintiffs' Claims.*** The district court stated that "'[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.'" Pet. App. 227a (citation omitted). In the settlement context, the typicality element "'requires proof that the interests of the class representative and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement.'" *Ibid.* (citation omitted). Here, the court found

that "the representative plaintiffs hail from a variety of jurisdictions and represent a wide range of occupations, medical conditions, and exposure to the CCR defendants' [asbestos] products." Pet. App. 105a. The court also found that the class members share an interest in maximizing recovery for each medical condition. *Id.* at 230a-231a. It thus concluded that "the claims of the representative plaintiffs are typical of the claims of the class for purposes of Rule 23(a)." *Id.* at 227a.

d. ***Superiority to Other Methods of Adjudication.*** Based on its factual findings regarding the fairness of the settlement, the court concluded that "the proposed settlement will provide class members with fair compensation for their claims while reducing the delays and transaction costs endemic to the asbestos litigation process as it occurs presently in the tort system. Thus, for purposes of Rule 23(b)(3), the proposed class action settlement is superior to other available methods for the fair and efficient resolution of the asbestos-related personal injury claims of class members." Pet. App. 227a-228a (citation omitted).

e. ***Adequacy of Representation.*** In determining that the representative parties would "fairly and adequately protect the interests of the class" (Fed. R. Civ. P. 23(a)(4)), the district court considered several issues.

Consistency of Interests. The district court found that:

> there is no antagonism of interest between persons in various categories, or between persons with and without currently manifest asbestos conditions. First, the assets of the defendants do not constitute a limited fund, and so Class Counsel was able to negotiate compensation schedules for varying diseases without competition between medical categories for the same dollars. Further, representative plaintiffs with no currently manifest asbestos condition, or with only non-impairing pleural changes, may in the future develop a condition in any one or more of the compensable medical categories. These

representative plaintiffs, through Class Counsel, therefore have a strong interest that recovery for *all* of the medical categories be maximized because they may have claims in *any*, or several categories.

Pet. App. 230a-231a (emphasis in original) (citations omitted).

Skill and Experience. The district court found that class counsel were "unquestionably experienced, highly respected leaders of the plaintiffs' asbestos bar" (Pet. App. 258a) and were "extraordinarily competent" (*id.* at 271a). Indeed, the objectors admitted "that they were not challenging the qualifications or experience of Class Counsel." *Id.* at 258a.

Alleged Conflict of Interest and Collusion. Based on extensive factual findings, the district court rejected the objectors' argument that class counsel had a conflict of interest in representing the class because they also represented and negotiated settlements for non-class members who already had asbestos personal injury lawsuits on file in the courts. Pet. App. 184a.

The court also rejected the objectors' contention that "the settlement in this class action was the product of collusion" (Pet. App. 204a) because class counsel allegedly received premium settlements in the pending non-class cases (so-called "inventory" settlements) in exchange for acquiescing in less favorable settlement terms for class members. Based on the evidence submitted at the hearing, including the report of a special master, the court found that the "inventory" settlements "were generally consistent with the historical settlement averages for comparable settlements with [defendants], were not inflated, did not include a premium paid to Class Counsel in exchange for the [class action] settlement, and were not the product of collusion" (*id.* at 213a). The district court likewise noted that petitioners entered into similar "inventory" settlements on comparable terms with numerous other plaintiffs' counsel *not* affiliated with class counsel. *Id.* at 182a.

5. ***Notice.*** The district court held that the notice provided to class members satisfied the requirements of Rule 23 and the Due Process Clause. Pet. App. 216a-223a, 263a-267a. The court-approved plan to provide notice of the settlement was implemented at a cost of over $7 million and included hundreds of thousands of individual notices, a wide-ranging television and print campaign, and significant additional efforts by 35 international and national unions to notify their members. *Id.* at 218a-219a. Every notice emphasized that an individual did not currently have to be sick to be a class member. 158 F.R.D. at 333. In the end, the district court was "confident" that Rule 23 and due process requirements were satisfied because, as a result of this "extensive and expensive notice procedure," "over six million" individuals "received actual notice materials," and "millions more" were reached by the media campaign. Pet. App. 272a.[7]

6. ***Fairness of the Settlement.*** Pointing to the evidence adduced at the hearing, which included the 25-year record of asbestos litigation — "probably the most mature mass tort litigation in this country" (Pet. App. 115a) — the district court determined, based on detailed factual findings (*id.* at 115a-

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[7] The district court reaffirmed (Pet. App. 263a) its prior rejection (157 F.R.D. at 334-336) of the objectors' contention that exposure-only claimants could *never* be provided with constitutionally-adequate notice. The court found, among other facts, that "after more than 20 years of extensive litigation, over 15 bankruptcies (many with extensive notice), and massive publicity about asbestos, persons who have had occupational exposure to asbestos are aware of that exposure." *Id.* at 334. The district court then held that "the objectors' argument that notice cannot be provided as a matter of constitutional law is without foundation," citing a number of federal decisions that have "approved notice to classes including persons with unmanifested injuries." *Id.* at 335, 336, citing, *e.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d at 1435; *In re Joint Asbestos Litig.*, 129 B.R. at 834-837.

176a), that each of the primary provisions of the settlement was "fair and reasonable to the class" (*id.* at 241a). Thus, the court found, among other facts, (1) that the settlement agreement's medical criteria will provide compensation to "substantially all persons with asbestos-related cancer or asbestos-related impairment" (*id.* at 125a); (2) that the compensation schedule is a "reasonable reflection of [petitioners'] historical settlement averages from the tort system," (*id.* at 139a); and (3) that the settlement provides non-impaired claimants with benefits of "significant value" (*id.* at 174a) — including the guarantee of compensation in the event they get sick — in exchange for their deferral of immediate cash compensation. *Ibid.*; see also pages 5-6, *supra*. The court concluded with this view of the benefits of the settlement balanced against the treatment of asbestos claims in the tort system (Pet. App. 270a):

> The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease. Indeed, [these] unimpaired victims have, in many states, been forced to assert their claims prematurely or risk giving up all rights to future compensation for any future lung cancer or mesothelioma. The plan which this Court approves today will correct that unfair result for the class members and the * * * defendants.

The court subsequently enjoined class members from pursuing claims against the defendants outside of the settlement. *Id.* at

67a-87a.[8] The parties have been operating under the settlement, processing and paying claims, for over two years.

7. ***The Court of Appeals' Decision.*** The objectors appealed the district court's preliminary injunction barring class members from instituting claims against petitioners. Their appeal did not challenge the district court's findings regarding the fairness of the settlement, but instead advanced a variety of constitutional contentions, including arguments based on due process, standing, and justiciability doctrines. The objectors also contended that the district court erred in granting the motion for class certification.

The court of appeals reversed, holding that the class certification violated Rule 23 and that the settlement therefore had to be invalidated. Pet. App. 57a-59a. The court of appeals did not overturn *any* of the factual findings underlying the district court's decision. Rather, the basis for the court of appeals' decision was its conclusion that the district court had to determine whether the criteria for class certification, as set out in Rule 23, were "satisfied without taking into account the settlement, and as if the action were going to be litigated." *Id.* at 39a. In so holding, the court relied and expanded upon its decision in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir.) (*"GM Trucks"*), cert. denied, 116 S. Ct. 88 (1995). The court conceded that "the better policy" may be to take the settlement into account, but held that "the current Rule 23 does not permit such an exception." *Id.* at 19a; accord *id.* at 39a. Applying its new interpretation of Rule 23, the court of appeals then held that the class could not be certified for *settlement* because it could not have been *litigated* on a class basis. *Id.* at 38a-57a.

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[8] Because a third-party insurance claim remained pending, the district court's order took the form of a preliminary (rather than a permanent) injunction.

For example, the court of appeals concluded that the class does not satisfy Rule 23(b)(3)'s requirement that common questions of law or fact predominate over individual questions because class members had different types of exposure to asbestos and "[d]ifferences in amount of exposure and nexus between exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff"; moreover, "because we must apply an individualized choice of law analysis to each plaintiff's claims, the proliferation of disparate factual and legal issues is compounded exponentially." Pet. App. 41a (citation omitted). Thus, even though the settlement eliminated the possibility that *any* of these issues would be *tried*, the Third Circuit held that the class could not be certified because a hypothetical trial would be too cumbersome.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Third Circuit held that "each of [Rule 23's] requirements must be satisfied without taking into account the settlement, and as if the action were going to be litigated." Pet. App. 39a. That approach makes certification turn on a wholly artificial inquiry — whether the requirements of Rule 23 would be satisfied in the imaginary circumstance that the case were litigated — and entirely disregards the actual situation presented to the district court. The Third Circuit's rule "require[s] a court to ignore important and relevant information that sits squarely in front of it when deciding whether to certify a settlement class." *In re Asbestos Litig.*, 90 F.3d 963, 975 (5th Cir. 1996).

The Third Circuit's novel interpretation of Rule 23, which conflicts with the uniform view of other courts, is wrong. Nothing in the Rule suggests that a court must ignore the existence of a settlement and apply the certification criteria to hypothetical litigation that assuredly *never* will occur. Nor does the Third Circuit identify any such language. To the contrary, the plain language of Rule 23(a) and (b) focuses on

real rather than hypothetical or abstract features of the case, and Rule 23(c)(1) expressly allows the district court to change its certification decision depending upon how the case *actually* develops.

The history of Rule 23 also makes clear that certification decisions must be based on the actual status of the case, including settlement. The drafters of the Rule expressly eschewed the kind of abstract, metaphysical approach taken by the court below, and instead adopted a functional and practical approach that — as both this Court and the Rules Advisory Committee observed — focuses on the "particular" facts of the case. In addition, the existence of a settlement is highly material to the purposes of each of the certification criteria set out in Rule 23.

The Third Circuit's approach, moreover, is flatly inconsistent with the principles used by the Court in construing the Federal Rules. Ignoring settlement violates the "background presumption" that a court must apply the Rules to the case actually before it, not to hypothetical controversies. The holding below also contravenes Rule 1's mandate that the Rules be construed to secure the "just, speedy, and inexpensive determination of every action." The Third Circuit's ruling would preclude many and discourage virtually all class settlements, would deprive many plaintiffs of any remedy, and would accentuate the worst problems of the tort system.

On a proper application of Rule 23 that gives due weight to the settlement in this case, the district court's certification of the class was correct — and the court of appeals did not hold otherwise. The predominant questions in this case, which concern the benefits of the settlement for persons injured through occupational exposure to asbestos, are common to all class members. The named representatives' claims are typical because all members of the class now have the same interest in achieving fair compensation for persons injured by exposure to asbestos. Class representation was adequate in light of the skill and experience of class counsel, the arms-length nature of

the negotiations, and the absence of any conflicting interests among members of the class. And it is patently clear that this class action is superior to myriad individual actions characterized by delay, crushing transaction costs, and inconsistent results.

ARGUMENT

I. A DISTRICT COURT MUST CONSIDER THE ACTUAL FACTS OF THE CASE BEFORE IT — INCLUDING THE EXISTENCE OF A SETTLEMENT — IN APPLYING RULE 23's CLASS CERTIFICATION CRITERIA.

Until the Third Circuit's 1995 decision in *GM Trucks*, the longstanding and consistent practice of the federal courts had been to take account of the fact of settlement in class certification decisions. As the Civil Rules Advisory Committee recently explained, that "is the law everywhere" other than the Third Circuit. Reporter's Draft Minutes, p. 198. Yet the court below offered no persuasive reason for its decision to abandon an eminently useful and manageable practice that has facilitated innumerable settlements on terms that courts have found to be fair to all class members. In fact, Third Circuit's holding cannot be reconciled with the language, history, or purposes of Rule 23, nor with the principles that govern construction of all Federal Rules.

A. The Language Of Rule 23 Requires Consideration Of The Case Actually Before The Court, Not An Imaginary Litigation.

1. The language of Rule 23 is the starting point for construction of the Rule. See, *e.g.*, *Business Guides, Inc.* v. *Chromatic Commun. Enterprises, Inc.*, 498 U.S. 533, 540-541 (1991); *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 123 (1989). But the court of appeals never identified any language in the Rule upon which its holding rests. Nor could it. Rule 23 makes clear that the certification inquiry must be directed to the *actual* status of the proceeding;

the Rule nowhere suggests that the existence of a settlement must be ignored, or that the district judge must apply the certification criteria to hypothetical litigation that assuredly *never* will occur.

Thus Rule 23(c)(1), which applies to all class actions, states that a class certification decision "may be conditional, and may be altered or amended before the decision on the merits." This provision expressly allows the district court to change its certification determination based on how the case *actually* develops. It can hardly be the case that, while developments that occur after the initial certification may be taken into account, developments (like settlement) that take place before certification may not be. Moreover, it would be most peculiar if some developments in the litigation could affect certification, but settlement — which is, after all, the most important and profound development bearing on the conduct of the litigation — could not. See generally *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 160 (1982) ("[e]ven after a certification order is entered, the judge remains free to modify it in the light of *subsequent developments in the litigation*" (emphasis added)).

Other parts of the text of Rule 23 also focus the inquiry on the actual state of the issues in the case at the time of the certification decision. Rule 23(a)(2), for example, requires the court to determine whether "there *are* questions of law or fact common to the class," *not* whether "there *[would be]* questions of law or fact common to the class [*if every issue in the case were litigated*]" (emphasis added). A district court thus may not find certification impermissible under this subsection because the plaintiffs *could* have (but declined to) advance claims that could not be litigated in a class setting. Rule 23(a)(3) similarly refers to the "claims or defenses *of* the representative parties," which can only be read to refer to the claims or defenses that the representative parties are actually advancing in the case at the time of the certification decision. The language is not limited, as respondents suggest it should

be, to claims "*alleged in the class complaint.*" Windsor Opp. 17 (emphasis in original).

In fact, respondents' proposed reading of Rule 23 is nonsensical. The Federal Rules do not require detailed pleading (see Fed. R. Civ. P. 8); as a result, complaints and answers usually are general documents. They need not specify the elements that the plaintiff must establish to prevail on his or her claims, or how the plaintiff plans to prove those elements, or the details of the particular defenses that the defendant will advance in attempting to defeat those claims. The Court therefore has observed that the issues relevant to the certification decision "[s]ometimes * * * are plain enough from the pleadings [, but] * * * sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Falcon*, 457 U.S. at 160. As a case develops, moreover, the defendant may choose to abandon potential defenses, or the plaintiff may decide not to pursue particular claims. Under respondents' approach, the district court presumably would be barred from taking account of these developments in making the certification determination. There is no justification in the Rule's language for such a bizarre result. And there is no principled distinction between those events and a settlement.

Indeed, this Court has observed that the commonality and typicality requirements of Rule 23(a) "serve as guideposts for determining whether *under the particular circumstances* maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 157 n.13 (emphasis added). Needless to say, analysis of the "particular circumstances" of the case must involve consideration of whether the parties have settled.

The language of Rule 23(b)(3) — the provision of Rule 23(b) at issue in this case — also directs the court's attention to the *actual* features of the case before it. For example, Rule

23(b)(3) states that "matters pertinent to the [court's certification] findings include" such things as "the difficulties *likely to be encountered* in the management of the class action" (Rule 23(b)(3)(D) (emphasis added)) and "the extent and nature of any litigation * * * *already commenced* by or against members of the class" (Rule 23(b)(3)(B) (emphasis added)). Likewise, the requirements that common issues "predominate" over individual questions and that the class action be "superior" to other methods for adjudicating the parties' controversy necessarily focus the court's inquiry on the actual circumstances of the case before it. Taken together, these factors "describe in practical and functional terms the occasions for maintaining class actions" (1 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 1.10 at 1-26 (3d ed. 1992)), and require consideration both of the actual status of the case and of the *real* manageability problems that will be confronted by the district court — to which the fact of settlement is critical.

2. The court of appeals based its contrary conclusion "in large part on the fact that '[t]here is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes.'" Pet. App. 38a (quoting *GM Trucks*, 55 F.3d at 799).

But this statement misapprehends the issue. The fact that certification of a settlement class includes consideration of the settlement, and excludes consideration of issues the settlement has resolved, does not "liberalize" the certification inquiry. Instead — as required by the language of the Rule — it simply focuses the inquiry on the actual facts instead of on an imaginary case. As the leading commentator in this area has explained, some courts, in approving class settlements * * * have observed that the class might not have been certified were it not for the proposed class settlement. *This observation does not mean that Rule 23 criteria were not applied strictly in these circumstances.* On the contrary, these tests were applied, and the observation that a different ruling might have resulted in

the absence of the settlement offer refers to the fact that Rule 23 criteria would have been applied in a different context and thus may have led to a different result. Class action determinations are made in the context of all the circumstances of the case as it is then postured.

2 NEWBERG ON CLASS ACTIONS, *supra*, § 11.27, at 11-54 to 11-55 (emphasis added).

3. A judicial consensus on the proper interpretation of particular language is powerful evidence of the meaning of that language. See, *e.g.*, *Owen* v. *Owen*, 500 U.S. 305, 310-312 (1991). Here, the six other courts of appeals that have addressed the issue all have concluded that the existence of a settlement should be taken into account in applying the Rule 23 criteria.[9] For example, the Fifth Circuit recently held that "a district court can and should" look at terms of a settlement in

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[9] *E.g.*, *White* v. *National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) (finding adequate class representation based upon "the settlement itself"), cert. denied, 115 S. Ct. 2569 (1995); *Malchman* v. *Davis*, 761 F.2d 893, 900 (2d Cir. 1985), cert. denied, 475 U.S. 1143 (1986); *Weinberger* v. *Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982) (Friendly, J.) (parties may "'compromise * * * class [action] issues'" through use of classes certified for settlement purposes) (citation omitted), cert. denied, 464 U.S. 818 (1983); *Officers for Justice* v. *Civil Serv. Comm'n*, 688 F.2d 615, 633 (9th Cir. 1982) (approving class certification "[f]or purposes of the consent decree," while professing "serious doubts * * * whether all aspects of this cause could have been litigated to a conclusion entirely within the class action mode"), cert. denied, 459 U.S. 1217 (1983); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 178 (5th Cir. 1979) (Wisdom, J.) ("it is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context") (citation omitted), cert. denied, 452 U.S. 905 (1981). See also *In re Dennis Greenman Secur. Litig.*, 829 F.2d 1539, 1543 (11th Cir. 1987).

front of it as part of its certification inquiry and that doing so "enhances the ability of the district courts to make informed certification decisions." *In re Asbestos Litig.*, 90 F.3d at 975. And the Fourth Circuit held: "If not a ground for certification per se, certainly settlement should be a factor, and an important factor, to be considered when determining certification." *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 740 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

In addition, district courts in the First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have certified a settlement class after declining to certify a litigation class or expressing doubt whether a litigation class could be certified.[10] This overwhelming consensus in the

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[10] *In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301, 308-309 (D. Mass. 1987) (certifying a temporary settlement class and noting that although certifiability of a litigation class would have been a "competitive question" on the facts of the case, that "is an issue that the parties may properly seek to compromise and settle"); *In re Marine Midland Motor Vehicle Leasing Litig.*, 155 F.R.D. 416, 420, 426 (W.D.N.Y. 1994) (certifying settlement class while noting that Second Circuit had denied certification of a similar class for litigation purposes); *In re First Investors Corp. Sec. Litig.*, 1993 U.S. Dist. LEXIS 18044, at *14 (S.D.N.Y. Dec. 22, 1993) (certifying class "for settlement purposes only" while noting that there was "no guarantee" that class could have been certified for trial); *Chatelain* v. *Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) (same); *Smith* v. *Vista Org.*, 1991 U.S. Dist. LEXIS 10484, at *24 (S.D.N.Y. July 29, 1991); *In re Cuisinart Food Processor Antitrust Litig.*, 1983-2 Trade Cases ¶ 65,680 at p. 69,472 (D. Conn. 1983) (certifying settlement class even though "plaintiffs' liaison counsel admitted * * * the risk that a [litigation] class would not [have been] certified is a substantial one"); *Desimone* v. *Industrial Bio-Test Labs., Inc.*, 83 F.R.D. 615, 620 (S.D.N.Y. 1979) (certifying settlement class even though the court had "twice denied certification" of the class for litigation purposes and noting that "[w]ere a trial to replace settlement, the chances are very slim that" the class could have been

certified); *City of Detroit* v. *Grinnell Corp.*, 356 F. Supp. 1380, 1390 (S.D.N.Y. 1972) (certifying settlement class even though question of certifying a litigation class "is neither easy nor free from doubt"), aff'd in relevant part and rev'd in part, 495 F.2d 448 (2d Cir. 1974); *South Carolina Nat'l Bank* v. *Stone*, 749 F. Supp. 1419, 1428 (D.S.C. 1990); *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1390-91 (D. Md. 1983) (certifying settlement class even though court had twice denied certification of litigation class); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 960-961 (N.D. Ga. 1980) (certifying nationwide settlement class and approving settlement despite "serious doubts" that class could have been certified for litigation), aff'd, 669 F.2d 228 (5th Cir. 1982); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357, 1373 (N.D. Ga. 1979) (same), aff'd in part and rev'd in part on other grounds, 645 F.2d 488 (5th Cir. 1981); *Bowling* v. *Pfizer, Inc.*, 143 F.R.D. 141, 158-60 (S.D. Ohio 1992) (relying on existence of settlement in certifying nationwide settlement class in heart valve tort litigation and distinguishing case in which certification was denied on ground that it "dealt with a proposed class action for litigation"); *In re Dunn & Bradstreet Credit Serv. Customer Litig.*, 130 F.R.D. 366, 369, 371 (S.D. Ohio 1990); *In re "Bendectin" Prods. Liab. Litig.*, 102 F.R.D. 239, 240 n.4, 241 (S.D. Ohio) (certifying nationwide settlement class after denying certification of litigation class), rev'd on other grounds, 749 F.2d 300, 305 n.10 (6th Cir. 1984) (noting but not reaching this issue); *Arenson* v. *Board of Trade*, 372 F. Supp. 1349, 1353-54 (N.D. Ill. 1974) (certifying settlement class even though, absent the settlement, "it is quite possible that the plaintiffs' class would not have been certified, causing the death of this * * * litigation"); Consent Decree in Full Settlement of Civil Action, *Wells* v. *Bank of America*, Civ. No. 71-409 CBR, at 3 (N.D. Cal. 1974) (cited in *Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1560 & n.130 (1976)) (approving bank-wide class settlement of employment discrimination suit notwithstanding prior refusal to certify bank-wide class for litigation because of problems proving individualized harm and measuring damages); *In re Petro-Lewis Sec. Litig.*, 1984-85 Fed. Sec. L. Rep. ¶ 91,899, at p. 90,470 (D. Colo. 1984) (certifying settlement class even though "there is doubt whether this action could be certified"

lower courts, acquiesced in by Congress and the Rules Committee for twenty-five years, by itself justifies rejection of the Third Circuit's approach. See, *e.g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 731-733 (1975); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200-201 (1974); *Missouri* v. *Ross*, 299 U.S. 72, 75 (1936).[11]

for purposes other than settlement); *In re Four Seasons Securities Laws Litig.*, 58 F.R.D. 19, 32, 39 (W.D. Okla. 1972) (certifying class for settlement purposes in securities class action and noting that reliance issue, if litigated, could have "hopelessly fragment[ed] the proposed class"); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 311, 317 (N.D. Ga. 1993) (approving settlement of class certified for settlement purposes and noting that decertification might have been required if the action were litigated because, as the plaintiffs conceded, proof of damages by the class composed of millions of members would have been difficult); *Woodward* v. *NOR-AM Chem. Co.*, 1996 U.S. Dist. LEXIS 7372, at *41 (S.D. Ala. May 23, 1996); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994) (relying on existence of settlement in certifying nationwide settlement class in breast implant tort litigation); *Sanders* v. *Robinson Humphrey/American Express, Inc.*, 1990 Fed. Sec. L. Rep. ¶ 95,315, at p. 96,492 (N.D. Ga. 1990) (certifying class "for purposes of settlement only" after denying certification of litigation class, see 634 F. Supp. 1048 (N.D. Ga. 1986)).

[11] Leading commentators agree that settlement must be considered in applying the Rule 23 criteria. For example, the principal treatise in the field states that "it is altogether proper * * * for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context" (2 NEWBERG ON CLASS ACTIONS, *supra*, § 11.27, at 11-55). That is because "[c]lass action determinations are made in the context of all the circumstances of the case as it is then postured." *Id.* at 11-54 to 11-55.

B. The History Of Rule 23 Shows That District Courts May Not Ignore Settlements In Their Class Certification Decisions.

The history of Rule 23 also makes clear that class certification decisions should be based on the actual case before the district court, not a hypothetical litigation.

Representative suits in equity, the predecessors of the modern class action device codified in Rule 23, were developed as tools for convenient and efficient adjudication of repetitive claims; by avoiding a multiplicity of suits, the equitable class action device was thought to "save[] the parties from needless expense and vexation, economize[] the time of judges and jurymen, and free[] the dockets for the affairs of other litigants." Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1297 (1932). See 7A WRIGHT, MILLER, & KANE, FEDERAL PRACTICE & PROCEDURE, § 1751, at 7-8 (1986); 1 NEWBERG ON CLASS ACTIONS, *supra*, § 1.06, at 1-17. Despite the practicality of this purpose, however, under pre-1966 class action procedures the propriety of a class action was determined by looking to "the abstract nature of the rights involved." *Amendments to Rules of Civil Procedure, Rules Advisory Committee Notes to Amended Rule 23*, 39 F.R.D. 69, 98 (1966). That artificial and abstract analysis — which sought to categorize class actions as "true," "hybrid," or "spurious" — "proved obscure and uncertain" (*ibid.*), and it was replaced in 1966 by a rule that "substitute[s] functional tests for the conceptualisms that characterized practice under the former rule." 7A WRIGHT, MILLER, & KANE, *supra*, § 1753, at 42; see *Snyder* v. *Harris*, 394 U.S. 332, 343 (1969) (Fortas, J., dissenting) (observing that the 1966 amendments of Rule 23 "replaced the metaphysics of conceptual analysis * * * by a pragmatic, workable definition of when class actions might be maintained").

The Advisory Committee accordingly stressed that "*[t]he amended rule* describes in more practical terms the occasions for maintaining class actions." 39 F.R.D. at 99 (emphasis in original). Addressing Rule 23(b)(3), for example, the Committee explained that certification is appropriate where "convenient and desirable *depending upon the particular facts*." *Id.* at 102 (emphasis added). The Committee added that courts, in resolving certification requests, should *disregard "interests that may be theoretic rather than practical."* *Id.* at 104 (emphasis added). In light of this history, commentators uniformly agree that the Rule 23 approach is "functional" and is to be applied "practical[ly]" and "pragmatical[ly]" based on the peculiar facts of each case. See, *e.g.*, Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 40 (1967) (Rule 23(b)'s emphasis on the "practicable" requires courts "to weigh the particular circumstances of particular cases and decide concretely what will work * * * in the individual situations"); 7A WRIGHT, MILLER, & KANE, *supra*, § 1778, at 528 ("the proper standard under Rule 23(b)(3) is a pragmatic one"); 1 NEWBERG ON CLASS ACTIONS, *supra*, § 1.10, at 1-26, 1-31. Thus, as Judge Wisdom wrote for the Fifth Circuit:

> The hallmark of Rule 23 is the flexibility it affords to the courts to utilize the class device in a particular case to best serve the ends of justice for the affected parties and to promote judicial efficiencies. * * * Accordingly, it is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context.

In re Beef Antitrust Litig., 607 F.2d at 177-178 (citation omitted).

The Third Circuit's rule, which applies the certification criteria to an abstract construct of hypothetical litigation while ignoring the real-world case before the court, resembles the pre-1966 class action procedures that Rule 23 was intended to eliminate. The amended Rule's focus on practicality — as well as the emphasis on the "particular facts" of the case — manifestly requires that the district court make the certification

decision in light of the actual status of the case, including a settlement. See 2 NEWBERG ON CLASS ACTIONS, *supra*, § 11.27, at 11-55.

C. The Purposes Of The Specific Certification Criteria Require Consideration Of A Settlement.

The purposes of, and interests served by, the pertinent specific requirements of Rule 23 confirm that, in adjudicating a certification motion, a district court should take the parties' settlement into account.

Rule 23(a). The policies that underlie Rule 23(a) plainly are advanced by taking settlement into account in conducting the certification inquiry. For example, when considering Rule 23(a)(4)'s adequacy of representation requirement in a contested class action, the district court's decision necessarily cannot be anything more than an educated guess; the court cannot wait to see how well class representatives and class counsel ultimately will perform because the certification decision must be made "[a]s soon as practicable after the commencement" of the action. Fed. R. Civ. P. 23(c)(1). In contrast, when certification of a settlement class is sought, the district court simultaneously has before it the motion for certification and the agreed-upon final result in the action. Once the case is settled, "'there [are] none of the imponderables that make the [class-action] decision so difficult early in [the] litigation.'" *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 406 n.12 (1977) (bracketed material added by the Court) (citation omitted).

The district court therefore need not speculate about whether hypothetical, potential divergences of interest among class members might compromise the interests of the class during continued litigation that will never occur. Instead, the court can address the issue of adequate protection directly, by asking whether the settlement is fair and whether, during the settlement negotiations, the class representatives and class counsel "fairly and adequately protect[ed] the interests of the class." Fed. R. Civ. P. 23(a)(4). As the Fifth Circuit

explained, "[s]ettlements and the events leading up to them add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint." *In re Asbestos*, 90 F.3d at 975.[12]

The courts of appeals accordingly have long understood that

> [i]t is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance.

Corrugated Container, 643 F.2d at 212. Accord *In re Asbestos*, 90 F.3d at 975, 980-982 (relying on the terms of the settlement to determine that no intra-class conflicts existed); *White* v. *National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) ("adequacy of class representation * * * is ultimately determined by the settlement itself"), cert. denied, 115 S. Ct. 2569 (1995). Hence, pretending that the case is going to be litigated not only adds nothing to the adequacy inquiry, but actually deprives it of the most probative evidence.[13]

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[12] The existence of a settlement also eliminates the need to assess whether class counsel and the class representative have the resources, willingness, and experience to see the litigation through discovery, trial, and any appeals. No legitimate interest of any kind is advanced by requiring district courts to undertake this inquiry when, in fact, the action is being settled. See 2 NEWBERG ON CLASS ACTIONS, *supra*, § 11.28, at 11-59.

[13] For similar reasons, taking settlement into account advances the purposes of the commonality and typicality requirements of Rule

Rule 23(b)(3). Rule 23(b)(3) is designed for actions in which "the particular facts" make class certification "convenient and desirable" by, among other things, "achiev[ing] economies of time, effort, and expense." Advisory Committee Notes (1966 Amendment). Both the predominance and superiority requirements of Rule 23(b)(3) focus largely on avoidance of inefficiencies. A court must find that common questions predominate because "[i]t is only where this predominance exists that economies can be achieved by means of the class action device." Advisory Committee Notes (1966 Amendment). Otherwise, "an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." *Ibid.* The superiority requirement similarly is concerned with identifying the method of adjudication that offers "greater practical advantages." *Ibid.*

Taking the fact of settlement into account directly advances these purposes. A settlement, of course, removes the danger that the proceeding will "degenerate into multiple lawsuits separately tried," just as it removes all other inefficiencies that could arise from continued litigation. And immediate relief for the class through a settlement surely may be superior to alternatives, such as individual litigations, even where that would not be true of an unmanageable litigated class action. See Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 835 (1985) (certification of settlement class in mass tort litigation is appropriate because it may "prove 'superior to other available methods'" of adjudication).

Taking settlement into account likewise is important to the specific "matters" that the Rule expressly makes "pertinent to the [23(b)(3)] findings." Rule 23(b)(3)(A) — "the interest of

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23(a). Indeed, the Court has recognized that those factors "tend to merge with the adequacy-of-representation requirement." *General Tel. Co.* v. *Falcon*, 457 U.S. at 157 n.13.

members of the class in individually controlling the prosecution or defense of separate actions" — asks the district court to balance any potential loss of autonomy for class members (the value of which can often be "theoretic rather than practical," as the Advisory Committee cautioned) against the possible benefits of a class action. When the case is settled, the benefits are known, thus making the balancing inquiry far more concrete. Moreover, class members may opt out if they are dissatisfied with those benefits. See *In re Beef Industry Antitrust Litig.*, 607 F.2d at 175; *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 223 (5th Cir. 1981).

Consideration of settlement also advances the evident purpose of Rule 23(b)(3)(B), which directs the court to take into account "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." When the parties have reached a settlement, class members' interest in further prosecuting any "already commenced" litigation will be substantially, if not wholly, eliminated. Finally, it would be senseless for a court to ignore settlement in applying Rule 23(b)(3)(C) and (D), which call the court's attention to "the desirability or undesirability of concentrating the litigation of the claims in the particular forum" and "the difficulties likely to be encountered in the management of a class action." Settlement creates immediate advantages for the class action forum and eliminates any case-management difficulties that might arise from continued litigation.

D. The Principles That Govern Construction Of The Federal Rules Require Courts To Take Settlement Into Account.

The decision below also conflicts with the principles applied by this Court in construing the Federal Rules.

1. Just last Term, this Court recognized that the Federal Rules are written against certain "background presumption[s]" and that a party urging a position inconsistent with one of those presumptions "bears the responsibility of identifying

some affirmative basis for concluding" that a particular Rule departs from that presumption. *United States* v. *Mezzanatto*, 115 S. Ct. 797, 803 (1995). The Court there held that the Federal Rules reflect a "presumption of waivability" that a party may overcome only with affirmative evidence. *Id.* at 802.

Here, the Third Circuit's rule runs afoul of the background presumption that a court applies the Federal Rules to the case actually before it, not to the case as the court imagines the parties *could* have litigated it. For example, this Court observed in *Mezzanatto* that courts routinely accept stipulations for the admission of otherwise inadmissible documents. 115 S. Ct. at 802. Yet the Federal Rules contain no express directive that courts must consider the parties' agreement instead of deciding whether to admit the evidence based upon objections the parties *might* have raised. Similarly, when parties agree not to raise substantive arguments, the court does not ignore that agreement and pretend that those issues remain in the case. See, *e.g.*, *Waisome* v. *Port Authority of New York and New Jersey*, 948 F.2d 1370, 1374 (2d Cir. 1991)).[14] Thus, respondents "bear[] the responsibility of identifying some affirmative basis for concluding" (115 S. Ct. at 803) that a district court applying the certification criteria in Rule 23 should ignore the parties' agreement.

Respondents cannot identify any "affirmative basis for [so] concluding." Indeed, the implications of the Third Circuit's holding that a district court may not consider the actual case before it are truly bizarre. Consider, for example, a class

[14] Of course, some sorts of stipulations are not binding on the courts. For example, parties may not stipulate to the resolution of legal issues, and in the class action context a settlement agreement is not effective without court approval. The question here, however, is whether a court must ignore a class action settlement that *satisfies* the fairness requirement.

action that is instituted against a defendant alleging a cause of action that allows proof of liability on a class-wide basis, but requires the plaintiff to prove causation and damages on an individualized basis, and permits recovery of both compensatory and punitive damages. The requirement of individualized proof of causation might pose a significant obstacle to certification of the case as a litigation class action. But suppose — prior to the district court's class certification decision — the class representatives and the defendant reach a fair agreement under which the defendant concedes causation, the plaintiff class waives its punitive damages claim, and the parties agree to a formula for the calculation of damages. The only issue remaining in the case would be the question of liability. Yet the Third Circuit would require the district court to ignore this extremely significant development, treat the case as if the partial settlement had not occurred, and deny certification because a hypothetical class that sought to litigate causation could not have been certified. There is no "basis" — affirmative or otherwise — in the Federal Rules for such a perverse result.

2. There is a second principle that is dispositive here: the Rules themselves state that they should "be construed and administered to secure the *just, speedy, and inexpensive determination* of every action." Federal Rule of Civil Procedure 1 (emphasis added). Rule 1 establishes efficiency and fairness as the "touchstones" for interpreting the Rules. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306 (1962).

The Third Circuit's construction of Rule 23 undeniably will frustrate both of these purposes. Indeed, that court itself acknowledged that it may be "better policy * * * to take settlement into account" in the certification decision. Pet. App. 19a. But the court of appeals went astray in believing that its observation was irrelevant to the proper construction of Rule 23. In fact, under the mandate of Rule 1, Rule 23 *should* be applied in a manner that provides a "convenient and economical means for disposing of similar lawsuits," while

"protect[ing] the interests of absentees." *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 403 (1980) (citations omitted). See *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 553 (1974).

a. ***Efficiency.*** "[P]ublic policy wisely encourages settlements" because they are an efficient means of resolving litigation. *McDermott, Inc.* v. *Amclyde*, 114 S. Ct. 1461, 1468 (1994). Consequently, the Federal Rules encourage and give district courts expansive powers to facilitate settlement. For example, Rule 16(a)(5) expressly identifies "facilitating the settlement of the case" as a proper purpose for a pretrial conference. See also Fed. R. Civ. P. 16(c)(9) (district court may take appropriate action at pretrial conference with respect to "settlement"). The Rules Advisory Committee observed that "[s]ince it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible."

Rule 23, as applied everywhere but the Third Circuit, plainly promotes settlement. The Federal Judicial Center study found that 84% of the cases in which a class was certified ended in settlement; almost half of those settlements — 39% of all certified class actions — involved classes certified for settlement purposes only. Willging, Hooper & Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Changes*, 71 N.Y.U.L. Rev. 74, 112, 180 (1996). The Third Circuit rule, by contrast, would provide a significant deterrent to settlement in at least three ways.

First, the MANUAL FOR COMPLEX LITIGATION (THIRD) explains that decoupling class certification in the settlement context from class certification in the litigation context "permit[s] defendants to settle while preserving the right to contest [class certification] if the settlement is not approved." *Id.* § 30.45, at 243. Under the test established by the Third Circuit, on the other hand, the district court will *have to* determine that a case in which a settlement has been reached

could be *litigated* as a class action — and will have to make specific findings justifying that conclusion (Pet. App. 19a). If the settlement ultimately falls apart or is disapproved, the defendant will face a certified *litigation* class, having conceded — for present and future cases — what "is often the most significant decision rendered in these class action proceedings." *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980).

Faced with that prospect, a rational defendant who holds any hope at all of defeating class certification will refuse to consider settlement until it loses that issue, which often does not occur until after the parties have litigated for many months (or years). And even after the certification issue is finally determined, a defendant might continue to refuse to settle so as to preserve its right to appellate review. This means that the Third Circuit's rule "'may render it virtually impossible for the parties to compromise class issues and reach a proposed class settlement before a class certification.'" *In re Beef Antitrust Litig.*, 607 F.2d at 177-178 (quoting 3 NEWBERG ON CLASS ACTIONS § 5570c, at 476 (1977)).

Consequently, while the Third Circuit has *said* that it endorses the idea of a class for "settlement purposes" as a mechanism that "affords considerable economies to both the litigants and the judiciary" (*GM Trucks*, 55 F.3d at 794), it is simply not possible to reconcile the Third Circuit's ruling with the concept of a class for settlement purposes only.[15]

Second, the Third Circuit's approach would deter class action settlements in cases involving securities, civil rights, and antitrust claims. These settlements frequently extend to both

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[15] Requiring the district court in every settlement case to determine whether the case could have been litigated also will impose significant additional burdens on the courts and the parties — such as the need to establish the manageability of litigating a case that in fact will never be tried.

liability and damages, establishing a formula for distribution of settlement proceeds to the plaintiff class.

But the damages issues in these cases may be too varied for litigation on a class-wide basis, and thus the criteria for certification as a litigation class would not be met. See MANUAL FOR COMPLEX LITIGATION (THIRD) § 33.36, at 342; § 33.52, at 349-355 (noting in the securities and civil rights contexts that class actions may be tried on specified issues, such as the defendants' respective liabilities, while leaving for subsequent individual trials other issues, such as damages and individual defenses); Fed. R. Civ. P. 23(c)(4) Advisory Committee Note ("in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims").[16]

Under the Third Circuit's rule, these class-wide settlements as a practical matter would be impermissible. The parties would be allowed only to settle the issue of liability, with damages left for resolution in individual claims. But no defendant would enter into such an open-ended admission of

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[16] See, *e.g.*, *Officers for Justice*, 688 F.2d at 621, 622, 633 (approving settlement class after partial litigation of employment discrimination claims and suggesting that the class could not have been certified for litigation of damages); *Griffin* v. *Harris*, 83 F.R.D. 72, 74 (E.D. Pa. 1979) (decertifying a Title VII class action with respect to damages because "significant individual issues * * * would have to be dealt with when determining the amount of damages each class member would be entitled to"); *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143, 154 (E.D. Pa. 1979) (certifying class in antitrust action but noting that "problems in proving damages" may preclude extension of certification to damages determinations), aff'd, 685 F.2d 810 (3d Cir. 1982), cert. denied, 459 U.S. 1156 (1983); *Butler* v. *Home Depot, Inc.*, 1996 WL 421436, *5-*6 (N.D. Cal. Jan. 25, 1996) (certifying Title VII class action as to liability but deferring class certification as to damages).

liability. Thus, settlements of this type likely would disappear under the Third Circuit's approach.

Third, the Third Circuit's interpretation would foreclose the use of class actions to settle mass tort cases, at a time when the number of tort filings in the federal courts is skyrocketing.[17] The great majority of courts have ruled that such cases cannot be certified for classwide *litigation*, given the myriad individualized injury, causation, damages, and choice-of-law issues that arise in trying such claims. See, *e.g.*, *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 & n.23 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297-1302 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995); *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1081 (6th Cir. 1996).

Under the Third Circuit's interpretation of Rule 23, these cases therefore cannot be certified for a classwide *settlement* either. The federal courts instead will be required to resolve those claims on a case-by-case basis. That result is sure to accentuate the worst aspects of the tort system: "expense, delay, * * * crowding of dockets, divergent decisions on identical factual questions, and sometimes the insolvency of the defendants who are being sued." Rehnquist, *Welcoming Remarks: National Mass Tort Conference*, 73 Tex. L. Rev. 1523, 1524 (1995). Accord Edley & Weiler, *Asbestos: A Multi-Billion Dollar Crisis*, 30 HARV. J. LEGIS. 383, 392-397 (1993).

Asbestos litigation provides a case in point. As noted above (at pages 2-3), the Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation concluded that "[t]he transaction costs associated with asbestos litigation are an

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[17] The Administrative Office of the United States Courts recently reported that "the number of personal injury/product liability cases filed nationwide climbed 125 percent from the 12-month period ending March 31, 1995, compared to the corresponding period in 1996." *The Third Branch* at 2 (July 1996).

unconscionable burden on the victims of asbestos disease," and "[c]lass action proceedings have the advantage of promoting efficiency and consistency and prevent whipsawing by defendants of plaintiffs' claims as well as scrambles for the assets of limited funds." *Id.* at 13, 22. The Third Circuit rule, which effectively precludes such proceedings, thus eliminates an invaluable procedure for efficient resolution of one of the most burdensome elements of the federal courts' caseload.[18]

Although the court below recognized that the asbestos litigation problem previously had "defied global management in any venue" (Pet. App. 18a), it vacated a settlement that represents a unique opportunity to unburden the federal and state courts of the "scourge" of asbestos litigation. Unless the decision below is reversed, federal and state courts will be flooded with tens of thousands of new asbestos claims against petitioners. See *id.* at 108a (district court found new claims were filed against petitioners at the rate of 24,000 per year). There is over a two-year backlog of potential filings against petitioners built up over the period covered by the district court's injunction.

b. ***Fairness.*** Construing Rule 23 to bar consideration of the fact of settlement also frustrates the second goal specified in Rule 1 — the fair resolution of claims.

The Third Circuit's rule will deny relief to many plaintiffs. The large number of cases in which courts have taken account of a settlement in the certification decision, frequently expressing doubt whether the case could be litigated as a class action (see pages 22-25 & nn.11-12, *supra*),

[18] Indeed, the Third Circuit itself previously recognized that "increased use of settlement classes has proven extremely valuable for disposing of major and complex national and international class actions in a variety of substantive areas ranging from toxic torts (Agent Orange) and medical devices (Dalkon Shield, breast implant), to antitrust cases * * *." *GM Trucks*, 55 F.3d at 778.

demonstrates that the Third Circuit rule would dramatically reduce the number of class action settlements in, among other kinds of cases, consumer class actions, civil rights suits, and antitrust claims. Numerous plaintiffs who would have been beneficiaries of a class-wide settlement but for the Third Circuit's rule will instead be relegated to the economically prohibitive option of pursuing their individual claims independently.

For many aggrieved persons (victims of consumer fraud are a classic example), this result will mean no relief at all because they will be unable to afford the costs of litigation. See *Deposit Guaranty Nat'l Bank*, 445 U.S. at 339 ("[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device"); accord *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 809 (1985); *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89, 99-100 n.11 (1981). Other aggrieved persons may be able to pursue their claims independently, only to find recovery impossible because the defendant has been bankrupted by large actual and punitive damages judgments awarded to prior claimants. See, *e.g.*, *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 420 (J.P.M.L. 1991); *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation*, at 29-30. In consequence, the Third Circuit's "ignore the settlement" approach may make it *impossible* for absent class members to obtain redress.[19]

[19] In addition, as we have explained (at page 28, *supra*), consideration of the fact of settlement in the certification inquiry helps to ensure that the interests of absent class members are adequately represented by making it unnecessary for the court to speculate about the future performance of the class representatives.

E. The Third Circuit's Expressed Concerns About Fairness To Absent Class Members Provide No Justification For Its Ruling.

The court of appeals was plainly wrong in its concern that consideration of the settlement will "erode" Rule 23's protections for absent class members. Pet. App. 36a-37a. Aside from its erroneous assumption that some "lower" certification standard would apply when settlement is taken into account (see *id.* at 37a), the court failed to explain how absent class members would be prejudiced. In fact, a district court that takes settlement into account is still obligated to conduct the certification inquiry specified in Rule 23. And no settlement may take effect unless the district court finds it fair under Rule 23(e). Basing the class certification decision on the case actually before the district court rather than a hypothetical construct therefore does not compromise any of the protections for absent class members. To the contrary, it is the Third Circuit's approach — which withholds from the district court valuable information bearing on the results obtained by the class representatives and on whether hypothetical conflicts have been avoided — that disadvantages the class.

The court of appeals also worried that class counsel would be pressured to enter into inequitable settlements. See *GM Trucks*, 55 F.3d at 796-797. But that risk, which is present in all types of class actions, is specifically addressed by the searching review of the fairness of settlements required by Rule 23(e). See, *e.g.*, *Weinberger*, 698 F.2d at 73; *In re Beef Antitrust Litig.*, 607 F.2d at 173-174. Indeed, the possibility of abuse is demonstrably *reduced* in the settlement context. Unlike plaintiffs in litigated class actions, class members in settlement classes are aware of the terms of the proposed settlement prior to certification. They accordingly will be able to challenge both certification and the settlement and, in a Rule 23(b)(3) class (like this one), to opt out of the class altogether. See *In re Beef Antitrust Litig.*, 607 F.2d at 175; *In re Corrugated Container Antitrust Litig.*, 643 F.2d at 223.

The Third Circuit's rule over-reacts to hypothetical dangers by imposing what amounts to an across-the-board prohibition of settlement classes. Rule 23 is characterized not by broad categorical prohibitions, but by a well-placed confidence in the ability of district courts to decide, case-by-case, whether a particular class was fairly and adequately represented and whether a particular proposed settlement is fair. For more than 20 years, numerous district courts have been exercising that authority in the context of settlement classes (see pages 22-25, *supra*) with *none* of the ill effects imagined by the Third Circuit. To the contrary, numerous disputes have been resolved fairly and efficiently in a manner that has minimized the burden both on the courts and on the litigants. There is simply no basis in law, and no justification, for the dramatic change in class action practice that would result from the broad-brush, extra-textual limitation upon district courts' discretion invented by the Third Circuit. See *McDonald* v. *Chicago Milwaukee Corp.*, 565 F.2d 416, 422 (7th Cir. 1977) ("[p]er se rules often represent the abdication of judicial discretion rather than its informed exercise").

It is the Third Circuit's approach — and not, as the Third Circuit said, the settlement in this case — that is an inappropriate assumption of "legislative" (Pet. App. 20a) responsibilities by the judiciary.

II. TAKING THE SETTLEMENT INTO ACCOUNT, IT IS MANIFEST THAT THE DISTRICT COURT'S DECISION TO CERTIFY THIS CLASS WAS CORRECT.

The Third Circuit found class certification improper in this case because it believed that "the district court erred by relying in significant part on the presence of the settlement to satisfy the Rule 23(a) requirements of commonality, typicality, and adequacy of representation, and the Rule 23(b)(3) requirements of predominance and superiority." Pet. App. 39a; accord *id.* at 39a-40a. But if the Rule 23 inquiry may take settlement into account, certification here assuredly was not an "abuse of

discretion" (*Califano* v. *Yamasaki*, 442 U.S. 682, 703 (1979)), and the court of appeals did not hold otherwise.

1. ***Predominance of common questions of law or fact.*** When the settlement is taken into account, this case easily satisfies the Rule 23(b)(3) requirement that common questions of law or fact predominate over other questions affecting only individual class members.[20] The court of appeals' conclusion that the predominance requirement was not met turned entirely on its belief that litigation of the class would be unmanageable. See Pet. App. 42a-47a. But the disparate legal issues relating to liability, defenses, and damages that the Third Circuit thought might arise in litigation (see *id.* at 40a-42a) are irrelevant under the terms of the settlement. The defendants have waived all defenses. They also have obligated themselves to compensate all class members who demonstrate exposure to defendants' asbestos products and manifest an asbestos-related disease, applying a formula that takes into account the considerations that bear on recovery in the tort system. The legal and factual questions that remain therefore relate solely to the fairness of the settlement, as the district court concluded. Pet. App. 226a. See *In re Corrugated Container Antitrust Litig.*, 643 F.2d at 212; *Malchman* v. *Davis*, 761 F.2d 893, 900 (2d Cir. 1985), cert. denied, 475 U.S. 1143 (1986). See generally 2 NEWBERG ON CLASS ACTIONS, *supra*, § 11.28, at 11-58. Moreover, the fairness inquiry here raised questions that were common to the members of the class, including the fairness of the medical criteria and settlement payments, as well as the value of the benefits provided to class members in comparison to the uncertainties, long delays, and high transaction costs of the tort system.

The court of appeals offered no justification for its belief that it is "impermissible" (Pet. App. 40a n.12) to treat the

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[20] It therefore also necessarily satisfies the Rule 23(a)(2) requirement that "there are questions of law or fact common to the class."

fairness of the settlement as a "common question" within the meaning of Rules 23(a)(2) and 23(b)(3). And no such justification is apparent. The Rule 23(e) inquiry into fairness is, as a matter of fact, the *only* question (other than class certification) before a district court that is presented with a class settlement. Focusing on that real world question is wholly consistent with the purpose of the predominance requirement, which is designed to "achieve economies of time, effort, and expense." Fed. R. Civ. P. 23(b)(3), Advisory Committee Note. See also *Califano* v. *Yamasaki*, 442 U.S. at 701; page 30, *supra*. That purpose surely is served by certifying a concededly manageable settlement class in which the court must determine only whether the settlement was fair.

2. ***Typicality.*** "[T]ypicality of claims in a settlement class context requires proof that the interests of the class representative and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement." 2 NEWBERG ON CLASS ACTIONS, *supra*, § 11.28, at 11-58. See *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 330 (1980). Here, the interests of the class representatives are typical of those of all the claimants. The class representatives and other class members "share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." Pet. App. 226a. All the claimants also share a common injury: occupational exposure to the asbestos products supplied by defendants. *Ibid.* See 1 NEWBERG ON CLASS ACTIONS, *supra*, § 3.13, at 3-76 ("[A] plaintiff's claim is typical if it arises from the same course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.") See also *Falcon*, 457 U.S. at 159 n.15.

Although the Third Circuit acknowledged that "the named plaintiffs include a fairly representative mix of futures and injured plaintiffs," it found that the representatives' claims

were atypical of the class claims because of "the underlying lack of commonality and attendant conflicts," including conflicts *among* the non-impaired plaintiffs themselves. Pet. App. 53a. But when the settlement is taken into account, it is evident that there is no lack of commonality.[21] The Third Circuit's related belief (*ibid.*) that "the futures plaintiffs share too little in common to generate a typical representative" because each may eventually manifest a different disease similarly fails to take into account the common interest of the presently non-impaired plaintiffs in settlement. At this moment, as the district court found (at Pet. App. 231a), *all of the non-impaired plaintiffs share precisely the same interest*: achieving adequate compensation for all plaintiffs who manifest *any* asbestos-related condition during the term of the settlement. That interest is unaffected by the differences in diseases the non-impaired plaintiffs might eventually manifest. *Ibid.*[22]

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[21] This Court has observed that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 157-158 n.13. "Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *Ibid.*

[22] The court of appeals did not set aside *any* of the district court's factual findings as clearly erroneous (see Fed. R. Civ. P. 52(a)). Yet the court of appeals' opinion contains statements that appear contrary to those findings. "If [the court of appeals] was of the view that the findings of the District Court were 'clearly erroneous' within the meaning of Rule 52(a), it could have set them aside on that basis. * * * But it should not simply have made factual findings on its own." *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986).

3. ***Adequacy of Representation***. When the settlement is taken into account, it also is clear that the district court correctly concluded that the representative plaintiffs "fairly and adequately protect[ed] the interests of the class." Rule 23(a)(4).[23] The Third Circuit held that the named plaintiffs could not adequately represent the class because it believed there were "serious intra-class conflicts" between presently ill and non-impaired plaintiffs. Pet. App. 49a. It listed all the "*potential* conflicts" of interest (*id.* at 48a (emphasis added)) it thought *might* arise between the non-impaired and presently ill plaintiffs in negotiating a settlement, and concluded that "presently injured class representatives cannot adequately represent the future plaintiffs' interests and vice versa." *Id.* at 50a-51a. Pursuant to its holding that each of the Rule 23 "requirements must be satisfied without taking into account the settlement" (*id.* at 39a), however, the court of appeals refused to determine whether any of these supposed hypothetical intra-class conflicts *actually* were reflected in the settlement agreement. *Id.* at 49a-51a. And it ignored the district court's determination, based on detailed factual findings, that there were no actual conflicts. *Id.* at 49a-51a; see pages 11-12, *supra*.

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[23] This inquiry contains two components: whether the interests of the named plaintiffs are sufficiently aligned with those of the class; and whether the class counsel are qualified and serve the interests of the entire class. See *Falcon*, 457 U.S. at 157-158 n.13. Respondents have never challenged the qualifications of class counsel and the court below noted that the objectors' allegations of collusion were resolved "in favor of class counsel largely on the basis of fact findings that the objectors have not challenged." Pet. App. 49a. It is therefore settled for present purposes that counsel adequately represented the class. Consequently, we address only the first component of the adequacy inquiry: whether the interests of the named plaintiffs are sufficiently aligned with those of the absentees.

These errors fatally tainted the Third Circuit's conclusion. In fact, this Court has noted the important role played by the Rule 23(e) fairness inquiry in ensuring that potential intra-class conflicts do not infect the settlement terms. See *Evans* v. *Jeff D.*, 475 U.S. 717, 738-739 (1986) (observing that Rule 23(e)'s requirement of "court approval of the terms of any settlement of a class action" is "wise" because it allows the court to determine whether "[t]he potential conflict among members of the class" has affected the terms of the settlement). Courts of appeals accordingly have long recognized that a court's determination that the terms of the settlement are fair presumptively establishes that the class received adequate representation. See page 29, *supra* (citing cases). Moreover, the fairness inquiry is in an important sense a better assurance of adequacy than is a determination made prior to litigation; the settlement terms offer *objective* evidence of the absence of intra-class conflicts of interest, while a before-the-fact determination necessarily is in large part speculative. See pages 28-29, *supra*.

Here, the hypothetical conflict of interest posited by the Third Circuit did not prevent the class representatives from achieving a settlement that is fair for every member of the class.[24] Viewing the case from the perspective of the presently impaired plaintiffs, the court of appeals was concerned that their interest in maximizing immediate payouts might be compromised by the non-impaired plaintiffs' interest in preserving funds for payment at a later date (Pet. App. 50a). The district court, however, found that *in fact* the payments to injured plaintiffs reflected "historical settlement averages from the tort system." *Id.* at 139a. That sort of

[24] In fact, as Professor Hazard testified and the district court specifically found, there was not even a hypothetical conflict between the presently impaired and non-impaired class members, given their common interest in securing a settlement that maximized recovery for each asbestos-related condition. Pet. App. 185a-186a, 230a-231a.

determination is easy to make in cases involving "mature mass tort litigation" where "claim values can be established within a relatively narrow range of uncertainty." Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 949, 950 (1995). And that consideration has obvious relevance here, for the "leading example of mature mass tort litigation involves asbestos." *Id.* at 949.

On the other hand, the court of appeals worried that non-impaired plaintiffs might be disadvantaged unless the settlement reduced current payments to presently impaired plaintiffs so as to preserve potential future recoveries for non-impaired plaintiffs (Pet. App. 50a). The district court, however, found that there *in fact* were sufficient funds to compensate *all* claimants who eventually qualified for payment. *Id.* at 172a-173a. Moreover, the district court specifically concluded that the settlement gives non-impaired plaintiffs a package of benefits that have "significant value" and compares *favorably* to their current treatment in the tort system. See pages 5-6, *supra*; Pet. App. 174a. Accord *id.* at 173a-176a, 268a. Like an insurance policy, the settlement guarantees these class members adequate compensation in the event that they do manifest asbestos-related diseases. This "insurance" model is a particularly effective means of compensating persons whose injuries, such as exposure to a toxic substance, increase their risk of developing a disease in the future.

> [T]he insurance model fully justifies class action settlements that trade fear of cancer and other risk-based mental distress claims for corresponding increases in scheduled payments to compensate for the accrued ultimate injury. Those who bear long-term risk but are fortunate enough never to suffer the ultimate injury benefit *more* from the trade because the insurance against such injury makes them better off than payments of damages for their mental distress.

D. Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U.L. REV. 210, 245 (April-May 1996) (emphasis in original).

Finally, the Third Circuit's focus on hypothetical conflicts of interest obscured an overriding concern that all plaintiffs hold in common: achieving a *global* settlement. The Judicial Conference Ad Hoc Committee on Asbestos Litigation noted the "unconscionable burden" of crushing transaction costs and the extreme delay involved in trying cases in the tort system. The Committee accordingly found that "[c]lass action proceedings have the advantage of promoting efficiency and consistency and prevent whipsawing by defendants of plaintiffs' claims as well as scrambles for the assets of limited funds." *Id.* at 21-22. A class action also prevents lottery-like verdicts in which some plaintiffs receive nothing at all. Without a global settlement, all claimants would be relegated to the uncertainties and inequities of the tort system. And if it were not global, the district court found, petitioners would not enter into *any* class settlement. Pet. App. 240a, 268a, 270a-276a. In these circumstances, the district court was correct in concluding that "there is no antagonism of interest" between class members (*id.* at 230a) and that the settlement is fair to all members of the class (*id.* at 115a-176a, 234a-248a).

4. ***Superiority***. The Third Circuit's decision that a series of individual or state-wide suits would be superior to this class action was based primarily on its concern that "[c]onsidered as a litigation class, * * * the difficulties likely to be encountered in the management of this class action are insurmountable." Pet. App. 54a.[25] But because class certification will entail a

[25] The Third Circuit also based its decision that a class action was not a superior method of adjudicating these cases on its concern that notification of non-impaired plaintiffs might be inadequate. Pet. App. 56a-57a. It expressly declined to decide, however, "whether the Constitution or Rule 23 prohibits binding futures plaintiffs to a 23(b)(3) opt-out class action" (Pet. App. 56a), and, as noted above, the district court carefully considered the notice issue and, based on the facts before it, was "confident" (*id.* at 272a) that all class members received fair notice. Moreover, the court of appeals' suggestion ignores the fact that the efficiency and fairness advantages of this settlement class action far outweigh any advantages of individual litigation.

settlement, rather than unmanageable litigation of the many tens of thousands of claims that comprise this "humongous" case (Pet. App. 42a), it is patently clear — especially in light of the district court's thorough fairness analysis — that "a class action is superior to other methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). See Pet. App. 227a-228a; see also *id.* at 106a-109a, 268a-271a. Given the undeniable benefits of class settlement in cases like this one, and the findings of the Judicial Conference Ad Hoc Committee, there can be no doubt that this particular class action is "a significantly improved method for delivering compensation to future victims of asbestos exposure" and "secures important gains for both sides." Edley & Weiler, *supra*, 30 HARV. J. LEGIS. at 405. It does so, moreover, in a setting where class members may opt out if they are dissatisfied. The superiority requirement therefore is amply satisfied.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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ADDENDUM

Rule 1. Scope and Purpose of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions or law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and

(C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and

may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

No. 96-270 (21)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., *et al.*,

Petitioners,

—v.—

GEORGE WINDSOR, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-270

AMCHEM PRODUCTS, INC., *et al.*,

Petitioners,

—v.—

GEORGE WINDSOR, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS AILEEN CARGILE, *ET AL.*

STATEMENT

The rulings of the courts below represent two extreme and opposite interpretations of the significance of settlement on class certification under Rule 23. While the district court allowed the existence of a settlement to substitute for satisfaction of the requirements of Rule 23, the court of appeals broadly held that settlement is irrelevant to class certification. Neither approach is correct.

Rule 23 mandates that courts adopt a middle ground that recognizes the relevance of settlement to a number of Rule 23 requirements, an approach actually followed by the Third Circuit (despite its overbroad holding). However, settlement, by

itself, cannot establish the required predominance of common issues over individual questions that is at the heart of a Rule 23(b)(3) action. Moreover, the right to opt-out of such actions must be meaningful. Because common issues did not predominate, and the opt-out right was illusory, the class certification in this case was improper. And the Third Circuit, therefore, should be affirmed.

This brief is filed on behalf of six Californians, all of whom have either contracted mesothelioma or are at risk of contracting it in the future. Mesothelioma, though rare, is the most lethal form of asbestos disease—invariably fatal within two years of diagnosis. Those individuals who actually contracted mesothelioma—John Soteriou, Harold Hans Emmerich and Thomas Corey—were first diagnosed shortly *after* the period for exercising a right to opt-out of the class had expired. JA 921-23. None of the three received actual or published notice of the class action; all three have since died.[1] The remaining three respondents—Aileen Cargile, Betty Francom, and John Wong—believe that the Settlement class certification did not take into account the interests of California residents, particularly those who will contract mesothelioma.[2] Both Mrs. Cargile and Mrs. Francom have an intimate understanding of mesothelioma; they each watched their long-time spouses die of the disease. JA 337-38, 348-49.

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[1] The claims of these men are now being pursued by their successors in interest. This Court granted the Motion of Respondents Aileen Cargile, *et al.* to Substitute Parties on January 6, 1997.

[2] These individuals filed a motion to certify an opt-out class of all California residents who have contracted or will contract mesothelioma. They have not consented to jurisdiction in this matter. *In re Real Estate Title & Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 770-71 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989). They asserted that the "benefits" of the Settlement provide little or nothing to California residents who already enjoy these or greater benefits under the unique California law. The district court denied the motion. *See* Order, filed September 2, 1994, Docket No. 1156.

1. RELEVANT BACKGROUND AND TERMS OF SETTLEMENT

Procedural Posture.—Simultaneously, on January 15, 1993 the named plaintiffs filed a class complaint,[3] the defendants, the Center for Claims Resolution (CCR), filed an answer, and those parties ("the Settling Parties") jointly filed a Stipulation of Settlement (the "Settlement") and a motion for class certification. Pet. App. 23a-24a. The district court granted the motion two weeks later. Pet. App. 26a. The district court issued final approval of class certification and ruled that the Settlement was fair on August 16, 1994. Pet. App. 29a. The court later entered a preliminary injunction, prohibiting the class members from filing suit against CCR until a final judgment was entered. Pet. App. 30a.

To date, the district court has *not* entered a final, appealable judgment in this action. Judgment cannot be entered because settlement of this action was expressly conditioned upon CCR's insurers assuming liability; a third-party action filed by CCR against its insurers to resolve coverage remains pending.[4] Pet. App. 24a n.4, 34a. Since no final judgment has been entered below, an appeal of the district court's fairness determination would be premature.[5] This appeal is thus only from

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[3] The complaint asserts various theories of liability, including negligent failure to warn, strict liability, breach of warranty, emotional distress, enhanced risk of disease, medical monitoring and civil conspiracy. Pet. App. 24a.

[4] The Settlement, by its own terms, is premised upon each of the members of CCR obtaining certain assurances from their insurers regarding coverage under existing general insurance policies. JA 99-100. If the pending third party action results in a denial of coverage, the Settlement will not become effective. JA 99. Despite the fact that the third party action against the CCR insurers has been pending for nearly four years, there has been virtually no activity in the case. To date, the district court has not even set a trial date in that action.

[5] Petitioners repeatedly imply that Respondents either chose not to challenge the fairness of the Settlement, or have somehow forsaken such arguments. *See, e.g.*, Brief for Petitioners at 15. Since the time for

the district court's issuance of the preliminary injunction, which bars class members from filing lawsuits against the CCR members in state or federal courts.

Scope of the Settlement. The proposed Settlement would resolve all present and future claims of individuals who were exposed to asbestos products produced by any of the 21 CCR defendants and who had not filed a lawsuit prior to the initiation of this action. The class is defined to include all persons who had been exposed to asbestos either occupationally *or* through exposure as a spouse or household member of such exposed persons, *and* all spouses and family members of such persons. Pet. App. 23a and n.3.

There is no dispute that the proposed Settlement encompasses hundreds of thousands of claims. Brief for Petitioners ("Pet.Br.") at 1. These claims arise in over fifty jurisdictions, based on different types of asbestos disease, against 21 different companies. The class members were "exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods." Pet. App. 41a.

Settlement Compensation Scheme. The Settlement does not simply establish a general recovery fund, leaving the liquidation of each claim within the control of each claimant, but creates an elaborate administrative scheme that dispenses compensation to claimants meeting certain rigid exposure and medical criteria. Compensation is only provided for each of four categories of disease: mesothelioma,[6] lung cancer,

appealing the district court's fairness finding has not even begun to run, such implications are groundless, especially since even petitioners admit that "[e]very aspect of the proposed settlement was sharply contested by the objectors" at the district court level. *Id.* at 9.

[6] Mesothelioma is a fatal cancer of the lining around the lung and/or abdomen that results from exposure to asbestos. Although only a small fraction of those exposed to asbestos will contract mesothelioma, its victims generally die within two years of diagnosis. Pet. App. 56a, JA

certain other cancers (including colo-rectal, laryngeal, esophageal, and stomach cancer), and non-malignant conditions (asbestosis and bilateral pleural thickening). For those claimants who qualify under the specified medical criteria, the Settlement "fixes a range of damages that CCR will award for each disease, and places caps both on the amount that a particular victim may recover and on the number of qualifying claims that will be paid in any given year." Pet. App. 25a. The exact damage amount that will be awarded to each claimant is determined by CCR, with virtually no right of appeal.[7] *Ibid.*

335. Unlike other asbestos diseases (such as lung cancer), the only medically established cause of mesothelioma is asbestos exposure. *Ibid.*

Mesothelioma can be caused by only slight or incidental exposure to asbestos fibers. The disease has been known to occur in children who lived with an asbestos-exposed parent or worker. Pet. App. 56a. "[T]he unpredictability of mesothelioma is further exacerbated by the long latency period between exposure to asbestos and the onset of the disease, typically between fifteen to forty years." *Ibid*; *see also* JA 335.

[7] There are only two extremely limited scenarios under which a claimant may receive an amount in excess of the damage ranges. First, for a restricted number of "Extraordinary" claims (between one and three percent of the total number of qualified claims in the four disease categories), CCR may award an amount in excess of the range, although the total amount that may be paid for such claims is itself capped. Pet. App. 25a.

Second, a small number of claimants who qualify for payment under the Settlement, but are dissatisfied with the damage amount offered by CCR, may pursue their claims in court. *Ibid.* However, the number of claimants who may pursue this "back-end opt-out" is very low. Between one-half of one percent and two percent of the total number of claims in each disease category from the previous year may exit to the tort system. *Ibid.* For example, only 700 mesothelioma claims can be resolved in the first year of the Settlement, and only 2%—14 victims—may seek an exit to their local court system. JA 108, JA 174. By the Settlement's tenth year, these figures drop to a maximum of 455 mesothelioma cases annually with only nine (9) exit permits. *Ibid.* Moreover, if the number of people who seek to re-enter the tort system in a particular year exceeds the annual quota, the surplus applicants have to wait one or more years for one of the few allocated spaces. Predictably, after less than two years, there is already a backlog of claimants waiting for exit visas. *See* Mem-

Although CCR makes no claim of potential insolvency for even one of its members, the Settlement fixes damages at amounts which are only a small fraction of the damages typically awarded in the tort system. For example, those "unlucky" few who contract mesothelioma are "relegate[d] . . . to a modest recovery, whereas the average recovery of mesothelioma plaintiffs in the tort system runs into millions of dollars." Pet. App. 49a; *see also* JA 351-52. The "negotiated average value" under the Settlement for mesothelioma claims ranges from $37,000 to $60,000. JA 110. According to an analysis that CCR conducted of their pre-class action settlement history, for all high value mesothelioma claims, their own national average was $359,715. JA 461. Fifteen percent of high value claims were from California and the California average was $419,674. The California state *average* is more than double the maximum allowable recovery for Non-Extraordinary Claims ($200,000), *ibid*, and 40% higher than the Extraordinary Claim cap ($300,000).[8] *See* JA 85, 110, 461. Moreover, the Settlement provides *no* cash compensation to pleural claims "even though such claims regularly receive substantial monetary payments in the tort system." Pet. App. 26a.

The class members are bound to the Settlement in perpetuity. In contrast, the CCR companies may choose to withdraw after ten years.[9] Pet. App. 25a-26a.

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orandum in Support of Additional Class Counsel's Motion to Alter FIFO Ordering For Mesothelioma Claims Under Part X at 3 (filed with district court on October 25, 1996). Given the short life expectancy of mesothelioma victims, most will likely die before they can exit the Settlement system.

[8] The number of Extraordinary Claims is limited to a maximum of 21 per year in the first two years and declining thereafter. JA 85, 109.

[9] Moreover, for the first ten years, the Settlement provides no adjustment of the compensation levels, even to account for inflation. Pet. App. 141a. After ten years, the values in the compensation schedule may be subject to a one-time adjustment, but by no more than 20%. Pet. App. 138a.

2. THE DISTRICT COURT'S CLASS CERTIFICATION DECISION

In the district court, the Settling Parties took the position that so long as the settlement itself is found to be fair under Rule 23(e), the settlement class would satisfy the certification requirements of Rule 23. *See, e.g.*, JA 41. They unambiguously argued that the "standards for determining whether a class should be certified are considerably *more lenient* when certification is sought for purposes of settlement, rather than for purposes of litigation." JA 39 (emphasis added).

The district court adopted the Settling Parties' position. The decisions regarding fairness and class certification were made simultaneously. The district court certified the class, after only a perfunctory review of Rule 23 certification requirements. It held that the Rule 23 requirements for class certification "are often more readily satisfied in the settlement context because the issues for resolution by the court are more limited than in the litigation context." Pet. App. 224a (citations omitted).

Thus, with respect to the Rule 23(b)(3) requirement that class issues predominate, the district court specifically held that this requirement is "more readily satisfied in the settlement context than in the litigation context." Pet. App. 226a (citations omitted). The court concluded that there was predominance:

> The members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system. *Whether the proposed settlement satisfies this interest and is otherwise a fair, reasonable and adequate compromise of the*

claims of the class is a predominant issue for purposes of Rule 23(b)(3).[10]

Ibid. (emphasis added)

With respect to the mandatory notice and opt-out requirement for Rule 23(b)(3) actions, the district court held that notice was adequate because "over 6.8 million persons, including individuals who were likely class members, received individually-delivered notice materials, and that millions more persons, including likely class members, were notified through media efforts." Pet. App. 267a. The district court ignored substantial evidence that it is impossible to provide adequate notice to individuals who, at some date in the future, will contract asbestos-related conditions such as mesothelioma. Moreover, those individuals who actually received notice were forced, in 1993, to make a final, irrevocable decision about opting-out of the class, despite the overwhelming dearth of information that they had regarding their future medical condition or what recovery, if any, the Settlement would provide. *See* discussion, *infra*, Section II.B.2.

The district court did not consider, or make any factual findings, regarding the substantial evidence that recoveries for asbestos victims varied greatly from state to state. *See* JA 351-52, 464-68, 562, 572-78.[11] While the district court

[10] With respect to the superiority prong of Rule 23(b)(3), the district court again relied upon the fairness and adequacy of the proposed settlement, concluding that because the settlement "provided class members with fair compensation for their claims while reducing the delays and transaction costs endemic to the asbestos litigation process as it occurs presently," it was "superior to other available methods for the fair and efficient resolution" of these claims. Pet. App. 228a. The district court's opinion does not reflect consideration of whether an individual's interest in controlling his or her own legal action, particularly the extremely valuable mesothelioma claims, might outweigh the efficiency afforded by a classwide settlement.

[11] Average mesothelioma settlements against the CCR defendants ranged from a low of $11,638(Maine) to a high of $198,041(South Dakota). For lung cancer, the low was $1,500 (Nebraska) to a high of $122,866 (District of Columbia). JA 572-78. California mesothelioma verdicts were 53% higher than the national average. JA 351-52.

described at length the perceived procedural advantages of the Settlement, it ignored the marked differences in the substantive and procedural rights of asbestos plaintiffs in different states.[12] For example, most of the procedural benefits provided by the Settlement are already available for California claimants, who enjoy unique procedural advantages under state law.[13] In a single footnote, the court summarily dismissed the evidence of interstate differences. Pet. App. 248-249 n.64.

3. THE THIRD CIRCUIT'S OPINION

The ostensibly governing legal standard articulated by the Third Circuit required that for the purpose of certifying a settlement class, each of the requirements of Rule 23 "must be satisfied without taking into account the settlement, and as if the action were going to be litigated." Pet. App. 39a. However, despite its own pronouncement, in fact it took the Settle-

[12] The objectors sought discovery from the Settling Parties concerning their consideration of inter-state differences with respect to the legal standards governing asbestos cases and the average amount of damages awarded to plaintiffs, on a state by state basis. This evidence was highly relevant to analyzing the terms of the Settlement, particularly with respect to inter-state conflicts among class members. All such discovery was disallowed on grounds of relevance. JA 327.

[13] For example, one of the purportedly key benefits of the Settlement to many claimants is that CCR agrees to waive all statutes of limitations. JA 75. For California claimants, this provision is of little value because such protection is already available under California Code of Civil Procedure Section 340.2, which provides a generous statute of limitations for claims for injury or illness based upon exposure to asbestos. Cal. Code Civ. Pro. § 340.2. Similarly, California provides calendar preference for fatally ill plaintiffs, which permits recovery at least as quickly as the Settlement. Cal. Code Civ. Pro. § 36(d); *see also* JA 351. For further discussion, *see* Written Objections of John Musante, filed with District Court on February 10, 1994, Docket No. 739, at 6-15.

ment into account in some respects in reviewing the district court's evaluation of certification. While the legal standard articulated by the Third Circuit is overbroad and unrealistic, the decision below should be affirmed because the court found that the Rule 23(b)(3) requirement of predominance and the Rule 23(c)(2) notice and opt-out requirements were not satisfied.[14]

Predominance of Common Issues. The Third Circuit acknowledged that a number of common issues existed[15] sufficient, perhaps, for a Rule 23(a)(2) showing of commonality, and instead focused its commonality analysis on the (b)(3) requirement that common questions predominate over individual issues. Pet. App. 43a. Under this demanding (b)(3) standard, the court determined that "the huge number of important individualized issues," overwhelmed the common and largely settled issue of the capacity of asbestos fibers to cause physical injury. Pet. App. 40a, 43a, 48a. The court noted the broad range of individual issues:

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma . . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.

[14] Examining the terms of the Settlement, the court also concluded that the Rule 23(a) requirements of typicality and adequacy of representation were not met. Pet. App. 49a, 53a.

[15] The Third Circuit noted that exposure to asbestos and the capacity of asbestos fibers to cause physical injury are common questions under Rule 23(a)(2). Pet. App. 40a. The court also recognized that "there may be several other common questions, such as whether the defendants had knowledge of the hazards of asbestos, whether the defendants adequately tested their asbestos products, and whether the warnings accompanying their products were adequate." *Ibid.*

> The futures plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.

Pet. App. 41a. With respect to the vast state-by-state differences in legal standards, the court observed that because "we must apply an individualized choice of law analysis to each plaintiff's claims, . . . the proliferation of disparate factual and legal issues is compounded exponentially."[16] *Ibid.*

Superiority. Rule 23(b)(3)'s requirement that the action be "superior to other available methods" requires the court "to balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication." Pet. App. 54a (citation omitted). The court concluded that superiority had not been established.

In terms of efficiency, the court, ignoring the Settlement, held that "a class of this magnitude and complexity could not be tried." Pet. App. 54a. With respect to the fairness prong of the superiority inquiry, the court determined: (a) that the superiority requirement would not be met if the class were "[c]onsidered as a litigation class," and (b) that superiority was lacking *even if the settlement were considered*, because, "in this class action," plaintiffs "have a substantial stake in making individual decisions on whether or when to settle" yet "may become bound to the settlement even if they are unaware" of the settlement "or lack sufficient information to evaluate it." Pet. App. 55a (emphasis added). The court

[16] The court contrasted the lack of common issues in this case with more limited certifications that involve injunctive relief, Pet. App. 42a, property damage actions, *ibid*, cases where there was a central single issue such as one basic defense, Pet. App. 45a, or cases involving only partial certification of common issues, Pet. App. 47a.

emphasized that these problems could have been alleviated if the Settlement provided for "an opt-in rather than opt-out procedure, or allowed plaintiffs to opt-out after they contract a disease." Pet. App. 56a n.16.

Notice. Finally, the court noted that Rule 23(b)(3) fairness concerns were exacerbated by "the difficulties in providing adequate notice" to "exposure-only plaintiffs [who] may eventually contract a fatal disease, mesothelioma, from only incidental exposure to asbestos." Pet. App. 56a. Given the long latency period between exposure to asbestos and the onset of the disease,

> persons contracting the disease today may have little or no knowledge or memory of being exposed. It is unrealistic to expect every individual with incidental exposure to asbestos to realize that he or she could someday contract a deadly disease and make a reasoned decision about whether to stay in this class action.

Ibid.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners focus their entire attack on the broad, abstract holding of the Third Circuit that the existence of a settlement may not be considered in determining certification of a settlement class. In fact, the Third Circuit ultimately did examine the Settlement in determining the appropriateness of certification. Its thorough and thoughtful analysis is carefully tailored to the specific requirements and purposes of Rule 23(b)(3) class cases.

The district court, on the other hand, adopted an extreme approach to class certification not embraced by any circuit court: that the settlement itself, and the settlement approval process, may substitute for the predominance of common questions required by Rule 23(b)(3).

Petitioners offer this Court a stark and unnecessary choice between the unqualified holding of the Third Circuit—that class certification must be assessed without considering the settlement—and their own equally broad-brush approach that would essentially allow the settlement and its asserted fairness to establish compliance with Rule 23(b)(3).

We agree that the settlement and its fairness should not be ignored in assessing class certification; we also concur that the court need not "pretend" that all aspects of the case will be tried. And we agree, *arguendo*, that the existence of a fair settlement may well be relevant to a Rule 23(b)(3) showing that the class action is "superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.Pro. 23(b)(3).

On the other hand, in Rule 23(b)(3) class actions, a fair settlement is no substitute for a showing that common issues predominate. The predominance requirement stems from the special nature of damage actions, where individual control of an action is a substantial interest, and class treatment is discretionary. Because such actions are by nature less cohesive than Rule 23(b)(1) or (b)(2) actions, and the need for unitary resolution is not essential, predominance is the core requirement, which determines if a Rule 23(b)(3) class exists. Predominance ensures that there is sufficient cohesiveness among class members such that collective action, which will have a binding effect on all class members, may substitute for the presumption in favor of individual litigation of personal injury damage claims. Nothing in Rule 23 or the case law supports the district court's conclusion that the settlement alone can establish the Rule 23(b)(3) requirement that class issues predominate. Indeed, no circuit court has so held. Petitioners' approach ultimately eviscerates the predominance requirement entirely. If a settlement will always satisfy the Rule 23(b)(3) predominance requirement, Rule 23(b)(3) settlements classes will automatically be certified.

A proper application of Rule 23(b)(3) balances the interests of efficiency against the rights of absent class members. Recognizing this important balance, the Third Circuit correctly concluded that the Settlement class did not meet the Rule 23(b)(3) predominance requirement and, moreover, properly underscored the failure of the Settlement to afford meaningful notice and opt-out rights to future claimants who have no idea if, or when, they may fall victim to one or more asbestos-related diseases. To conclude otherwise would allow parties to sacrifice the bedrock requirement of class cohesiveness and the opportunity to opt-out of the class upon the altar of expediency. It would allow any parties, so long as represented by competent counsel, to impose a settlement upon enormous numbers of putative class members without regard for their interests or desires. Res judicata should not be the reward for the achievement of judicial efficiency at any cost.

ARGUMENT

I. THE THIRD CIRCUIT'S APPROACH, WHILE OVERBROAD, CORRECTLY FOCUSED THE ANALYSIS OF CLASS CERTIFICATION ON THE UNIQUE REQUIREMENTS OF RULE 23(b)(3)

The Third Circuit articulated a legal standard that was plainly too broad and inflexible. In holding that settlement must be ignored for *all* elements of the certification inquiry, the court enunciated a principle that was not only inconsistent with what a number of other circuits have held, but was one which *it did not itself apply*. Contrary to its own maxim, the Third Circuit's actual analysis of the Settlement weighed the Settlement itself in evaluating a number of the Rule 23 certification requirements.[17] As such, resolution of petitioners'

[17] The Third Circuit considered the Settlement in analyzing the adequacy of representation and typicality requirements under Rule 23(a) and the superiority requirement under Rule 23(b)(3). Thus, even if petitioners' position were adopted, the Third Circuit would reach the same result.

complaint about the Third Circuit's broad statement of the theoretical standard will have little impact on the resolution of this—or any other—class action settlement.

If one sets aside the Third Circuit's unqualified statement of its legal standard, its actual analysis was, for the most part, a textbook example of the careful scrutiny that must be applied to class certification in the settlement context.[18] Most importantly, the Third Circuit scrupulously focused on the unique purposes and prerequisites for Section (b)(3) class treatment and expressly limited its commonality holding on that basis. Pet. App. 19a. Section (b)(3) actions—where class treatment may be desirable but not necessary to achieve a just result—were intended for use only where the putative class demonstrates sufficient cohesion and the right of class members to retain individual control of their claims is preserved. Recognizing the careful balancing of interests which underlie Rule 23(b)(3), the Third Circuit was *correct* in requiring that the predominance requirement be satisfied independent of the existence of the settlement.

A. The History and Purposes of Rule 23(b)(3)

Section 23(b)(3) was added to Rule 23 in 1966 as part of a comprehensive revision of the class action rule by the Advi-

[18] This Court has repeatedly held that the requirements of Rule 23 are mandatory. *See, e.g., General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982); *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 405 (1977); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (rejecting suggestion that the mandatory notice requirement for Rule 23(b)(3) actions should be excused because of its expense or because there had been adequate representation); *Richards v. Jefferson County*, 116 S.Ct. 1761, 1766-67 (1996)(adequate representation does not cure a lack of notice). *See also Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1007 (D.C. Cir. 1986) (no basis for applying Rule 23 less stringently in Magnuson-Moss action), *cert. denied*, 482 U.S. 915 (1987). "Actual, not presumed, conformance" with Rule 23 is "indispensable." *Falcon*, 457 U.S. at 160. We focus, here, solely on Rule 23(b)(3) predominance and notice requirements—the narrowest grounds consistent with the Issue Presented—because the Third Circuit's approach to these issues conforms to the purposes underlying Rule 23(b)(3).

sory Committee on Civil Rules. The Committee chose to jettison the existing rule's cumbersome and obscure classification system (i.e., true, hybrid, spurious) in favor of "more practical" descriptions of the circumstances in which class actions could be maintained as well as "the measures . . . to assure the fair conduct of these actions." *Amendments to Rules of Civil Procedure, Rules Advisory Committee Notes to Amended Rule 23*, 39 F.R.D. 69, 99 (1966). The new subdivision (b) of Rule 23 described the "varying situations" in which the Committee believed the use of class actions could be justified. *Id.* at 100.

Rule 23(b)(1) was intended to address those circumstances where "an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit." *Id.* at 101. This subdivision encompasses, for example, the disposition of a traditional "limited fund." Where a fund exists which is too small to satisfy all claims against it, unitary class disposition is necessary to "effect a pro-rata reduction of all claims in order to treat all claimants fairly." *In Re Asbestos Litigation*, 90 F.3d 963, 986 (5th Cir. 1996). In such actions, "equitable circumstances dictate the need for unitary adjudication regardless of the individual consent of the parties affected." Herbert Newberg and Alba Conte, 1 *Newberg on Class Actions* § 1.22 at 1-51 (3d ed. 1992). In the classic (b)(1) limited fund context, a failure to grant class relief may result in many class members receiving a severely diminished recovery or no recovery at all.

Rule 23(b)(2) was intended for equitable actions seeking primarily injunctive or declaratory relief against a party which "has acted or refused to act on grounds generally applicable to the class." Fed.R.Civ.Pro. 23(b)(2). Like Rule 23(b)(1) actions, adjudication of the rights of one class member will necessarily determine the rights of others.

Thus, in both Rule 23(b)(1) and (b)(2) actions, class treatment "arises out of the necessity to protect all interested persons and to give full relief when numerosity precludes joinder." James Wm. Moore, 3B *Moore's Federal Practice*, ¶ 23.45[2] at 23-298 (2d ed. 1987). In such cases, a failure to grant class relief is often tantamount to a denial of all relief for class members.

The third, and most controversial, subdivision of the 1966 amendment was the creation of the Rule 23(b)(3) opt-out class action. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, (1967); Judith Resnik, *From Cases to Litigation*, 54 Law and Contemporary Problems 5, 9 (Summer 1991). While the historical roots of Rule 23(b)(1) and 23(b)(2)-type class actions can be traced to traditional equitable class action procedure recognized at English common law, the Rule 23(b)(3) opt-out class action device was an invention of the 1966 Advisory Committee.[19] *In Re Asbestos Litigation*, 90 F.3d at 987 n.16.

The Advisory Committee envisioned that Rule 23(b)(3) would be used in situations "where class-action treatment is not as clearly called for" as it was in the Rule 23(b)(1) and Rule 23(b)(2) situations, but might "nevertheless be convenient and desirable." Advisory Committee Notes, 39 F.R.D. at 102-03.

> Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, *without sacrificing procedural fairness or bringing about other undesirable results.*

Ibid (emphasis added).

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[19] The only historical antecedent to Rule 23(b)(3) was the "spurious" opt-in action of the 1938 version of Rule 23 which was a permissive joinder device rather than a true class action. *See* Advisory Committee Notes, 39 F.R.D. at 98-99.

At the heart of the debate was a concern that, in circumstances where unitary resolution is *not* essential (as it is in the Rule 23(b)(1) and (b)(2) situations), the rule should account for each individual's interest in retaining the right to control his or her own claim. Where, for example, the amount of an individual's potential stake is small, and thus the individual's need to exercise direct control of the lawsuit is minimal, discretionary use of class treatment under Rule 23(b)(3) might well be desirable and would achieve "economies of time, effort and expense." Advisory Committee Notes, 39 F.R.D. at 102. On the other hand, "where the stake of each member bulks large and his will and ability to take care of himself are strong," class treatment might not be appropriate. Kaplan, *Continuing Work*, at 391. The Committee recognized that "[t]he interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action." Advisory Committee Notes, 39 F.R.D. at 104.[20]

To accommodate this compelling interest in individual control over claims, the Committee erected three independent hurdles to be met for Rule 23(b)(3) discretionary class treatment, *in addition to* the requirements of numerosity, typicality, commonality and adequacy of representation found in Rule 23(a). These requirements are that: 1) common issues predominate, 2) class resolution will be superior to alternative methods of adjudication; and 3) class members receive notice

[20] Indeed, the Advisory Committee's concern for individual control of traditional damage claims is reflected in its opinion that "a 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a [Rule 23(b)(3)] class action." Advisory Committee Notes, 39 F.R.D at 103. The drafters viewed tort actions as "quintessentially cases involving individuals" and this vision reflects, among other things, a concern "for plaintiffs whose autonomy, individuality and control could be limited." Resnik, *Cases to Litigation*, at 17. While the case law regarding the class treatment of mass torts has obviously evolved since 1966, the Advisory Committee's concern reflects the significance that was placed on individual control in determining the propriety of certifying a Rule 23(b)(3) discretionary class action. Resnik, *Cases to Litigation*, at 17-19.

and a right to opt-out of the class. These additional hurdles take into account the fact that Rule 23(b)(3) classes are by nature less cohesive than (b)(1) or (b)(2) classes, and thus require more stringent protections for absent class members. *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 963 & n.1 (3d Cir. 1983).

B. Analysis of Rule 23(b)(3) Requirements for Settlement Classes

Rule 23(b)(3) ultimately requires a balance between the strong interest in individual control of an action and the interests of efficiency and fairness. For the predominance and opt-out requirements, the concern with individual control is paramount, and thus the the fact of settlement is not relevant to the analysis. The superiority requirement, on the other hand, permits considerations of the fairness and efficiency of a settlement.

1. Predominance of Common Issues

a. Predominance Establishes the Threshold Existence of a Cohesive Class

The first hurdle imposed by Rule 23(b)(3) is that "questions of law and fact predominate over any questions affecting only individual class members." The predominance finding ensures that there is a sufficient cohesiveness of common interests to justify class treatment. Unlike the Rule 23(a) commonality requirement which may be satisfied by one common issue of law or fact,[21] Rule 23(b)(3) requires:

[21] Because the threshold for demonstrating the Rule 23(a) commonality requirement is quite low, it will rarely be an impediment to certification of a settlement class. *Jenkins v. Raymark*, 782 F.2d 468, 472 (5th Cir.) *reh'g denied en banc* (5th Cir. 1986); Pet. App. 42a. Indeed, the Third Circuit in this case had no trouble identifying sufficient common issues to satisfy this requirement without considering the settlement. Pet. App. 40a, 43a. In a Rule 23(b)(1) or (b)(2) class action settlement, commonality under 23(a) will normally be easily established without reliance on the settlement, because the additional requirements of sections (b)(1)

> common questions [must] not only exist but "predominate" over questions touching only individual members of the class. For a class action loses attractiveness as the individual questions are seen to have such scope or variety as to overload the action.

Kaplan, *Continuing Work*, at 390.

Predominance requires that there be a group which is "more bound together by a mutual interest in the settlement of common questions than it is divided by the individual members' interest in the matters peculiar to them." 3B *Moore's Federal Practice*, ¶23.45[2] at 23-299. The predominance requirement is not simply a tool to ensure administrative efficiency, "it is a necessary feature in the demonstration of the existence of an actual class." *Id.* ¶23.45[2] at 23-299 n.5. Without predominance, there is no class.

The unique predominance requirement of Rule 23(b)(3)—but not of Rule 23(b)(1) or (b)(2)—flows, in part, from the historic change from the "opt-in" provision of the old "spurious" class action to the new "bound if no opt-out" rule. With the revised opt-out approach, it was recognized that, even with an opt-out right, members of the class could be bound to the class judgment as a result of inaction rather than personal choice. Marvin Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 44-45 (1967). To avoid "potentially capricious" results, a more stringent showing of cohesion was required as an extra safeguard. 3B *Moore's Federal Practice*, ¶23.45[2] at 23-300.

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and (b)(2) virtually always demonstrate commonality. 1 *Newberg on Class Actions*, § 3.10 at 3-56. Thus, for example, in a Rule 23(b)(1)(B) case, the risk of diminished recovery by all members of the class, in the absence of class treatment, is a common issue of fact. See *In re Asbestos Litigation*, 90 F.3d at 975-76.

b. Predominance Should be Evaluated Without Consideration of the Settlement

Because predominance serves as a safeguard to ensure that discretionary class treatment under Rule 23(b)(3) is appropriately invoked, the Third Circuit correctly evaluated this requirement without reliance on the Settlement. The threshold inquiry for Rule 23(b)(3) is: do the claims (and defenses thereto) of a disparate collection of individuals share enough common features to establish an interest in a unitary resolution despite individual interests? Unless this finding can affirmatively be made, then the parties are not entitled to use Rule 23(b)(3); instead, the presumption in favor of individual control of claims will prevail. If a settlement were allowed to establish predominance, it would defeat the Rule 23(b)(3) recognition of the desirability of individual control and, more importantly, would beg the essential threshold question of whether there is sufficient class cohesiveness.

Petitioners attempt to justify the district court's approach to class certification on the grounds that it is based on a "judicial consensus" that "the existence of a settlement should be taken into account in applying the Rule 23 criteria." Pet.Br. at 22-23 and accompanying footnotes. Although there is broad consensus that settlement classes are permissible,[22] and there may be a consensus that settlement may be taken into account in some fashion in making the certification decision, there is *no* authority for the proposition that a settlement may substitute for establishing the existence of a class. Most significantly for our purposes, of the appellate court cases cited by petitioners, *none has held that a settlement establishes the Rule 23(b)(3) requirement of predominance.*[23]

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[22] The Third Circuit is part of this consensus. *See* Pet. App. 36a; *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 799-800 (3d Cir.) *cert. denied*, 116 S.Ct. 88 (1995).

[23] There are but three district court cases that hold that a settlement is relevant to the predominance requirement, yet none of these cases con-

Petitioners also argue that a proposed settlement eliminates all uncommon or "disparate" issues, leaving the remaining issue of only whether the settlement is fair to the class. Pet.Br. at 42. But a settlement proposal does not erase the differing claims and interests of class members, including their interest in controlling their own claims. Rather, a Rule 23(b)(3) settlement *presumes* that the underlying claims share sufficient unity to justify class treatment. Only if that presumption is, in fact, correct do the putative class representatives and class counsel have the authority to compromise those claims. Petitioners' approach would essentially bootstrap the class determination from the fact that a settlement has been offered. Such an approach would invariably eliminate the predominance requirement in all settlements. While that may be "efficient," it is not the purpose of the Rule 23(b)(3) predominance requirement.[24]

tain any analysis whatsoever. *Woodward v. Nor-Am*, No. 94-0780-CB-C, 1996 U.S. Dist. LEXIS 7372, at *42 (S.D. Ala. May 23, 1996); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 160 (S.D. Ohio 1992); *In re First Comodity Corp. Customers Accounts Litig.*, 119 F.R.D. 301, 307 (D. Mass. 1987).

[24] Petitioners' repeated reliance on the goal of "efficiency" is particularly inappropriate for cases such as this, where certification is sought under Rule 23(b)(3). To be sure, the predominance requirement also ensures that class litigation will be an efficient use of judicial resources. Since arguably any class action may be more efficient than numerous individual actions, however, the requirement is not met merely by an assertion that a class action will be efficient. In order to certify a Rule 23(b)(3) class, the rule mandates careful evaluation of each class member's due process rights and interest in controlling his or her own litigation. Fed.R.Civ.P. 23(b)(3). While efficiency is one factor to be balanced in the (b)(3) superiority inquiry, it does not substitute for a showing of either predominance of class issues or a meaningful notice and opt-out right.

Nor does Rule 1 of the Federal Rules of Civil Procedure, which provides that the rules must be construed to secure the "*just*, speedy, and inexpensive determination of every action," Fed.R.Civ.Pro. 1 (emphasis added), suggest that efficiency should override Rule 23 prerequisites. Rule 1 focuses upon the need for *both* efficiency and justice. An interpretation of Rule 1 which sacrifices fairness on the altar of efficiency is

Moreover, the claim that petitioners have "obligated themselves to compensate [qualifying] class members" and have "waived all defenses" under the terms of the Settlement does not change the analysis.[25] Pet.Br. at 42. If anything, it underscores the need for rigorous and independent analysis of Rule 23(b)(3) predominance. The procedural and substantive rights provided by state law to asbestos victims vary widely among the states. For asbestos victims considering whether to litigate or settle, the rights unique to their individual states, along with the likely recovery for claims that flow from those differing rights, will be determining factors. The Settlement does not "waive" such differences—it obliterates them and imposes a one-size-fits-all standard on the class.[26] Perhaps such a national standard might be justified if class resolution were necessary (for example in a limited fund Rule 23(b)(1)(B)

completely contrary to both the language and spirit of the federal rules. *See* 3B *Moore's Federal Practice* ¶23.45[3] at 23-313 n.5 ("the administration of justice is not an end in itself. It is only a means to get justice.")

[25] Petitioners' justification of the district court's analysis, based on the so-called "background presumptions" underlying the federal rules, also fails. Pet.Br. at 31-33. They imply that the parties may *waive* Rule 23. This argument presupposes the very issue that the district court must address—whether there is in fact a class cognizable under Rule 23(b). Only if there is a class would the representative have the authority to make agreements, or waive claims on behalf of the class. If the requirements of Rule 23(b) are not met, then the parties do not have the authority to impose their agreement upon the class.

[26] The Settlement sets forth a non-exhaustive list of over eighteen factors which CCR may consider in setting compensation for claimants within its specified damage ranges. While the "location of the forum in which a lawsuit" might otherwise be filed by a claimant is included on that long list, the Settlement provides no formula or system for weighing this or any other factor. Indeed, there is utterly no guidance about how these factors should be evaluated or compared. JA 80. Instead, victims are left to the unfettered discretion of the CCR defendants they can no longer sue. Such discretionary and standardless determinations cannot substitute for an assessment of whether state-by-state differences are material enough to compel a finding against predominance.

action) or where state law differences were not significant However, in a Rule 23(b)(3) action, such differences, in fact, may expose the essential lack of cohesion of the class, and the lack of predominance of common issues. *See Castano v. American Tobacco Co.* 84 F.3d 734, 741 (5th Cir. 1996); *Walsh v. Ford Motor Co.* 807 F.2d at 1016-17.

c. A Finding of a Settlement's Fairness under Rule 23(e) Cannot Substitute for Independent Evaluation of Rule 23(b)(3) Predominance

While the terms of a settlement and its approval process may undoubtedly provide evidence relevant to a number of the Rule 23 requisites, the Rule 23(e) settlement inquiry—which serves distinct purposes—does not address the same purposes that underlie the predominance requirement.

Rule 23(e) prohibits the dismissal of a class action "without approval of the court." This has uniformly been interpreted to mean that the district court must determine that the proposed settlement is "fair, adequate and reasonable." *Girsh v. Jepson*, 521 F.2d 153, 156-57 (3d Cir. 1975). This inquiry will focus on the terms of the settlement itself and its fairness to the class *overall*. As the Second Circuit explained in *Weinberger v. Kendrick*, 698 F.2d 61, 73-74 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983):

> Determination [of] whether a proposed class action settlement is fair, reasonable and adequate involves consideration of two types of evidence. The primary concern is with the substantive terms of the settlement: 'Basic to this . . . is the need to compare the terms of the compromise with the likely rewards of litigation.' [citations omitted] * * * In order to supplement the thus necessarily limited examination of the settlement's substantive terms, attention also has been paid to the negotiating process by which the settlement was reached, and courts have demanded that the compromise be the result of

> arm's length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in discovery, necessary to effective representation of the class's interests. [citations omitted]

See also Moore v. San Jose, 615 F.2d 1265, 1271 (9th Cir. 1980) (the sole question before the district court in reviewing a settlement agreement is whether the agreement is fundamentally fair or just); *Grunin v. International House of Pancakes*, 513 F.2d 114, 124 (8th Cir.) (the most important factor in assessing fairness is the strength of the case on the merits balanced against the amount offered as settlement), *cert. denied*, 423 U.S. 864 (1975). Thus, the court is concerned with the *substance* of the agreement and the process by which the agreement was reached. Moreover, as the district court in this case noted, the focus in a fairness inquiry is whether the proposed settlement "evaluated as a whole, and not term-by-term or plaintiff-by-plaintiff" is fundamentally fair. Pet. App. 237a. Thus, nothing in Rule 23(e) is intended to safeguard the substantive or procedural rights of individual class members.

In contrast, Rule 23(b)(3) focuses on the cohesiveness of the class and a proper regard for individual control of an action. Additionally, while the fairness process examines the substantive fairness of a settlement, Rule 23(b)(3) is concerned with the due process rights of the class. *In re General Motors Corp. Pick-Up Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir.), *cert. denied*, 116 S.Ct. 88 (1995).

d. Requiring that Predominance Exist Independent of any Proposed Settlement Will Not Hamper Class Resolution of Complex Cases

Contrary to petitioners' dire predictions, the requirement that predominance be established without reliance on the settlement will not impede settlement of civil rights, antitrust, and securities actions, or even appropriate mass tort cases. Pet.Br. at 35-37.

First, because *predominance* is only a requirement for cases certified under Rule 23(b)(3), many types of class actions are unaffected. Many civil rights cases, for example, are certified under Rule 23(b)(2).[27] Similarly, in many mass tort cases, recovery is subject to a limited fund, requiring certification under Rule 23(b)(1).[28] While some overreaching settlements in mass tort cases may be precluded under Rule 23(b)(3) if a court cannot rely on the proposed settlement to get over the predominance hurdle, this result is necessary to preserve the core values of Rule 23(b)(3): class cohesion and individual control of damage actions.

Second, outside of the field of mass torts, petitioners have not demonstrated that the predominance requirement would be a major impediment to class settlements. Indeed, even in securities actions, class certification is relatively routine in the litigated context. *See* Thomas E. Willging, Laural L. Hooper and Robert J. Niemac, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 NYU Law Rev. 74, 89 (April-May 1996). Moreover, in contrast to complex personal injury mass tort actions, civil rights, antitrust, securities and fraud cases present substantially fewer individualized claims than those in mass tort cases. Statutory actions, such as civil rights, antitrust or securities cases, present no choice of law or inter-state differences because they are based upon a single body of law. Furthermore, courts have already developed a variety of procedural devices to streamline any potentially individualized determinations in such actions. *See, e.g., Cooper v. Federal Reserve Bank*, 467 U.S. 867, 878-81

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[27] Indeed, the Rules Advisory Committee describes civil rights cases as the prototypes of (b)(2) class actions. Advisory Committee Notes, 39 F.R.D. at 102. *See, e.g., Officers for Justice v. Civil Service Comm'n.*, 688 F.2d 615, 622 (9th Cir. 1982) (certified as Rule 23(b)(2) for purposes of injunctive, declaratory and back pay relief), *cert. denied*, 459 U.S. 1217 (1983).

[28] *See, e.g., In re Asbestos Litigation*, 90 F.3d at 974; *In re A.H. Robins*, 880 F.2d 709, 742 (4th Cir.), *cert. denied sub nom., Anderson v. Aetna Casualty & Surety Co.*, 493 U.S. 959 (1989).

(1984) (classwide allegation of pattern and practice of discrimination decided separately from individual claims); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 359-62 (1977) (liability and damages bifurcated with burden shifted to defendant at damage phase); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) (approving formulaic determination of classwide backpay award in civil rights case), *cert. denied*, 439 U.S. 1115 (1978); *In re Independent Gasoline Antitrust Litig.*, 79 F.R.D. 552, 561-62 (D. Md. 1978) (approving formulaic determination of classwide damages in antitrust case); *In re United States Financial Sec. Litig.*, 69 F.R.D. 24, 47-48 (S.D. Cal. 1975) (approving formulaic determination of classwide damages in securities case). Thus, a requirement that predominance be assessed without regard to settlement is unlikely to hamper settlement of such cases.

2. Superiority

The second, independent hurdle of Rule 23(b)(3) is the requirement that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.Pro. 23(b)(3). "That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages." Advisory Committee Notes, 39 F.R.D. at 103.

The Rule provides that the "superiority" determination include consideration of two factors which directly address concerns for individual control and autonomy: "the interest of members of the class in individually controlling the prosecution or defense of separate actions" and "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." Fed.R.Civ.Pro. 23(b)(3). "The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they

see fit." Advisory Committee Notes, 39 F.R.D. at 104. These factors are *balanced*, under the rule, against considerations of "manageability" and "the extent of litigation. . .already commenced."[29] Fed.R.Civ.Pro. 23(b)(3).

In contrast to the predominance inquiry, the superiority requirement explicitly directs some consideration of the practical aspects of "managing" the case. It would serve, rather than hinder, the purposes of Rule 23(b)(3) to consider the Settlement in this calculation. The Third Circuit erred in ignoring the Settlement in determining manageability.[30]

3. Mandatory Notice and Opt-Out

Even where common issues predominate and class resolution is "superior," Rule 23(b)(3) incorporates yet another protection for the rights of individuals to control their claims: mandatory notice and a right to opt-out of the class. "[E]ven when the action is found by the court to lie within (b)(3), individual preference is still allowed to operate, and in a somewhat novel manner." Kaplan, *Continuing Work*, at 391. Subdivision (c)(2) requires that, in all (b)(3) actions, class members receive notice and the right to exclusion from the class.

> [T]he interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request.

Advisory Committee Notes, 39 F.R.D. at 104-05. Moreover, the right to notice and opt-out in a Rule 23(b)(3) action is *mandatory*. *Eisen*, 417 U.S. at 176 (rejecting suggestion that the mandatory notice requirement for Rule 23(b)(3) actions should be excused because of its expense).[31] *Walsh v. Ford Motor Co.*, 807 F.2d at 107-08.

The mandatory notice requirement for Rule 23(b)(3) actions "is designed to fulfill requirements of due process to which the class action procedure is of course subject." Advisory Committee Notes, 39 F.R.D. at 107 (citations omitted). In *Eisen*, this Court, in applying Rule 23(c)(2)'s notice requirement for (b)(3) actions, reaffirmed its earlier holding in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), that notice must be *meaningful*:

> when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reason-

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29 Petitioners dismiss Rule 23(b)(3) predominance and superiority requirements as focused "largely on avoidance of inefficiencies." Pet.Br. at 30. Because Rule 23(b)(3) prescribes a careful balancing of individual control *and* judicial economy, petitioners' characterization of Rule 23(b)(3) as nothing more than a tool for achieving judicial efficiency and convenience tells only half of the story. While manageability is one of several factors to be considered in assessing superiority, a factor we agree can properly be considered in the settlement context, efficiency is not the *sine qua non* of Rule 23(b)(3) treatment.

30 However, as argued *infra*, Section II.B.2, the Third Circuit's overall finding that superiority was absent because of the inherent problems of notice to future asbestos victims was correct.

31 The Court in *Eisen* also rejected plaintiff's contention that adequate representation, rather than notice, was the "touchstone of due process" in a Rule 23(b)(3) class action.

> Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided. Moreover, petitioner's argument proves too much, for it quickly leads to the conclusion that no notice at all, published or otherwise, would be required in the present case. This cannot be so, for quite apart from what due process may require, the command of Rule 23 is clearly to the contrary. We therefore conclude that Rule 23(c)(2) requires that individual notice be sent to all class members who can be identified with reasonable effort.

Eisen, 417 U.S. at 176-77.

ableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected.

Eisen, 417 U.S. at 174, *quoting Mullane*, 399 U.S. at 315. *See also Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 834 (3d Cir. 1973).

There is no justification for a relaxed or liberalized analysis of notice and opt-out rights in the context of a settlement. In *Eisen*, this Court expressly rejected arguments that the parties be allowed to dispense with notice in a Rule 23(b)(3) case in circumstances where notice was difficult, expensive or unjustified by the size of the class member's stake. *Eisen*, 417 U.S. at 176. Notice and opt-out are "unambiguous requirement[s] of Rule 23." *Ibid.* For all (b)(3) settlement classes, courts must ensure that meaningful individual notice and the right to exclusion are provided.[32] If this mandatory requirement is not met, the putative class may *not* be certified and the class settlement, whatever its benefits, must be rejected. In other words, *no cost-benefit calculus will justify inadequate notice and opt-out rights*.

Indeed, in contrast to notices for litigated classes, greater scrutiny of settlement class opt-out notices is necessary for at least two reasons. The *contents* of a settlement notice will often be substantially longer and more complex because it will describe the underlying litigation, the opt-out process, and the settlement provisions and procedures for objecting to the fairness of the settlement. Second, faced with a lengthy document that describes a complex settlement, a class member may feel as if he or she is being presented with a "fait accompli." *Mars Steel Corp. v. Continental Illinois Nat'l.*

[32] Notice and an opportunity for exclusion are not required for actions under Rule 23(b)(1) and (b)(2) because unitary resolution mandates the binding of all class members. *In re Asbestos Litigation*, 90 F.3d at 986-87. Class notice of a settlement will, however, be provided to class members to permit them to object to the settlement or, if appropriate, to file a claim. Fed.R.Civ.Pro. 23(e).

Bank & Trust Co., 834 F.2d 677, 680-681 (7th Cir. 1987); *GM Trucks*, 55 F.3d at 789.

II. THIS SETTLEMENT CLASS DOES NOT MEET THE RULE 23(b)(3) REQUIREMENTS OF PREDOMINANCE AND NOTICE

A. The Class Does Not Satisfy the Requirement that Common Issues Predominate

If the Settlement is not taken into account—as it should not be—the class clearly does not satisfy the Rule 23(b)(3) predominance requirement.

The district court identified only one common question of law or fact, apart from the class's interest in the fairness of the settlement: that "members of the class have all been exposed to asbestos products supplied by the defendants. . . ." Pet. App. 226a. The Third Circuit, while noting that this was probably sufficient to meet the relatively low threshold for commonality under Rule 23(a)(2), Pet. App. 43a, described the issue of exposure and its harmful consequences as "settled long ago."[33] Pet. App. 40a, *citing In Re School Asbestos Litig.*, 789 F.2d 996, 1000 (3d Cir.), *cert. denied sub nom., Celotex Corp. v. School Dist. of Lancaster*, 479 U.S. 852, and *National Gypsum Co. v. School Dist. of Lancaster*, 479 U.S. 915 (1986).

On the other hand, as the Third Circuit concluded, absent consideration of the Settlement, "the number of uncommon issues in this humongous class action, with perhaps as many as a million class members, is colossal." Pet. App. at 42a. The legion of uncommon factual issues encompassed by the proposed class are manifest in that the Settlement covers all forms of asbestos disease, despite their differing pathologies,

[33] The Third Circuit identified a few other common issues, such as defendants' knowledge of the hazards of asbestos, whether they adequately tested their products or if they offered adequate warnings accompanying their products. Pet. App. 40a.

causes and degrees of injury. For example, mesothelioma, perhaps the worst form of asbestos disease, has but a single cause (exposure to asbestos), unlike lung cancer, which has been linked to other causes. Pleural thickening usually causes no physical impairment at all, while mesothelioma ensures swift and certain death. As the Third Circuit noted, "[s]ome class members suffer no physical injuries or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma. . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry." Pet. App. 41a. The Third Circuit further noted that "[i]t is unclear whether they will contract asbestos related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories." Pet. App. 41a.

These uncommon factual situations may lead to significant legal differences with respect to affirmative defenses, causation, comparative fault, and the types of damages available to each class member. Pet. App. 41a.

Finally, and critically, the proposed class ignores the substantive and procedural differences among the states.[34] State laws differ on a variety of issues relevant to class member claims: "availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury; causation; the type of proof necessary to prove asbestos exposure; statutes of limitations; joint and several liability; and comparative/contributory negligence." Pet. App. 41a-42a. Moreover, these differences are not mere abstractions—the claims of class members and defenses thereto, and the values of their claims, are directly tied to such state law and procedural differences, as is graphically reflected by the substantial inter-state variation in settlements and judgments in asbestos cases. *See* JA 572-578, 562, 464-468. Such variations in state law and procedure "swamp any common issues and defeat predominance." *Castano*, 84 F.3d at 741. *See also In re American Medical Sys.*, 75 F.3d 1069, 1085 (6th Cir 1996); *cf. Walsh v. Ford Motor Co.*, 807 F.2d at 1017 (state law variations may defeat predominance unless major factual issues are "identical or virtually so"); *In re School Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986) ("extensive analysis" demonstrated state law differences fall within four categories in property damage action).

The Third Circuit correctly found that, given the large number of uncommon issues that are present, predominance cannot be established. *See Castano*, 84 F.3d at 742 n.15 (discussing difficulty in establishing predominance and comparing to problems described in Third Circuit decision in this case). Indeed, substantially more cohesive proposed classes have failed the Rule 23(b)(3) predominance test. *See, e.g., Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566, 570-71 (E.D. Tex. 1974).

A finding of lack of predominance for this immense and immeasurable class does not mean that more narrowly tailored classes would not meet the Rule 23(b)(3) predominance test. A class may be defined in an infinite number of ways.[35] The

[34] Such state law differences cannot be ignored. *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985) (constitutional limitations on choice of law apply even in nationwide class actions); *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-80 (1938) (federal court sitting in diversity jurisdiction must apply common law of the state in which case would normally be tried rather than general federal common law). It is the duty of class proponents to establish, through "extensive analysis," that state law differences do not undermine the predominance of class issues. *In re School Asbestos Litig.*, 789 F.2d at 1010. Such an assertion cannot be accepted "on faith." *Walsh v. Ford Motor Co.*, 807 F.2d at 1016. *See also Castano*, 84 F.3d at 742 (state law differences must be examined by district court).

[35] In this case, there has been no showing that state law differences fall within a few patterns. *See, e.g., In re School Asbestos Litig.*, 789 F.2d at 1010. Nor were narrower geographic classes explored. For example, a more focused action, limited to a single state or group of states with similar substantive and procedural rules, would present substantially fewer individualized issues. In this regard, it bears noting that settlements

scope of the class will, however, directly impact the degree to which common issues predominate. In this case, petitioners' reach greatly exceeded the permissible grasp of Rule 23(b)(3).

B. The District Court Improperly Approved Rule 23(b)(3) Class Treatment Where Meaningful Notice and the Right to Exclusion Were Not Provided

The lack of predominance of common issues, which resulted in a proposed class that lacked any cohesion, meant that many disparate class members were swept up by a settlement that imposed a resolution of their future claims. This obvious mischief might have been partly alleviated if there were a meaningful method by which class members could exclude themselves from the Settlement, specifically through the mandatory Rule 23(b)(3) opt-out right. Instead, the Settlement exacerbated the lack of class cohesion by providing for a largely illusory process for receiving notice and exercising exclusion rights. Accordingly the district court should not have certified this action as a Rule 23(b)(3) class.[36]

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from a handful of states account for a large portion of the petitioners' past liability. *See* JA 562, *et. seq.* (showing that claims from California, New York, Pennsylvania and Texas account for 50% of all CCR settlement payments).

[36] The Third Circuit explained that the class definition and the terms of the Settlement raised serious questions regarding whether adequate notice and opt out rights were provided to the class. Pet. App. at 31a, 56a-57a. While it declined to base its holding on the sufficiency of the opt-out notice under Rule 23(c)(2), it concluded that the notice problems *in this case* demonstrated that the Rule 23(b)(3) superiority requirement had not been met. *Id.* at 55a-57a. Its analysis, as well as our Rule 23(c)(2) analysis, considers the terms of the Settlement and the class definition. Whether the notice problem is analyzed as a Rule 23(c)(2) or superiority issue, it remains clear that the certification of *this* case as a (b)(3) class was improper.

1. Ensuring Adequate Notice and Opt-Out Rights in a Rule 23(b)(3) Action Involving Future Claims Requires Close Scrutiny

In evaluating certification of any Rule 23(b)(3) class—whether a litigation or settlement class—a district court must find that each class member will receive meaningful individual notice and the right to opt-out. *Eisen*, 417 U.S. at 176. This requirement must be met even where predominance and superiority have already been established. *See* discussion *supra*, Section I.B.3. The right to individual notice and opt-out is an integral component of the Rule 23(b)(3) balance; it ensures that the desired efficiencies that may be accomplished through class treatment do not subsume the equally important right of any individual class member to control his or her legal claim. The demanding requirement of notice and opt-out rights cannot be relaxed in the context of a settlement. *See* discussion *supra*, Section I.B.3.

Rule 23(b)(3) settlement classes that seek to bind *future* class members present the most difficult issues of notice and opt-out and demand the most careful review. For future class members to actually receive meaningful notice of a right to opt-out of a settlement—whether through individual or published notice—they must be susceptible to identification and they must be in a position to make an informed choice about whether to opt-out. Otherwise, notice in any form to the class is nothing more than "a mere gesture." *Mullane*, 339 U.S. at 315. As a leading class action commentator noted:

> For class members who cannot currently identify themselves for purposes of protecting their interests with respect to a class action purportedly commenced on their behalf, an opt-out right with a court designated period of time, (if opt-outs are permitted for other known members), *is of no beneficial use*.

1 *Newberg on Class Actions*, § 1.23 at 1-55 (emphasis added). Indeed, the *Manual for Complex Litigation, Third* (Federal

Judicial Center 1995) highlights the particular concern raised by settlement classes:

> The court should consider the impact of the settlement on persons who may not currently be aware that they have a claim or whose claim may not yet have come into existence. Since they cannot be given meaningful notice, they may be particularly prejudiced by the settlement, and *their opt-out rights (in a Rule 23(b)(3) action) may be illusory*.

Id. at 244 (emphasis added).

Even assuming that future class members may be identified, the notice inquiry is still not complete. The court must also ascertain whether future class members—who do not know if and to what extent they may later suffer injury—have sufficient information to evaluate their choices and meaningfully exercise their rights to exclusion. While class members in both litigation and settlement classes are often required to exercise opt-out rights based upon incomplete or imperfect information, the court must nonetheless determine whether—in the particular factual circumstances—there is sufficient information to meaningfully exercise opt-out rights.

2. Notice and the Right to Opt-Out Are Illusory in this Case

The Settlement defines a class, which includes all persons who in the future will get one or more of a number of asbestos related diseases from occupational exposure caused by one or more of the 21 CCR companies *as well as their family members* (who will either contract an asbestos disease themselves or will have wrongful death claims for the individual who was occupationally exposed). Rule 23(b)(3) requires that each of the members of this enormous and amorphous class receive the best practicable notice. *Eisen*, 417 U.S. at 176.

Since it is impossible to predict at the present time who will get any asbestos disease, and even harder to predict who will get *which* asbestos disease, class notice of necessity had to aim broadly to reach all who might potentially fall victim to any asbestos-related disease. The district court estimated that nearly seven million people received individually delivered notice. Pet. App. 219a, 267a.

Because of the unique factors present in this case, what appears at first blush as extensive notification is, in fact, legally insufficient. To begin, many who have been occupationally exposed to asbestos may no longer be working in the related industries and would not have received individual notice triggered by their employment status. Even if they had received notice—either through mail or publication—they may not recall exposure that has occurred long in the past. Their family members (who may not have even known the future victim at the time of exposure) will be even less likely to receive mailed notice or to self-identify as a class member.

The problem of effectuating notice is particularly acute for those who will ultimately get mesothelioma, which may result from slight exposure forty years in the past, *see* JA 335. The future class member may be entirely unaware of the exposure. He or she may not currently work—or have ever worked—in the asbestos-related trades. As a result, the class member is also unlikely to have received mailed individual notice. If he or she happened to see one of the published or broadcast notices that ran during the eight-week notice period, he or she will have little reason to believe that his or her rights will be affected by a pending lawsuit.[37] As the Third Circuit con-

[37] Asbestos diseases, and particularly mesothelioma, are relatively unique because of their long latency period and the risk from incidental exposure. This is, for example, quite different from other mass tort cases such as those involving breast implants or heart valves, where the potential victims can self-identify (one would expect an individual to know if either had been implanted) or be tracked through medical records or manufacturers' sales records. In those cases, class members who have not yet manifested injury must still make hard choices but they will do so with

cluded, because a person may contract mesothelioma based on slight or incidental exposure which occurred fifteen to forty years ago, "it is unrealistic to expect . . . every [exposed] individual to realize that he or she could someday contract a deadly disease." Pet. App. 56a. For the family members of a future mesothelioma victim, the connection becomes impossibly attenuated.

But this is not the end of the problem. Even assuming a putative class member did, in fact, receive a notice in this case, it is inconceivable that he or she could comprehend the vast complexity of the Settlement's provisions, calculate the probabilities and consequences of contracting one of many asbestos diseases, and make a meaningful decision whether to opt-out, all within less than 12 weeks.

The Settlement agreement encompasses the full range of asbestos diseases—from pleural thickening to mesothelioma. The settlement notice specifies technical and detailed medical proof requirements for each separate disease that must be met to qualify for compensation. JA 227 *et. seq*. The Settlement includes separate dollar value ranges for different diseases but provides virtually no information from which a class member can determine where in the range their potential claim would fall. The Settlement limits the number of claims in each disease category that may be processed each year. While these "flow rates" will affect how quickly a claim may be processed within the settlement resolution process, the likely number of claims (particularly since the size of the class is unknown) would be a mystery to the class member, who could not begin to determine whether his claim would be reached in year one, year ten, or never.

But, even assuming that the class member diligently read and comprehended the Settlement's contents, he or she must

much greater information about the range of options that they have. Thus, a ruling that notice is impossible for all or part of the present class will not impede the future evolution of class action methods to resolve many mass torts.

also attempt to predict which disease or diseases he or she might get, and then assess whether the offered damage ranges are reasonable.[38] The reasonableness of the damage ranges, however, turns on a comparison with the values obtainable by litigation or settlement in the jurisdiction in which the class member resides. This latter assessment is complicated still further by the impossibility of predicting *when* one will fall ill—another critical question since the Settlement provides for no inflation adjustment during the first ten years and then only a single modest adjustment thereafter.

The significance of the exclusion decision cannot, moreover, be underestimated. For mesothelioma victims in particular, remaining in this class may be of immense and catastrophic consequence since "[t]he [S]ettlement relegates those who are unlucky enough to contract mesothelioma in ten or fifteen years to a modest recovery, whereas the average recovery of mesothelioma plaintiffs in the tort system runs into the millions of dollars." Pet. App. at 49a. Moreover, resolution of their claims under the Settlement may be delayed by its flow rate limitation, while under state law, their claim might have priority for adjudication. *See, e.g.*, Cal. Code Civ. Pro. 36(d). Those who suffer the devastating and fatal consequences of mesothelioma have the strongest interest in pursuing their own individual litigation and will have no trouble finding attorneys willing to prosecute their claims. Indeed, the Advisory Committee anticipated that "[t]he interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action." Advisory Committee Notes, 39 F.R.D. at 104-05.

[38] Historically, only about 3% of all claims against CCR defendants were for mesothelioma, and a bit more than 4% for lung cancer. JA 570, 580. Thus, while the potential class targeted for notice is exceedingly large, only a relatively small proportion of the class will fall victim to these asbestos cancers. For most class members, the remote possibility of fatality will likely not figure into their consideration of the notice.

These overwhelming inadequacies of notice are exacerbated by the Settlement itself, which required that the right to opt out be exercised precisely at the point at which most individuals had the least information or incentive to make such a choice—before diagnosis of any asbestos-related disease. Yet the class definition and the complexity of the Settlement make it very unlikely that potential mesothelioma victims will appreciate the impact of the Settlement. Had the Settlement, instead, provided a meaningful right to opt-out after the onset of any disease, it would have done much to alleviate these serious notice problems. Pet. App. 56a. Instead, the Settlement limits the number of mesothelioma victims nationwide who may exit to the tort system to a maximum range of nine (9) to fourteen (14) individuals annually, only 2% of an already capped number of such claims that may be resolved each year.

Thus, as the Third Circuit summarized, the notice is problematic for undiagnosed plaintiffs because: (1) "[such] plaintiffs may not know that they have been exposed to asbestos within the terms of this class action;" 2) even if aware of their exposure, these plaintiffs who suffer no physical injuries, have little reason to "pay attention to class action announcements;" and 3) "even if class members find out about the class action and realize they fall within the class definition, they may lack adequate information to properly evaluate whether to opt out of the settlement." Pet. App. 55a-56a.

In contrast to the Third Circuit's careful analysis, the district court summarily rejected the concern that potential class members would be unable to self-identify or evaluate their risk of future injury and thereby receive meaningful notice and the right to exclusion.[39]

[39] The district court made only the following unsubstantiated conclusion:

> I am satisfied, however, that after more than 20 years of extensive litigation, over 15 bankruptcies (many with extensive notice) and massive publicity about asbestos, persons who have had occupational exposure to asbestos are aware of that exposure.

JA 311. The district court ignored the fact that the class included not just those with occupational exposure but family members of those with occupational exposure. Its conclusion was particularly unfounded for mesothelioma victims, where exposure may have been caused by washing the household laundry, or living with a parent who was exposed to asbestos in the workplace. JA 335.

To support its decision, the district court relied primarily on bankruptcy cases, which permitted notice to future asbestos victims. These cases are particularly inapposite since they involve bankruptcy procedures where notice and the right of exclusion are *not* mandatory (as they are in Rule 23(b)(3) classes). Moreover, as with Rule 23(b)(1)(B) limited fund cases, due process requirements may differ where a unitary resolution is mandated. *See In Re Asbestos Litigation*, 90 F.3d at 986-87.

The district court also relied on the decision in *In re "Agent Orange" Prod. Liab. Litig. ("Agent Orange I")*, 818 F.2d 145, 154, 168-69 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988), which is similarly distinguishable. Unlike mesothelioma victims, absent class members in *Agent Orange* had sufficient information to self-identify. The class included only Vietnam War veterans, spouses, parents, and children born before January 1, 1984. Claimants knew that they were Vietnam veterans and potentially affected by the settlement, when they learned of it through mail or published notice. Also unlike mesothelioma claims, the *Agent Orange* claims were legally weak and therefore worth very little. *In re "Agent Orange" Prod. Liab. Litig. ("Agent Orange II")*, 996 F.2d 1425, 1436-37 (2d Cir. 1993), *cert. denied sub nom, Ivy v. Shamrock Chemicals Co.*, 510 U.S. 1140 (1994). Finally, the district court treated the class settlement as functionally a limited fund case. After 2500 class members opted out pursuant to a Rule 23(b)(3) settlement notice, the district court granted summary judgment against all of the opt-out plaintiffs on the issues of causation and the military contractor defense. The district court, with the approval of the parties, then took the unprecedented step of allowing all the opt-out claimants to *rejoin the class and share in the settlement fund*. *See In re "Agent Orange" Prod. Liab. Litig.*, 689 F.Supp. 1250, 1261-63 (E.D.N.Y. 1988). The extraordinary facts and circumstances of the *Agent Orange* saga render that case *sui generis*.

Petitioners may argue that Rule 23(c)(2) requires individual notice only to class members "who can be identified through *reasonable* effort." Fed.R.Civ.Pro. 23(c)(2) (emphasis added). Given that notice was mailed to 6.8 million households, Pet. App. 267a, they may contend that reasonable

efforts have been exercised. *See* Pet.Br. at 48-49 n.25. But, the notice issue presented in this case is not whether the parties have exercised reasonable efforts to deliver a notice document to known class members. This is not, for example, about whether some class members have moved and cannot be traced to a new address. Instead, the problem here is that petitioners have defined a class that includes millions of Americans who have been exposed to asbestos within the definition of the Settlement but may not be aware of their exposure and are unlikely to receive or appreciate notice. Even if they do, class members cannot know what disease might lie in store for them, when they will get sick, how many years they will have to wait for claim processing and payment through CCR, or what their claim might to worth in court or through settlement. A class member could well conclude that the settlement would be acceptable if he developed a pleural plaque next year, but not if he developed mesothelioma in five years. Indeed, he could get *both*, yet he has to decide to either stay in or opt-out before falling victim to either. These people, who represent the vast majority of the class, *cannot* receive meaningful notice and intelligently decide whether to opt-out because of the very nature of this Settlement. Consistent with Rule 23(b)(3)'s purpose of providing for meaningful individual control of claims, where notice and opt-out rights are illusory, a class simply cannot be certified. *See* Advisory Committee Notes, 39 F.R.D. at 104-05.

CONCLUSION

Even though the Third Circuit erred in its broad pronouncements on general principles of class action law, on the basis of its actual examination of this case and this record, the Third Circuit correctly concluded that the proposed class failed to meet the predominance requirement of Rule 23(b)(3) and failed to provide adequate notice to class members of their right to opt out. Therefore, its judgment should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners,

v.

GEORGE WINDSOR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS WHITE LUNG ASSOCIATION OF NEW JERSEY, ET AL.

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QUESTIONS PRESENTED

1. Did the complaint in this asbestos personal-injury class action satisfy (a) the amount-in-controversy requirement of 28 U.S.C. 1332, where the class representatives testified that they had sustained no damages and presently sought no monetary or other recovery, and (b) Article III's case-or-controversy requirement, where the simultaneously-filed class action settlement provided no relief for the claims pled in the complaint, but rather established a binding extra-judicial claims procedure to process *future* personal-injury claims if and when they accrue?

2. Was the court of appeals correct in holding that this class action—which purports to resolve the *future* asbestos personal-injury claims of millions of class members under the varying laws of all 50 states, and would enable the class members to opt out only *before* they contract an asbestos-related disease—failed to meet the typicality, adequacy of representation, predominance, and superiority requirements of Federal Rule of Civil Procedure 23?

PARTIES TO THE PROCEEDING

Petitioners have listed the parties below in the appendix to the petition for a writ of certiorari at 292a. Respondents who were appellants below and who appear in this Brief are the White Lung Association of New Jersey, the National Asbestos Victims Legal Action Organizing Committee, the Oil, Chemical, and Atomic Workers International Union, the Skilled Trades Association, Myles O'Malley, Marta Figueroa, Robert Fiore, Ron Maher, and Lynn Maher (in her own behalf and as next friend for her minor children, Jessica Marie Maher, Jamie Marion Maher, and Jennifer Megan Maher).

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BRIEF OF RESPONDENTS WHITE LUNG ASSOCIATION OF NEW JERSEY, ET AL.

STATEMENT OF THE CASE

A. The Class Action "Suit."

In mid-1991, the Judicial Panel on Multidistrict Litigation transferred all asbestos personal-injury cases pending in federal court to the Eastern District of Pennsylvania to explore settlement options. *In re Asbestos Prod. Liab. Litig.*, 771 F. Supp. 415, 416 (J.P.M.L. 1991). After efforts at settlement involving all asbestos defendants failed, petitioner Center for Claims Resolution ("CCR")—a consortium of 20 asbestos defendants—approached two plaintiffs' asbestos lawyers, Ronald L. Motley and Gene Locks, for the purpose of negotiating a settlement, *not* of the cases that the Panel had transferred, but of all asbestos claims against the CCR defendants that had not yet been filed, but might be filed in the future, in federal or state court.

By January 15, 1993, that settlement had been reached, and Motley and Locks filed the complaint in this case, seeking an opt-out class under Rule 23(b)(3). At the same time, CCR filed its answer, and all counsel signed and filed a Stipulation of Settlement. Shortly thereafter, the CCR defendants conceded that the case, involving the disparate claims of millions of class members under the laws of all 50 jurisdictions—some with serious diseases, some with relatively minor asbestos-related impairments, and the vast majority with no symptoms at all—could not be litigated as a class action. JA 131. Although nominally styled as a case brought by named plaintiffs against CCR, in the words of CCR's chief executive officer, CCR "picked" Motley and Locks for the purpose of negotiating a settlement, which would, in turn, become a friendly lawsuit the sole purpose of which was to substitute an extra-judicial claims procedure for the remedies available in the court system. JA 427.

The class—which numbers in the millions (Cert. App. 248a, 103a)—was defined to include all U.S. residents occupationally exposed to asbestos for whom CCR defendants

may now, or at any time in the future, bear legal liability, as well as all individuals residing with, or related to, such persons. JA 50-51. Specifically excluded are all individuals who had brought suit against one or more of the CCR defendants prior to January 15, 1993, the date that the complaint and settlement were filed.

The exclusion of previously-filed suits was critical to class counsel, who effectively opted-out their presently-injured clients from the class and settled their claims for $215 million in cash (including at least $70 million in attorney's fees), rather than subjecting those claimants to the class settlement's administrative scheme. JA 560. CCR agreed to these side-settlements, the most important of which were signed on the eve of the filing of the class action, only after it believed that the class action settlement would be consummated. JA 447, 667-68, 761. Not only did the side-deals pay class counsel's "present" clients far more than they could hope to obtain under the class action settlement (*see, e.g.*, Obj. Ex. O-170), but they paid cash for certain illnesses, such as many asbestos-related lung cancers, that, CCR concedes, would not qualify for any compensation under the class settlement. *See, e.g.*, JA 771.

The vast majority of the class members were so-called "exposure-only" plaintiffs—individuals who had been exposed to CCR asbestos-containing products, but who then suffered from no asbestos-related disease. Cert. App. 103a-105a. The class complaint alleged three bases for recovery of money damages for the exposure-only plaintiffs: negligent infliction of emotional distress, increased risk of a future condition, and medical monitoring. JA 18-20. The complaint did not request any of the relief agreed to in the simultaneously-filed class settlement, and none of the relief actually provided in that settlement corresponds to the damages nominally sought in the complaint.

Instead, the settlement established a procedure under which class members may file claims if they develop an asbestos-related illness. Under it, the CCR defendants themselves decide whether the claimant satisfies the settlement's strict medical criteria for compensation, with an appeal to

arbitrators appointed by the parties. JA 56-75. Among other things, those criteria exclude so-called "pleural cases"—involving lesions or thickening of the lining on the outside of the lung, but little or no physical impairment—which are compensable under the laws of most states. If medical eligibility is established, CCR itself, *without any independent review*, makes decisions on payment levels, within broad ranges, on more than 98% of all claims. JA 80-81. Within those ranges, CCR has complete discretion to make individual monetary awards, as long as certain averages are maintained, which themselves are vastly below historical levels.[1] Moreover, the awards are *not* adjusted for inflation, which is all the more significant because the class members are bound to the settlement in perpetuity, although each CCR defendant has an unbridled right to abandon the settlement after 10 years. JA 101.

After completing this process, claimants who meet the medical criteria may, in theory, seek arbitration or relief in the tort system (subject to numerous procedural requirements and no right to seek punitive damages) (JA 87-91), but fewer than 1% of eligible claimants may file in any one year. JA 109,

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[1] For instance, under the settlement all but 1% of non-malignant claimants are limited to between $2,500 and $30,000, with the average award as low as $5,800, *in CCR's sole discretion*. JA 81, 110. Historically, however, CCR's average payment to non-malignant claimants is $8,810, which *includes* pleural claimants, who get no cash recoveries under the class settlement. *See* JA 578. Some of the state-by-state discrepancies are even more dramatic. *See, e.g.*, JA 574-78 (in the tort system Minnesotans average $23,984, Marylanders average $12,170, New Yorkers average $16,421, South Carolinians average $18,327, all *including* pleural claimants). Discrepancies for other diseases are equally, if not more, striking. *Compare* JA 81, 110 (average qualifying claim under settlement for "other cancer" need not exceed $9,500), *with* JA 578 (historical CCR payment for "other cancer" $16,939, which *includes* all claims that would not meet the class settlement's medical criteria); *see also* JA 471, Affidavit of Larry Sartin of Oil, Chemical, and Atomic Workers' Int'l Union (historical tort recoveries of union members far below average permissible settlement recoveries).

174. Thus, even if just a small percentage of class members seek such relief, the wait will soon exceed 15 years. *See, e.g.*, JA 917.

Nominally, the settlement requires that claimants be paid within about nine months of the filing of a qualifying claim. JA 344, 385-86. However, payment is subject to strict yearly case-flow maximums, and if those levels are exceeded (JA 382, 436), which is likely in light of historical data, payments could be delayed for many years. *See* 3/3/94 Tr. at 52-54.

B. Proceedings Before The District Court.

The settlement was challenged in the district court as grossly unfair. *See generally* Brief Amicus Curiae of Asbestos Victims of America. The objectors included respondents herein—individual class members, a broad consortium of asbestos advocacy groups, and labor organizations, including the Oil, Chemical, and Atomic Workers International Union, whose 300,000 current and former members were heavily exposed to asbestos in the workplace. The objectors also argued that the settlement suffered from four fundamental legal impediments. First, they argued that this was a feigned case, not susceptible to resolution under Article III's case-or-controversy requirement, principally because the nominal plaintiffs never intended to pursue any of the relief listed in the complaint. This was made plain not only by the lack of any relation between the relief purportedly sought in the complaint and that obtained in the settlement, but also by the testimony of the named "exposure-only" plaintiffs, each of whom expressly renounced the claims in the complaint and disclaimed any desire for money damages because they had not sustained any asbestos-related injuries. As one named plaintiff put it, "I have nothing wrong with me. So therefore, I should not and will not seek any damages or actions." JA 686.

Second, objectors maintained that none of the exposure-only class members had the requisite $50,000 in controversy to establish diversity jurisdiction under 28 U.S.C. 1332, since the causes of action pled were not valid causes of action in most

jurisdictions. The lack of a good faith allegation of $50,000 in damages for each class member was buttressed by the named plaintiffs' testimony which, again, demonstrated that the complaint's damage allegations were a sham. *See* Cert. App. 62a-66a (Wellford, J., concurring).

Third, objectors maintained that the class notice was ineffective under Rule 23 and the due process clause because it was impossible to provide meaningful notice to millions of "future" class members to alert them to their opt-out rights. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-13 (1985). Objectors pointed out that the *uninjured* plaintiff class would have no reason to heed a notice because many class members knew nothing of their exposure, and that, even for those who did, it was fundamentally unfair to force them to decide whether to opt out before they knew the extent of their injuries or what their personal circumstances would be at the time they became ill.

With respect to the argument that formed the basis for the court of appeals' decision, objectors challenged class certification under Rule 23. They argued that it was impossible to meet Rule 23(a)(3)'s requirement that the claims of the representative plaintiffs be "typical" of the class, since no claims of the class representative could be said to be "typical" of any, let alone *all*, claims of future asbestos victims whose circumstances were unknown and unknowable. The objectors also contended that the case did not present common questions of law and fact under Rule 23(a)(2), and that any common questions did not predominate over the case's myriad individual variations under Rule 23(b)(3), including enormous choice-of-law difficulties in this nationwide diversity case.

Finally, the objectors contended that Rule 23(a)(4)'s adequacy of representation requirement had not been met. The settlement terms themselves indicated that the class representatives could not, with one set of lawyers, represent *all* the class members, some of whose claims were abrogated, or made virtually worthless, in order to enhance the position of other claimants. Similarly, the objectors pointed to class counsel's decision to benefit their "present" clients outside the

class, by obtaining the $215 million side-deal, instead of including them in the settlement.

The district court rejected each of respondents' arguments and approved the settlement. Cert. App. 88a-276a; JA 183-226. CCR then moved for an injunction that would bar all class members from suing the CCR defendants for asbestos-related injuries in federal or state court and require them to use the settlement's claims procedure to obtain compensation. At this point, certain class members who had been diagnosed with asbestos-related diseases *after* the end of the opt-out period, and who had never received the court-ordered notice of the class action, entered the case to argue against the injunction. *See, e.g.*, Dkt. No. 1161. On September 21, 1994, the district court granted the injunction (Cert. App. 67a), and respondents appealed that order under 28 U.S.C. 1292(a)(1), arguing that, because the district court lacked subject matter jurisdiction and the power to bind the absent class members under both Rule 23 and the due process clause, the injunction should be vacated.

C. The Decision of the Court of Appeals.

The court of appeals unanimously reversed in an opinion by Judge Edward M. Becker. The opinion began by describing the "most notabl[e]" aspect of the settlement—that generally it did not resolve the claims of those who had suffered injuries, but of those who had not (Cert. App. 17a-18a)—and by expressing "serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction over the absent class members." Cert. App. 19a. In order to avoid ruling on these constitutional problems, the court held that "this class meets neither the [Rule] 23(a) requirements of typicality and adequacy of representation, nor the 23(b)(3) requirements of predominance and superiority." *Id.* The court rejected CCR's two related contentions—that Rule 23's certification criteria should be applied more liberally in a settlement context and that the court's review of the settlement terms may substitute for strict

application of the certification criteria to the claims pled in the complaint.

Judge Becker relied on the Third Circuit's recent decision in *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.* ("*GM Trucks*"), 55 F.3d 768, 799 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995), which had concluded that neither the text nor the purpose of Rule 23 "authorize[d] separate, liberalized criteria for settlement classes." The court then explained that, in order to obtain certification of any class action, the district court must first find that Rule 23(a)'s numerosity, commonality, typicality, and adequacy of representation requirements are met, and then that the class falls within one of Rule 23(b)'s three subdivisions. Cert. App. 38a. The court initially examined whether common questions of law and fact exist (Rule 23(a)(2)) and whether such common questions "predominate over any questions affecting only individual [class] members" (Rule 23(b)(3)). It also discussed the large number of individual factual variations, such as differences in types of illness and smoking history, particularly regarding the "futures plaintiffs [who] share little in common, either with each other or with the presently injured class members." Cert. App. 41a. These factual differences created significant legal variations regarding causation, comparative fault, and the types of damages available to each class member. The problem was "compounded exponentially" by choice-of-law issues, which demanded application of the law of all 50 states on a range of issues, such as statutes of limitations, the viability of "exposure-only" causes of action, causation, and the like. *Id.*

Despite these difficulties, the court of appeals declined to rule that the class did not satisfy the commonality requirement of Rule 23(a)(2); however, it did conclude that the sole common issue of asbestos' harmfulness could not support a finding that common questions *predominated* over individual questions under Rule 23(b)(3). Cert. App. 43a-48a.

Turning to Rule 23(a)(4), the court ruled that "serious intra-class conflicts preclude this class from meeting the adequacy of representation requirement." Cert. App. 49a. The

court looked to the settlement itself, noting that it "makes numerous decisions on which the interests of different types of class members are at odds" and that such decisions "necessarily favor some claimants over others." *Id.* Thus, some claimants would obtain benefits on relatively favorable terms, while those with legally viable claims of asymptomatic pleural thickening, medical monitoring, or loss of consortium would receive no damages at all, and others, such as mesothelioma victims, would get far less than they would in the tort system. *Id.*

The "most salient conflict," the court concluded (*id.*), was between presently-injured and future class members; the former would want to maximize current benefits, while the latter would want protections, such as an adjustment for inflation or a back-end opt-out procedure (which allows the class member the option of going directly to court after an illness arises), neither of which the settlement provided. The lack of any such protections "thwarted the adequate representation of the disparate groups of plaintiffs." Cert. App. 52a.

The Third Circuit also held that typicality—which demands alignment between the claims of the named representatives and the absentees—was lacking because the same "hodgepodge" of claims and factual variations that plagued the commonality inquiry, and that defeated adequacy of representation, made it impossible for a class member's claim to be "typical" of that of any other class member. Cert. App. 53a. This was particularly true, the court held, because of the clash between presently-injured and future class members, but would also have been true if the class contained only "futures," since their circumstances are inherently unknowable and the types of diseases they might contract vary widely. *Id.*

Finally, relying mainly on fairness concerns about the settlement itself, the court found that class treatment was not "superior" to individual adjudication under Rule 23(b)(3). It noted, first, that class members had significant interests in controlling their own litigation because asbestos personal-injury claims, as opposed to the kinds of small claims for which Rule 23(b)(3) was intended (Cert. App. 55a), are judicially viable on their own. Second, the court relied on the inherent problems of

providing adequate notice in a "futures" class action. It noted that the class is composed primarily of uninjured persons, who would have little reason to pay attention to the class notice and who may not even be aware of their own asbestos exposure. *Id.* (citing testimony of two named plaintiffs who were unaware of their own exposure until their spouses became ill from asbestos).[2]

Thus, the court held, binding the class could not be deemed superior to individual actions brought when a class member develops an asbestos-related illness. The panel supported its notice concerns by explaining that the latency period for asbestos-related disease can be very long, and that one particularly horrible disease—mesothelioma—can be contracted through incidental exposures, as befell the wife of one of the named plaintiffs. JA 684. The court concluded that "we cannot conceive of how any class of this magnitude could be certified." Cert. App. 57a.

Judge Harry W. Wellford of the Sixth Circuit filed a concurrence, noting his agreement with Judge Becker's opinion, and further holding that the plaintiffs' "speculative," future injuries did not present an Article III case or controversy. He relied on the testimony of the class representatives which, as noted above, expressly renounced any present intention of seeking damages. *See* Cert. App. 62a-66a.

Judge Wellford's apprehension about the proper role of the courts thus struck the same chord as the panel's conclusions, albeit in a different key. While expressing concern over the large number of asbestos claims, the court of appeals made clear that the courts were not the place to seek mass-tort reform. Cert. App. 57a-58a. The court was thus determined to "leave legislative solutions to legislative channels." Cert.

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[2] Spouses and other household members are class members in two ways. First, they hold *future* loss-of-consortium claims if the exposed person with whom they live becomes ill (JA 49)(defining "Claim"). Second, they hold *future* personal-injury claims if *they* become ill as a result of contact with asbestos brought home on a worker's person or clothing (JA 50)(defining "Exposed Person").

App. 20a. "In doing so," the panel concluded, "we avoid a serious rend in the garment of the federal judiciary that would result from the Court, even with the noblest motives, exercising power that it lacks." *Id.*

SUMMARY OF ARGUMENT

I. Judging by the briefs of CCR and class counsel—CCR's nominal adversaries—the reader might conclude that this was an ordinary asbestos case that happened to be brought in the form of a federal-court class action. The difficulty with the settling parties' approach is that it overlooks the facts. Far from being routine or ordinary, the settlement stretches the boundaries of "case" or "controversy" and the limits of subject matter jurisdiction far beyond that allowed by any jurisdictional statute, procedural rule, or concept of due process, in order to bar *future* personal-injury claimants, who have no current cause of action, from using the tort system. In reality, the settlement is an extreme attempt to secure judicial legislation, clothed in the garb of a traditional lawsuit. "In short," as the Third Circuit observed, "what the district court did here might be ordered by a legislature, but should not have been ordered by a court." Cert. App. 20a.

The first and most alarming fact is that the defendants initiated this case. It began with an invitation from CCR to two leading plaintiffs' asbestos lawyers to discuss the possibility of a global settlement of both present and future claims. The present claims would be settled by the payment of $215 million in damages on a mass, or "inventory," basis, and the future claims would be settled by a class action. Settlements of the inventory claims were completed literally on the eve of the filing of the class action complaint. *See, e.g.*, JA 530. With respect to the future claims, a settlement was reached prior to the filing of a complaint. Then, as one named plaintiff testified, uninjured class representatives were recruited to "fit the profile" of the class (3d Cir. Jt. App. 1122), and, as planned, a settlement agreement, an answer, and a joint motion for class certification were filed with the complaint.

But the class settlement gave the future claimants a concededly very different and, in respondents' view, a far less advantageous deal than was given to victims who had filed their cases before the class complaint was filed, even though the lawyers for the class represented both groups of claimants. Moreover, although the complaint requested money damages for medical monitoring and for "injuries" such as fear of contracting asbestos-related disease, the simultaneously-filed settlement abandoned all of those requests and instead established a mandatory private dispute resolution system for all future asbestos claims against CCR. That system includes strict medical criteria which, in effect, establish a nationwide "applicable law," and it imposes limits on monetary recoveries that apply to all class members who do not opt out. This lack of congruence between the complaint and the settlement is confirmed by the fact that all of the named plaintiffs who testified said that they had never wanted the medical monitoring or the other relief sought in the complaint. And underscoring the fact that the class allegations were contrived, the class representatives testified not only that *they* wanted no present relief, but that exposure-only claimants seeking monetary recovery—including the millions of persons whose interests they purported to represent—should not get damages now because they were not sick from asbestos. JA 356-57, 695.

Even viewed on its own terms, the complaint creates jurisdictional problems that are insurmountable. It seeks relief under the laws of all 50 states, but those claims are legally foreclosed in many jurisdictions. *See* Cert. App. 60a-61a (Wellford, J., concurring). Those problems worsen significantly when the complaint is recast to bring it in line with the facts as they actually developed. Surely, a federal court could not "adjudicate" a lawsuit by exposure-only plaintiffs who sought only the court-ordered imposition on themselves and other exposure-only persons of an alternative dispute resolution system not authorized by any law. Under such circumstances, there would be no actual controversy between the named plaintiffs and the defendants; there could be no basis for finding that the named plaintiffs adequately represented people whose

needs and wishes were entirely unknown and, indeed, unknowable; and no one would suggest that the amount in controversy (if there were a controversy) even approached $50,000 for each of the named plaintiffs, let alone for each member of the class. Yet that is, in essence, what the settling parties seek here.

In fact, the situation presents a greater deviation from the norm than that. This suit is, in effect, an action for a declaratory judgment by the CCR defendants. It asks for a judicial stamp-of-approval on an agreement that will allow the CCR defendants to escape from the tort system into a private realm created by the settlement, with its own applicable law (JA 80), case flow procedures (JA 77-79), and limitations on monetary recovery (JA 110). Under it, the CCR defendants themselves process the claims and, within wide ranges, make unreviewable decisions on the amount that each eligible claimant will receive. JA 81. An affront to *Erie* and the principles of federalism on which it is built, this extra-judicial scheme is binding on all potential CCR claimants, unless they opted out in a narrow window before almost any of them knew enough to make an informed decision. Although formally a suit between real plaintiffs and defendants, this "case" is, in practical effect, a "reverse" declaratory judgment action, by which CCR has sought to adjust all of its unaccrued asbestos liabilities. As such, there is no Article III case or controversy. *See Keene Corp. v. Fiorelli*, 14 F.3d 726, 730-33 (2d Cir. 1993).

II. The settlement's fundamental jurisdictional problem—its attempt to impose a legislative solution on uninjured persons—is also at the root of its Rule 23 and due process defects. The Third Circuit avoided reaching respondents' "powerful" due process attack on the settlement (Cert. App. 31a), and held that Rule 23(b)(3)'s requirement that a class action be "superior" to individual adjudication could not be met in this "futures" class action. Indeed, notifying all persons with present asbestos claims against CCR about the settlement would have been difficult enough, but the problem was greatly exacerbated both because virtually all of the "future" class members had no current illness, and many,

including two class representatives, did not know, until after they were recruited by class counsel, that they had been exposed to asbestos, let alone to CCR's products. JA 368, 380. Even those who realized that they might be part of the class and who fully understood the voluminous notice materials, faced an almost impossible choice: The settlement provides relief for some, but not all, of the asbestos-related conditions for which plaintiffs had been recovering damages by settlement or judgment through the tort system. Not knowing what illness they might develop in the future, or what their personal circumstances might be at that time, the choice of staying in or opting out was no more rational than the flip of a coin. As the court of appeals noted, in addition to these notice problems, the lack of information about the "futures" class made adequate representation under Rule 23(a)(4) impossible, because the class representatives could not possibly advocate the interests of persons whose circumstances were not only unknown, but unknowable. Cert. App. 50a.

ARGUMENT

Respondents have grave concerns about the fairness of the settlement and the manner in which it was negotiated. But regardless of those concerns, and despite the allure of settlement as a method of unclogging dockets or alleviating an alleged social problem, there is a basic flaw in petitioners' efforts: Petitioners have gone to the wrong place to seek an end to what they apparently believe is their long asbestos nightmare. There is another place—a proper place—where CCR might obtain the result it sought in the district court. Congress has the power, but not always the political will, to mandate prospective solutions to perceived problems such as those sought to be avoided by the settlement here. Because the district court acted in contravention of the limited powers of the federal judiciary, and of the Rule 23 rights of persons who know little of what has occurred here, the decision of the court of appeals should be affirmed.

In the pages that follow, respondents focus initially on two reasons why the district court did not have subject-matter jurisdiction: the failure to satisfy 28 U.S.C. 1332's amount-in-controversy requirement and the lack of an Article III "case" or "controversy." We then turn to Rule 23 and explain that the court of appeals' decision was correct, concentrating on the Rule's "superiority" and "adequacy of representation" requirements.

I. THE RULING BELOW SHOULD BE AFFIRMED BECAUSE THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION.

The Third Circuit expressed "serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction over the absent class members" (Cert. App. 19a), but rested its decision solely on Rule 23 grounds. Like concurring Judge Wellford, this Court should first consider the question of subject-matter jurisdiction because it has an obligation to "satisfy itself not only of its own jurisdiction but also that of the lower courts in a cause under review. ... [I]f the record discloses that the lower court was without jurisdiction this court will notice the defect, [even where] the parties make no contention concerning it." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)(citation omitted). In such a case, this Court has "jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Id.* (citation omitted).

The Court's duty to resolve the jurisdictional questions is of great significance here because of the district court's injunction, which, for more than two years, has barred every class member from maintaining a personal-injury suit against any of the 20 defendants, making it difficult, if not impossible, to challenge jurisdiction by collateral attack. Therefore, if the Court were to remand this case without considering subject-matter jurisdiction, the class members would continue to be

burdened by a potentially unlawful anti-suit injunction until the jurisdictional issues were resolved.

A. Section 1332's Amount-In-Controversy Requirement Was Not Satisfied.

When class certification is sought under Rule 23(b)(3), the representative plaintiffs must show that the claims of each member of the class individually exceed the jurisdictional amount. *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973). If the plaintiffs' jurisdictional allegations have been made in good faith, "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938).

The complaint alleges that the exposure-only named plaintiffs—Robert Georgine, Ambrose Vogt, Ty Annas, and Timothy Murphy—and every one of the millions of uninjured absent class members they purport to represent, are entitled to recover more than $50,000 on two similar claims of negligent infliction of emotional distress and enhanced risk of future condition (hereafter "fear claims"), as well as on a claim for medical monitoring. They make this allegation even though, by their own admission, they have not suffered any asbestos-related disease, nor do their x-rays show any asbestos-related abnormality, such as pleural plaques. *See, e.g.*, Complaint, ¶ 6, JA 6-7. Because none of the named plaintiffs, nor the exposure-only class members whom they purport to represent, was, at the time the suit was filed, seeking *any* money damages from the CCR defendants, they did not properly invoke the district court's jurisdiction under 28 U.S.C. 1332.

1. The Testimonial Evidence Demonstrates That Jurisdiction Was Lacking Over The Exposure-Only Claims. This Court has demanded that, at least when "challenged by his adversary in any appropriate manner," the party claiming the requisite amount in controversy must meet the challenge with "competent proof" by a "preponderance of evidence." *See McNutt v. GM Acceptance Corp.*, 298 U.S. 178, 189 (1936).

Far from providing any such proof, the representative plaintiffs' own testimony establishes that the amount-in-controversy requirement has not been met. *See* 1 *Moore's Federal Practice* ¶ 0.92[4] & cases cited therein, p. 855 (2d ed. 1994)(depositions and other oral testimony constitute appropriate evidence on amount-in-controversy questions). We now review key portions of the testimony of each exposure-only named plaintiff.[3]

Lead plaintiff Robert Georgine testified in court that he was not seeking money damages from the defendants then, nor at the time that he became a class representative (JA 749-50), because "I'm not impaired, and I have no damage that I know of that's caused by asbestos." JA 755, App. 1a; see also JA 449-50, App. 1a (making same point at deposition). When asked about the specific claims for relief, Mr. Georgine said that he had never suffered any emotional distress or other psychological injury from his asbestos exposure or needed any medical monitoring. JA 450, App. 1a-2a.

Plaintiff Vogt testified repeatedly that he had never sought any money damages and did not believe that the petitioners owed him any money because he was not sick. JA 395, 398, 678, App. 2a-3a.

Ty Annas' testimony was, if anything, more emphatic. Under questioning by his own attorney, he related his wife's death from mesothelioma in July 1992, and explained:

> I have nothing wrong with me. So therefore, I should not and will not seek any damages or actions. If my wife's breathing had not deteriorated, there would never had been a case [by her] against the asbestos companies.

JA 686, App. 3a. And on cross-examination, Mr. Annas bolstered his prior testimony (JA 691, App. 3a-4a):

[3] For convenience, the named plaintiffs' testimony relevant to subject matter jurisdiction is contained in an appendix to this Brief ("App.").

> Q: At deposition you testified that as of January 15, 1993 that you hadn't authorized anybody to sue for money for yourself because of your asbestos exposure, is that right?
> A: That's right.
> Q: And that is correct today?
> A: Yes, sir.[4]

Finally, plaintiff Timothy Murphy testified repeatedly that, since he was not injured, he was not seeking money damages from the CCR defendants. After receiving a medical report stating that he had no asbestos-related injuries, "[i]t never crossed [his] mind" to sue anyone, but he was recruited as a named plaintiff after an attorney told him that he "fit the profile of someone who was occupationally exposed to asbestos for

[4] In addition, Mr. Annas testified that, as a class representative, he had no intention of seeking money damages for anyone other than those who have asbestos-related physical impairments, making it clear that neither he, nor the class members that he seeks to represent, had any current money damages claim for emotional distress or medical monitoring (JA 694, App. 4a):

> I don't believe if there is [sic] impairment that anyone needs to be trying to collect money. ... People that are not impaired [who are trying to collect money] are exactly like those on the welfare system. ...

Mr. Annas continued (JA 694-95, App. 4a):

> Q: — you then believe that people who have pleural plaques should receive no compensation whatsoever, and that was your intent in entering into this agreement, correct? ... [objection overruled]...
> A: If they are not impaired.
> Q: If they're not impaired they should receive no compensation whatsoever?
> A: That's my feelings.

See also JA 357 (representative plaintiff Anna Baumgartner testifying that unimpaired individuals should not be compensated by anyone).

over a long period of time and that I could help him [the attorney] in their litigation." 3d Cir. Jt. App. 1122-23, App. 6a. Mr. Murphy testified that he had no idea that the complaint purported to seek money damages on his behalf, that the CCR defendants did not owe him anything, and that he was not claiming money damages or injuries of any kind and would only do so if he contracted an asbestos-related disease. 3d Cir. Jt. App. 1124-25, App. 6a-7a; *see also* Raver Dep., JA 375-76, App. 7a (named plaintiff who "didn't want any money" from CCR before suit was filed and "still do[esn't] want any money").

The foregoing testimony demonstrates that none of the representative plaintiffs wanted any recovery from the CCR defendants on the date that the complaint was filed. We recognize that a negotiated settlement that results in a recovery of less than the jurisdictional amount does not, by itself, defeat jurisdiction. *See* 1 *Moore's Federal Practice* ¶ 0.91[3], p. 824 (2d ed. 1994). Nor does the fact that the complaint relies on non-specific claims of unliquidated damages to meet the amount-in-controversy requirement warrant dismissal, as long as such claims are not implausible or lacking in good faith. But here, where the exposure-only claims were concededly pled solely as the vehicle for establishing a future claims procedure, and those claims were abandoned as part of a settlement that provided no current money damages, those facts are highly probative, if not dispositive, of a lack of jurisdiction. *Cf. Jones v. Knox Exploration Corp.*, 2 F.3d 181, 183 (6th Cir. 1993)(case must be dismissed where plaintiff concedes that amount in controversy is for less than jurisdictional amount); *see also Tongkook America, Inc. v. Shipton Sportswear Co.*, 14 F.3d 781 (2d Cir. 1994).

At bottom, if the amount-in-controversy requirement is to mean anything at all, a plaintiff must at least desire some of the relief requested in the complaint at the time the complaint is filed. Here, the complaint is a stunning example of parties—or more properly put, the CCR defendants and the plaintiffs' attorneys—colluding to establish jurisdiction under § 1332. *See St. Paul Mercury*, 303 U.S. at 290. Despite the allegations in

the complaint, every named exposure-only plaintiff did not want any recovery for negligent infliction of emotional distress, increased risk of a future condition, medical monitoring, or any other current asbestos-related injury.

Indeed, CCR conceded the dispositive factual issue below: "[A]lthough some of the named [exposure-only] plaintiffs had not incurred monetary loss at the time the complaint was filed, they testified that they were seeking relief in the form of the comprehensive, insurance-like benefits of the settlement...." CCR 3d Cir. Br. 20.[5] This is the clearest admission of what this case is *not* about: recovering money damages now. Indeed, if anything, it is a significant understatement since *all*, not just "some," of the exposure-only named plaintiffs had not yet incurred any monetary loss and, therefore, sought no money damages.

CCR seeks to establish the requisite jurisdictional amount by relying on the purported *future* value of the settlement as a whole to those who *may* benefit from it, *not* on the present value of each of the class members' present claims for relief. But it has been "well settled" for over a century that the amount in controversy may not include any "contingent loss either one of the parties may sustain by the probative effect of the judgment, however certain it may be that such loss will occur." *New England Mortgage Security Co. v. Gay*, 145 U.S. 123, 130 (1892). Rather, it is the value of the claims in the complaint that control, *St. Paul Mercury*, 303 U.S. at 288-89, and, therefore, the plaintiffs' testimony—which repudiates those claims—negates jurisdiction in this case. The settling parties' contention that the plaintiffs made good-faith allegations for more than the jurisdictional amount fails, and, on this basis alone, the district court should have dismissed the complaint. *Id.* at 289.

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[5] *See also* CCR 3d Cir. Br. 65 (CCR concedes that exposure-only class representatives "are not seeking and will not receive any money damages at this time, but instead will receive the insurance-like package of benefits...").

2. The Causes of Action Pled Do Not Establish Jurisdiction Under § 1332. The named plaintiffs' testimony—that only individuals with bona fide asbestos-related injuries, not mere asbestos exposure, should obtain compensation—is consistent with the applicable substantive law in most jurisdictions. The great weight of authority rejects the exposure-only plaintiffs' causes of action, in the absence of a physical injury.[6] Therefore, even if the plaintiffs had never conceded that they did not want damages, the exposure-only claims had, for the most part, no legal basis, and thus would not satisfy the amount-in-controversy requirement. Because fear of disease from exposure to asbestos, or harm from the future risk of a product alone, is not actionable, neither can form the basis of a good-faith claim for damages, let alone support a claim for more than $50,000 for each member of the class.

The district court held that even where no cause of action exists, it "must still be counted for jurisdictional purposes." JA 209. But there is no authority for that proposition, which is not surprising, since a plaintiff cannot possibly plead in "good faith" a claim foreclosed by applicable substantive law. To the contrary, consistent with this Court's view that it is sometimes necessary to decide whether a cause of action exists to determine whether jurisdiction exists, *Land v. Dollar*, 330 U.S.

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[6] *See, e.g., Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 39 (4th Cir.)(rejecting exposure-only causes of action under West Virginia and Virginia law on basis of general American tort principles), *cert. denied*, 112 S. Ct. 876 (1992); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.)("subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law"), *cert. denied*, 474 U.S. 864 (1985); *Deleski v. Raymark Indus., Inc.*, 819 F.2d 377, 380-81 (3d Cir. 1987)(no damages allowed for fear or risk of asbestos-related injury in absence of current physical harm); *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996); *see also Bowling v. Pfizer*, 143 F.R.D. 141, 162 (S.D. Ohio 1992)(reviewing cases in numerous jurisdictions where courts refuse to recognize claim for fear of product failure in the absence of physical harm).

731, 735, 739 (1947), the courts have repeatedly held that allegations that are not actionable under governing law do *not* count for jurisdictional purposes.[7]

Moreover, under this Court's decision in *Zahn*, *every* class member must have the requisite amount in controversy. 414 U.S. at 300. To make that determination, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-23 (1985), requires that each class member's claim be assessed under the law of a jurisdiction with which he or she has had some contact relevant to the claims for relief. Thus, as a prerequisite to establishing jurisdiction over the entire class, the plaintiffs would have to show that at least one exposure-only cause of action is valid in every state, not merely, as CCR states (CCR Br. 7 n.3), that *some* causes of action exist in *some* jurisdictions.[8]

Further, even if exposure-only causes of action were cognizable in every jurisdiction, the allegations of the absent class members here would still be insufficient. As noted earlier, under this Court's decision in *McNutt*, once the complaint's amount-in-controversy allegations are challenged,

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[7] *See, e.g., Larkin v. Brown*, 41 F.3d 387, 389 (8th Cir. 1994); *Packard v. Provident Bank*, 994 F.2d 1039 (3rd Cir.)(in class action, because compensatory claims were below jurisdictional amount, and Pennsylvania law would not recognize punitive damage claims under relevant circumstances, amount-in-controversy requirement was not satisfied), *cert. denied*, 114 S. Ct. 440 (1993); *Morris v. Hotel Riviera, Inc.*, 704 F.2d 1113, 1115 (9th Cir. 1983)(because there was no cause of action, jurisdictional amount was not met); *Kahal v. J.W. Wilson & Associates, Inc.*, 673 F.2d 547, 548-49 (D.C. Cir. 1982).

[8] Even the cases upon which CCR relies would not establish a cause of action for a large proportion, if not all, of the class members. *See, e.g., Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993)(cited by CCR as establishing fear-of-cancer cause of action, but actually holding that such claim may generally go forward only if can be shown more likely than not that cancer will develop from exposure); *Hansen v. Mountain Fuel Supply*, 858 P.2d 970 (Utah 1993)(cited by CCR as establishing medical monitoring cause of action, but failing to point out that plaintiff must show that monitoring will alter course of the disease).

the plaintiff must come forward with specific facts to support jurisdiction. *See also, e.g., NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 237 (7th Cir. 1995); *In re School Asbestos Litig.*, 921 F.2d 1310, 1316 (3d Cir. 1990), *cert. denied*, 499 U.S. 476 (1991); *Amen v. City of Dearborn*, 532 F.2d 554, 560 (6th Cir. 1976). However, having pled *no* facts nor presented *any* evidence on the emotional distress suffered by the class members at the hands of the CCR defendants, or the level of fear of disease suffered by the class, *see NLFC*, 45 F.3d at 237, class counsel was in no position to make a *good-faith* allegation that these claims exceeded the jurisdictional amount. Consistent with *McNutt*, the lower courts require dismissal of diversity claims for emotional distress and pain and suffering, when, as here, they are conclusory, without evidentiary support, or unaccompanied by claims of significant liquidated damages.[9]

Common sense confirms why class counsel were unable to present any plausible evidence regarding the emotional distress of the class. The exposure-only class, like its four representative plaintiffs whose testimony is discussed above, is composed of persons who are not currently afflicted with disease. Even assuming that each class member knows that he or she has been exposed to asbestos, it is implausible to suggest that each of them—consisting of everyone in the United States who has been occupationally exposed to CCR asbestos, plus their spouses, relatives, and other household members—is currently suffering from non-physical harm in an amount exceeding $50,000. Rather, many absent class members, despite knowledge of their asbestos exposure, do not suffer from emotional distress or any other present harm. Indeed, the only absent class members to address the complaint's allegations of emotional distress expressly renounced those allegations

[9] *See, e.g., Larkin*, 41 F.3d at 388; *Rosenboro v. Kim*, 994 F.2d 13, 17 (D.C. Cir. 1993); *Christensen v. Northwest Airlines, Inc.*, 633 F.2d 529, 530-31 & n.3 (9th Cir. 1980); *Gill v. Allstate Ins. Co.*, 458 F.2d 577, 579 (6th Cir. 1972); *Nelson v. Keefer*, 451 F.2d 289, 296 (3d Cir. 1971).

under oath. *See* JA 137 (exposure-only class member suffering no emotional distress); JA 139 (same).[10]

Moreover, the Court should not indulge the fantastic presumption that all of the class members are aware of, let alone suffer emotional distress from, their asbestos exposure. As the Third Circuit noted (Cert. App. 55a), large numbers of class members know little or nothing of their occupational exposure to asbestos, an airborne toxin; therefore, they cannot possibly suffer any present emotional distress. *See, e.g.*, Winbun Dep., JA 368 (did not know anything about asbestos exposure until husband's mesothelioma revealed on autopsy, and, as far as she knew, husband had no knowledge either). Indeed, it is precisely because the class consists largely of uninjured and/or unknowing class members that the complaint is bereft of *any* facts specifying the pain and suffering or emotional harm suffered by the class. See JA 5, 6-7, 8-10, 16, 18, 19.

Perhaps recognizing that the fear claims were a wholly implausible basis for jurisdiction, the district court held that the claims for medical monitoring met the $50,000 requirement. But even if those claims were legally valid in all 50 states, that would not overcome the fact that each plaintiff who was questioned about medical monitoring indicated that he had no such damages or disclaimed any intention to seek such relief. *See* JA 370, 375-76, 393-94, 679-80, 3d Cir Jt. App. 1129, App. 5a, 6a, 7a-8a.

To be sure, unlike their other claims, which generally have no legal basis, the absent class' "claim" for medical monitoring, if it had been alleged in good faith, might be

[10] The same is true for the named plaintiffs. Mr. Annas testified that he had never instructed a lawyer to seek compensation for mental anguish (JA 421, App. 5a), even though the complaint purports to do that on his behalf. *See* JA 18. Mr. Murphy testified that he had never sought payment from the defendants for mental anguish or distress caused by his exposure to asbestos. 3d Cir. Jt. App. 1123, App. 6a. Mr. Georgine stated that he has never suffered from any psychological problems or emotional distress from his asbestos exposure. JA 450, App. 2a.

cognizable for some class members. *See Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 852 (3d Cir. 1990), *cert. denied*, 499 U.S. 961 (1991). *But see Fried v. Sungard Recovery Servs. Inc.*, 936 F. Supp. 310, 311 (E.D. Pa 1996). However, in this nationwide class action it would be necessary to show that medical monitoring is cognizable as a general matter, and in some jurisdictions that claim is foreclosed for exposure-only plaintiffs. *See, e.g., Ball*, 958 F.2d at 39 (no medical monitoring cause of action under West Virginia and Virginia law).

And even if one indulges in the unwarranted assumption that each class member needs to undergo medical monitoring and that medical monitoring is cognizable in all jurisdictions, the unrebutted evidence shows that the claim would entitle each class member to no more than an initial pulmonary function test, physical exam, patient history, and chest x-ray, valued at no more than $500, with annual chest x-rays thereafter. *See* Aff. of Dr. Thomas Lee Kurt, ¶¶ 4-5, JA 135. Thus, while the monitoring costs might amount to several thousand dollars over a particular class member's lifetime (discounted to present value), medical monitoring is the kind of small, liquidated claim that does not suffice to meet the $50,000 jurisdictional-amount requirement.[11]

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[11] *See Rosenboro*, 994 F.2d 13; *Nelson*, 451 F.2d at 297. Recognizing that the medical monitoring claim fell far short of the $50,000 line, CCR claimed for the first time in its Third Circuit brief that the claim could be aggregated as a common, undivided right to "research and other medical activities." CCR 3d Cir. Br. 61. But after respondents pointed out that CCR's argument was an end-run around this Court's anti-aggregation decisions in *Zahn* and *Snyder v. Harris*, 394 U.S. 332 (1969), and was belied by the complaint, which asked for individual medical-monitoring damages based on "each and every Defendant[s']" failure to warn each plaintiff (JA 19), CCR conceded at oral argument that no such aggregation was pled. 3d Cir Arg. Tr. at 218. Indeed, the case law generally affirms that a "claim for medical surveillance is simply a claim for future damages." *Ball*, 958 F.2d at 39; *see also Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 387 (D. Colo. (continued...)

CCR did not dispute below that the compensatory aspect of a valid medical monitoring claim is only a small fraction of $50,000, but argued that an award of punitive damages is not foreclosed, citing cases in which plaintiffs have *asserted* such claims, but citing no case in which punitive damages actually have been *awarded* incident to a medical monitoring judgment. This Court should reject the incredible notion that each class member, in every jurisdiction (even in those that have rejected the claim entirely), has pled a good-faith medical monitoring punitive damages claim worth more than $50,000. *Accord Sellers v. O'Connell*, 701 F.2d 575, 579 (6th Cir. 1983)(disregarding punitive damages allegation to augment amount in controversy because "appellant has cited no case" in which punitive damages were awarded under relevant circumstances). That would be quite a presumption in any case, but especially here where the named plaintiffs specifically stated that they had never sought, and did not want, medical monitoring or any damages at all, let alone punitive damages.[12]

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[11](...continued)
1993)("many decisions classify medical monitoring costs as an item of damage," citing cases).

[12] In finding jurisdiction, the district court erroneously relied on punitive damages awards in cases involving asbestos disease claims. JA 213. Those cases are irrelevant here, because punitive damages have *never* been awarded in an exposure-only case, where there generally is no cause of action at all. In addition, punitive awards are unavailable to class members in states which do not permit such awards under any circumstances. *See* Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Vill. L. Rev. 363, 367 & n.15, 369 n.30 (1994)(reviewing law in five states where punitive damages are generally prohibited). Even in jurisdictions where punitive damages are available in some cases, the court must conduct an inquiry into whether, as a matter of each state's law, class members would have a plausible punitive damages claim on the particular facts alleged in the complaint. *See, e.g., Missouri v. Western Surety Co.*, 51 F.3d 170, 174-75 (8th Cir. 1995); *Larkin*, 41 F.3d at 389; *Packard*, 994 F.2d at 1046-50; *Givens v. W.T. Grant Co.*, 457 F.2d 612, 614 (2d Cir. 1972).

Finally, the notion that the plaintiff class can rely on unsubstantiated claims of punitive damages—whether as adjuncts to the medical monitoring claim or to the fear claims—is at odds with the Congressionally created scheme. Congress enacted § 1332's monetary limits to ensure that only some diversity cases would come to federal court. It has repeatedly raised the minimum jurisdictional amount—most recently to $75,000, Pub. L. 104-317, § 205, 110 Stat. 3850 (1996)—so that its original purposes would not be undermined. *See* H.R. Rep. No. 889, 100th Cong., 2d Sess. 45, *reprinted in* 1988 U.S.C.C.A.N. 6005-06. This policy should not, of course, be "thwarted by the simple expedient of inflating the complaint's *ad damnum* clause." *Nelson*, 451 F.2d at 294. But if, as CCR maintained below, one can gain entry to the federal courthouse simply by adding a claim for punitive damages in any case, then Congress' periodic reevaluation of § 1332 would be for naught. In sum, even if one were to ignore the plaintiffs' testimony, the class claims do not suffice to establish jurisdiction under § 1332.[13]

[13] A few courts have held that the supplemental jurisdiction statute, 28 U.S.C. 1367, overrules *Zahn* and the requirement that each absent class member have the requisite amount in controversy. *See In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995). That is a decidedly minority view, *see id.* at 528 n.8 (collecting cases), and is at odds with § 1367's language and purposes, as its drafters have noted. *See* Mengler, Burbank, & Rowe, *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 Judicature 213, 214-15 (1991); *see also* H.R. Rep. No. 734, 101st Cong., 2d Sess. 29, *reprinted in* 1990 U.S.C.C.A.N. 6879 (indicating that *Zahn* remains good law). In any event, the Court need not reach this question here because, as explained above, none of the named plaintiffs have the requisite amount in controversy, a requirement that remains regardless of the reach of § 1367. *See Snyder v. Harris*, 394 U.S. 332.

B. The Complaint And Simultaneously-Filed Settlement Did Not Present An Article III Case Or Controversy.

The district court's exercise of jurisdiction was also inconsistent with Article III's case-or-controversy requirement, particularly the prohibition against feigned or collusive cases. Under the proposed settlement, all the claims alleged in the simultaneously-filed complaint were extinguished in favor of an alternative dispute system that will resolve asbestos claims if and when a class member manifests certain symptoms. Class members have not yet sustained (and likely will never sustain) such future injuries, and all parties concede that they have no standing to assert them at this time. *See, e.g., Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). In short, the absence of any legal nexus between the claims purportedly sought by the exposure-only class, and the future "relief" agreed to on their behalf, shows that there never was a case or controversy to be decided by the district court.

The case-or-controversy requirement "limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). The Article III problem arose initially from the fact that this suit, from its very inception, concerned "adversaries" who had an identical goal in mind. When both parties desire the same result, there is no case or controversy. *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971). In *Moore*, the plaintiffs brought an action asking for a judicial determination that a state anti-busing statute was unconstitutional. Because the state's Attorney General agreed, the Court found there was no case or controversy and dismissed the action. Similarly, here, the record demonstrates that the settling parties agreed before the case was filed that the fear and medical monitoring claims alleged by the exposure-only class were to serve only as a jurisdictional gimmick to open the door to the federal courthouse. Once inside, the settling parties

would then ask for the court's blessing on their agreement to resolve future tort claims for hundreds of thousands of persons, wholly outside the court system. This collusive effort at invoking federal jurisdiction should have been rejected by the district court. *See also United States v. Johnson*, 319 U.S. 302 (1943); *Muskrat v. United States*, 219 U.S. 346 (1911).

The district court acknowledged that there is no case or controversy "if two litigants commence a suit with the same goals in mind," but that a "different case arises when litigants *begin* a suit as adversaries." JA 218 (quoting *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 290 (E.D. Pa. 1972)). But even this language would negate jurisdiction here, and so the court relied not on the state of affairs when the case commenced, but on an assumption that, at some point prior to the filing of the suit, there had been the requisite adversity. At that time, the court speculated, the interests of the plaintiffs and CCR were in opposition because that had been the case for *other* asbestos victims "throughout the twenty-year history of asbestos litigation." JA 218.

But a case or controversy cannot be supplied by prior adversity between the same, let alone other, parties arising some time before the filing of the case, which had surely been true in *Moore*. Nor can that adversity be supplied simply by reference to a formal complaint. Instead, Article III compels the Court to look beyond the pleadings to the actual state of affairs when the case is filed in deciding whether the parties' interests are sufficiently adverse:

> [W]e are not bound to accept as true all that is alleged on the face of the complaint and admitted, technically, by demurrer, any more than the Court is bound by stipulation of the parties. [citation omitted] ... Formal agreement between parties that collides with plausibility is too fragile a foundation for indulging in ... adjudication.

Poe v. Ullman, 367 U.S. 497, 501 (1961). Here, the complaint alleges a feigned controversy with respect to the fear and

medical monitoring claims, and, quite understandably, the simultaneously-filed settlement grants the exposure-only plaintiffs no relief for those claims. For example, under the settlement, even class members who pay significant amounts of their own money for medical monitoring, but who never contract an asbestos-related disease, will receive no compensation for the medical monitoring claim that was alleged in the complaint. Contrary to the allegations of the settling parties, therefore, there is no controversy which would lead to the "honest and actual antagonistic assertion of [the] rights" alleged in the complaint. *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 344 (1892).

Furthermore, in *Moore*, the complaint at least sought relief of a kind that a federal court is capable of conferring. If jurisdiction was lacking there, *see also Granfield v. Catholic Univ. of America*, 530 F.2d 1035 (D.C. Cir.), *cert. denied*, 429 U.S. 821 (1976); *Brown v. Watkins Motor Line*, 596 F.2d 129, 131-32 (5th Cir. 1979), then surely there is none here, where the complaint has no relation to relief actually sought, and the relief actually sought—the imposition of a futures claims procedure—is not within the court's competence to award. Put another way, class counsel and CCR put the fear and medical monitoring claims before the district court not as dedicated advocates of those claims, but for the sole purpose of seeking the district court's judicial approval of a settlement that it would not otherwise be empowered to approve. In this context, class counsel and the named plaintiffs will not be (and, as the settlement makes plain, have not been) aggressive advocates for the supposed rights of the exposure-only class asserted in the complaint (*i.e.*, medical monitoring and other claims not compensable under the settlement). In the absence of this adversity, the district court lacked jurisdiction over the claims of the exposure-only class.

Recognizing that "this class action was settled before the complaint was filed" (JA 218) and that it "lacks a dispute as to the remedy" (JA 222), the district court relied on cases in which the government entered consent decrees simultaneously with the filing of complaints. JA 220 (citing, *e.g.*, *SEC v.*

Randolph, 736 F.2d 525, 528 (9th Cir. 1984)). In so ruling, the district court erred for three distinct, but related, reasons which, in fact, demonstrate why Article III jurisdiction is lacking here.

First, the consent decree cases posed a real threat to the defendants because they involved viable causes of action that presumably could have, and would have, been tried had negotiations failed or the settlement not been approved. *See, e.g., Randolph*, 736 F.2d at 527. Here, the claims alleged posed no such legal threat, the plaintiffs had no intention of pursuing them, and the defendants conceded that those claims could not have been litigated on a class basis. JA 131. To be blunt, this was a fake case from start to finish, and the complaint was simply a ruse to provide access to a federal forum.

The settling parties never seriously contested this point until they claimed in the Third Circuit that "there is no way to predict the outcome[] ... of this case if the settlement fails" and that there is "no support for appellants' assertion that the exposure-only plaintiffs never intended to litigate their claims if the settlement were disapproved." CCR 3d Cir Br. 38 n.19, 39. But in this Court CCR has effectively conceded the falsity of its prior assertions and acknowledged that the complaint sets out "hypothetical litigation that assuredly *never* will occur." CCR Br. 19. In any event, as explained above, the exposure-only plaintiffs themselves stated that they had no desire to seek any present relief, including particularly a medical monitoring remedy and damages for asbestos-related fear. Their willingness to abandon such claims is not surprising since CCR has been unable to point to a single case in its entire history in which it has settled (or even defended against) an exposure-only claim, nor has class counsel claimed that they have ever filed an exposure-only claim against any defendant. *See* 3d Cir. Jt. App. 1202-03 (CCR's chief operating officer testified that he knew of neither any exposure-only claim ever settled by CCR nor any such claim ever asserted by class counsel).

Moreover, class counsel agreed with CCR shortly before the filing of the class action complaint that they would not file

suit on behalf of any asbestos client against any CCR defendant unless certain medical criteria were met. *See, e.g.*, JA 534-35. These agreements were intended primarily to bar class counsel from representing clients with so-called "pleural claims"—claims involving asbestos-related lung abnormalities but little or no functional impairment, but for which thousands of prior claimants had received significant compensation (JA 530-34, 770-71); *a fortiori*, the agreements barred them from representing exposure-only class members. There is, therefore, no doubt that the complaint presented a feigned controversy, containing causes of action that class counsel never intended to litigate on January 15, 1993, or at any time thereafter.[14]

Second, in the cases relied on by the district court, the relief sought in the complaint was substantially the same relief accorded in the settlement. *Randolph*, 736 F.2d at 529 (court notes that only one of many legally available remedies was arguably not incorporated into consent decree); *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826 (5th Cir. 1975); *Colorado Environmental Coalition v. Romer*, 796 F. Supp. 457, 459 (D. Colo. 1992)("Plaintiff's complaint set out two specific requests for relief, both of which were achieved precisely and completely by the consent decree ..."). This nexus between the relief sought and the relief obtained underscores that the complaints in the consent decree cases involved real controversies between the parties. *See Baker v. Carr*, 369 U.S.

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[14] The agreements restricting class counsel's future representation of asbestos plaintiffs were amended after the American Bar Association's Committee on Professional Responsibility found them to violate Rule 5.6(b) of the Model Rules of Professional Conduct. *See* ABA Formal Opin. No. 93-371. The amended versions, entered into *after* the class action complaint and settlement were filed, state that, absent "some unforeseen circumstance," class counsel will "recommend" to their future clients that the clients defer their personal-injury claims until certain medical criteria are met. *E.g.*, JA 559. For a detailed explanation of the settling parties' and their expert witnesses' ever-changing interpretations of the restrictions on class counsel's future practice, see Koniak, *Feasting While The Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045, 1128-37 (1995).

186, 204 (1962). Here, on the other hand, CCR sought out the plaintiffs' lawyers in order that it might be "sued" for relief that class counsel's clients had no intention of recovering and that bore no relationship whatsoever to the relief provided in the settlement.

In the court below, CCR responded that "the exposure-only plaintiffs are getting substantial relief in settlement of the claims made in the complaint." CCR 3d Cir Br. 38 n.19. If that statement is not false, it is at least highly misleading. Even assuming that the settlement's claims procedure provides "substantial relief," especially when compared to what the tort system would provide, whatever future "relief" there may be has no relationship to the claims in the complaint. Only in a world of make-believe can one say that a claims procedure that provides no payments for the fear claims and no medical monitoring was "in settlement of" the complaint.[15]

Finally, the consent decree cases differ from this case in another highly relevant respect: They bargain away only the government's rights and specifically preserve the rights of individuals harmed by the defendant's conduct, *i.e.*, they do *not* purport to be binding on absent members of the public. *See, e.g., Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1003 (3d Cir. 1976)(specifically noting that individuals' rights to sue are preserved under consent decree). Here, the overriding purpose of the settlement was to bind the absent class

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[15] This Court's pendent jurisdiction jurisprudence further demonstrates that jurisdiction is lacking when parties fabricate a controversy solely to gain access to a federal forum. Under *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966), when a plaintiff asserts an insubstantial federal claim for the purpose of attaining a federal forum for a pendent state claim, the district court should decline to exercise jurisdiction over the state claim. *See also* 28 U.S.C. 1367(c)(2), (3), and (4). Similarly, here, when the complaint and settlement were filed, the only claims that the exposure-only plaintiffs arguably had standing to assert—the fear and medical monitoring claims—were not bona fide claims, but were asserted solely so that the settling parties could gain access to a federal forum.

members, not the settling parties, so that CCR will no longer have to defend asbestos cases in court.

CCR responded below that, since this case was certified as a class action—the propriety of which we take up in Part II *infra*—the named plaintiffs here did not improperly negotiate away the rights of others. That response begs the question. It is true that named plaintiffs may, in accordance with Rule 23's safeguards, make binding decisions for others. But the fact that class counsel have bargained away the fear and medical monitoring claims for an absentee class distinguishes this case from the consent decree cases and other bi-polar litigation, where, because the rights of others are not compromised, it can generally be presumed that the parties are resolving an actual controversy between themselves. Thus, if class counsel had entered into this very settlement for the purpose of redressing only the claims of their actual current clients, *i.e.*, the 14,000 clients whose disease claims they settled for cash, this case would more closely resemble the consent decree cases. By contrast, however, where the parties concede that CCR sought out class counsel for the purpose of establishing a private claims procedure to resolve only the *future* asbestos personal-injury claims of hundreds of thousands of unnamed and unknown individuals, the vicarious nature of the representation is further evidence of the absence of an Article III case or controversy between the plaintiff class and the CCR defendants.

II. THE THIRD CIRCUIT'S DECISION SHOULD BE AFFIRMED UNDER RULE 23 FOR LACK OF "SUPERIORITY" AND INADEQUACY OF REPRESENTATION.

The Third Circuit held that this class action met neither Rule 23(a)'s typicality and adequacy of representation prerequisites, nor Rule 23(b)(3)'s requirements that common questions predominate over individual questions and that the class action be superior to individual adjudications. Each of those rulings is independently sufficient to sustain the court of appeals' decision below. In this brief, we focus on

"superiority" and "adequacy of representation," but first we present several overall responses to the settling parties' briefs.

Although petitioners' question presented is crafted to evade the Third Circuit's multi-faceted ruling, it cannot do so. Even if, for instance, this Court holds that Rule 23(a)(2) "typicality" may be assessed *solely* through the lens of the settlement—as the settling parties urge—class certification would still be improper. The named exposure-only plaintiffs are, if anything, *more* atypical of the class when the settlement is considered than they are when their "claims" are considered from the perspective of the complaint. As the court of appeals held (Cert. App. 53a), because the settlement releases the future claims of class members whose injuries, desires, and even identities are unknown and unknowable, no class representative can be typical of the "futures" class.

That conclusion follows from *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 158-59 & n.13 (1982), an employment discrimination class action in which the Court held that a Mexican-American employee, who was denied a workplace *promotion*, was not typical of a class of Mexican-American job *applicants*. If the differences between the class representatives and the absentees in *Falcon* defeated typicality, then this case does not even remotely justify certification, where a handful of representatives purport to seek relief over a dizzying array of unlawful conduct under the laws of 50 jurisdictions, and claim to represent the victims of future injuries, whose circumstances are obviously unknowable. *See also East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403-05 (1977).

Similarly, the court of appeals' holding that "common questions" do not "predominate" over individual variations applies with equal force in the settlement and litigation contexts. In both situations, the *only* common issue is the class members' exposure to asbestos, and that is not a "question" at all, but a prerequisite to class membership; each class member's smoking history, level of exposure, disease, and amount of damages, not to mention differences in applicable law, are present in the future personal-injury causes of action released by the

settlement, just as they are in the exposure-only claims alleged in the complaint. To be sure, the settlement purports to resolve the thousands of vexing individual variations in the class members' claims by homogenizing them in the settlement's claims process. But to say, as does CCR (Br. at 42), that the end product itself satisfies Rule 23's carefully crafted criteria is to do more than simply take the settlement into account; rather, it is to permit settlement to override the Rule's certification criteria altogether and to treat Rule 23(e)'s fairness inquiry as a *surrogate* for class certification. *See* CCR Br. 43. That result is at odds with the Rule's overarching concern for protection of the absentees, among other reasons, because a fairness inquiry is not sufficient to protect the divergent subgroups in a complex class action nor to delve into the adequacy of counsel's negotiations. *See GM Trucks*, 55 F.3d at 796-77.[16]

The Court need not consider the Rule's purpose in rejecting petitioners' approach, however, because its language and structure do not permit Rule 23(e) to swallow-up the rest of the Rule. Rule 23(e) does not discuss the certification criteria, but says only that "[a] class action"—presumably the same "class action" referred to in Rule 23(b)—"shall not be ... compromised without the approval of the Court...." This language indicates that Rule 23(e) contemplates judicial review of settlements that independently meet the certification criteria and demonstrates that *all* "class actions," including settlement classes approved under Rule 23(e), must meet the requirements of Rules 23(a) and (b). Thus, the approval requirement of Rule 23(e) is plainly in addition to, rather than a substitute for, strict application of the certification criteria.

This reading of the Rule—that its commands are consecutive, not alternative—is confirmed by the logic of *Eisen*

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[16] Here, for instance, despite the exclusion of class counsel's individual clients from the class definition, the district court did not permit objectors to depose class counsel. This ruling was presumably premised on the district court's belief that a finding of fairness was a proper proxy for class certification findings. *See* Cert. App. 226a.

v. Carlisle and Jacquelin, 417 U.S. 156 (1974). There, the named plaintiffs argued that they should be excused from giving class members notice and opt-out rights under Rule 23(c)(2) because "adequate representation, rather than notice, is the touchstone of due process in a class action...." *Id.* at 176. "[T]his view has little to commend it," this Court held, because "Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided." *Id.*; *see also id.* at 176 n.13 (class members' opt-out rights also protected). So too here, petitioners may not pick and choose which portions of Rule 23 are applicable. Rather, as we show below with respect to the superiority and adequacy prongs of the Rule, the protections provided class members under Rules 23(a) and (b) serve functions for which Rule 23(e) does not provide an adequate substitute.[17]

A. This "Futures" Class Action Is Not Superior To Individual Adjudications When Class Members' Claims Accrue.

There are serious due process problems with any suit that attempts to bind a class of persons with respect to their future *in personam* damages claims. *See Shutts*, 472 U.S. at 810-13. We agree, however, with the Third Circuit that the due process issue need not be reached since, under Rule 23(b)(3)(A), this class action cannot be deemed "superior" to individual adjudications—or even to a more modest class action—commenced when the individuals sustain injuries giving rise to a claim for damages.

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[17] We believe that Rule 23's text permits the district court to consider a settlement's effect on case management, which is one aspect of "superiority." *See* Fed. R. Civ. P. 23(b)(3)(D). However, that factor—which would allow the court to take into account a settlement's effect on the purely mechanical difficulties of trying a complex class action—has no bearing here, where the case fails each of the Rule 23 requirements on which the court of appeals expressly ruled—typicality, adequacy of representation, predominance, and (other aspects of) superiority.

In cases involving bankruptcy and "limited-fund" certifications under Rule 23(b)(1)(B), it is arguably a practical necessity to provide for future claimants. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 341-49 (1976). But reliance on those cases would have no place here because, as the district court put it, "the assets of the defendants do not constitute a limited fund." Cert. App. 230a. To the contrary, the settling parties' financial expert testified that, over the first 10 years of the settlement, CCR's gross profits were projected at $133.8 billion, while the maximum payout under the settlement was $1.289 billion, 60% of which would be paid by insurance. *See* 3/15/94 Tr. at 88-89. Outside of the "limited fund" and bankruptcy contexts, the law generally bars certification of futures class actions.[18]

And for good reason. "[I]t was clearly understood [when Rule 23(b) was promulgated] in 1966 that no class member could possibly be bound to a judgment who was not given

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[18] *National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9, 17-18 (2d Cir. 1981); *Shults v. Champion Int'l Corp.*, 821 F. Supp. 520, 521-24 (E.D. Tenn. 1993); *Wajda v. Penn Mutual Life Ins. Co.*, 80 F.R.D. 303, 313 (E.D. Pa. 1978); *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974); *see also Schweitzer v. Reading Co.*, 758 F.2d 936, 943 (3d Cir.)(rejecting argument that "a person who had no inkling that years in the future he would be killed by a product produced by the debtor would be required to file a claim in the debtor's ... bankruptcy proceedings so as to preserve any rights that he might have in a future tort suit"), *cert. denied*, 474 U.S. 864 (1985); *Foster v. Bechtel Power Corp.*, 89 F.R.D. 624, 626-27 (E.D. Ark. 1981)(future plaintiffs cannot satisfy typicality, commonality, or adequacy of representation requirements); *Freeman v. Motor Convoy, Inc.*, 68 F.R.D. 196, 200 (N.D. Ga. 1975)(class action could not include future plaintiffs because "overbroad framing of the class may operate to deprive absent members of due process")(citing *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125-27 (5th Cir. 1969)(Godbold, J., concurring)); Note, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85 Colum. L. Rev. 397, 408 (1985)(certification of "futures" class violates due process because courts must apply Rule in a "factual vacuum," introducing "a substantial element of speculation, distortion, and confusion" into certification process).

actual notice of the proceeding and [was] in a position to exercise intelligently the choice to opt out." Carrington & Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Invalidity of Proposed Rule 23(b)(4)*, Ariz. L. Rev. (forthcoming 1997). Despite the formal right to opt out under Rule 23(c)(2), the problem here is that, because of a lack of information before an injury has been sustained, "persons might neglect to 'opt-out' of the class, and then discover some years in the future that they have contracted asbestosis, lung cancer or other pulmonary disease." *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974).

This Court has held that, in actions that are primarily for money damages, absent class members must receive, as a matter of due process, notice and an opportunity to opt out. *Shutts*, 472 U.S. at 813. The standard applied in *Shutts* was whether, at the time the absent class member is given notice, he or she is able to make an informed decision. *Id.* at 813. Whether viewed as a matter of due process, or Rule 23(b)(3) superiority, that standard was not met here for two distinct, but related, reasons.

First, without question, many of the class members received no notice at all. Of the seven representative plaintiffs who testified on the subject, *six* said that they did not see the publication notices which provided the crucial first-link in providing individual notice to the class.[19]

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[19] *See* JA 353-54, 362-63, 368-69, 373-74, 389-90, 397-98, 420-21, 693. The district court's statement that the class representatives obtained significant information from sources other than the notice materials is incorrect, as the testimony shows. For instance, the district court implied that plaintiff Kekrides learned about the settlement from her brother-in-law. Cert. App. 223a. But Kekrides simply said, in response to a question concerning whether she saw anything about the class action on TV, that "[i]t's my brother-in-law [who] see it on TV." JA 390. Indeed, the district court's "finding" (Cert. App. 222a) that some of the named representatives received "notice" because they were recruited as class representatives only underscores that class members who were *not* class representatives would likely be left in the dark.

Moreover, it is undisputed that certain respondents—who contracted asbestos-related diseases after the opt-out period ended—did not receive notice of the settlement. *See, e.g.*, JA 918-19 (class member who had no knowledge of settlement or mesothelioma diagnosis until after opt-out date); *see also* Dkt. No. 1311, Mem. Op. (Nov. 10, 1994)(rejecting motion to permit late opt out by class members who had no notice of action or of right to opt out).

Aside from the notice campaign which, as noted, did not reach most of the named plaintiffs, the settling parties relied heavily on 58 national labor unions, 13 of which did not cooperate at all with the notice program, and the great majority of which did not agree to provide to their members the individualized notice packet, including the opt-out form, even at CCR's expense.[20] Moreover, because many exposures took place years ago, many potential asbestos victims are former union members who simply cannot be reached by their unions. JA 844-45 (union president testifying that 200,000 former union members cannot be notified by union). Finally, millions of non-union class members, including virtually all of the relatives of exposed persons, were very unlikely to have received notice unless they saw the media advertisements.

Nor can there be any doubt—given the immense size of the class and the nature of an airborne toxin—that many people who may eventually contract an asbestos-related disease are unaware that they have been occupationally exposed *at all*, as was true of two of the class representatives. *See, e.g.*, JA 367-68 (did not know anything about asbestos exposure until

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[20] The district court stated that six million union members received individual notice. Cert. App. 221a. This statement should not be misconstrued. The hearsay declaration of the CCR's notice expert, on which the court's statement is based, simply proclaimed that 35 unions ran "clip-art," *i.e.*, small announcements, in publications sent to union members (who may or may not have been class members), which did not provide any information on the terms of the settlement, much less an opt-out form. JA 164. What occurred here is not what this Court has understood as individualized notice under Rule 23 or as a matter of due process. *See Eisen*, 417 U.S. at 173-75; *Shutts*, 472 U.S. at 812.

husband's mesothelioma revealed on autopsy; husband apparently had no idea of extent of exposure, and, possibly, that exposure occurred at all), 380. Others who are aware that they have been in a work place where there was some level of asbestos would often have no way to know how serious their exposure was and, accordingly, could not make an informed decision on whether it would be worthwhile to retain an attorney and determine their legal rights. *See Shutts*, 472 U.S. at 813 (due process requires that class member be able to determine whether their claims are "sufficiently large or important" to pursue independently). Both of the problems discussed above—that many individuals would not learn of the action in time, and that those who did would be unaware either of their exposure or its extent—are inherent in an action that tries to provide notice to individuals who are not yet injured.

Second, even assuming that all class members had been notified and understood the settlement, including what rights in the tort system they were giving up, the settlement still would not be superior to individual adjudication. Because absent class members have not suffered an asbestos-related injury, the settlement presents them with a fundamentally unfair opt-out choice. Class members are required to choose from a schedule of cash compensation (JA 110)—or no compensation at all for certain diseases—before they have contracted any asbestos-related disease. Assume, for instance, that an uninjured class member (i) does not like the elimination of compensation for pleural disease, (ii) believes that the payment range for asbestosis is adequate, and (iii) regards the payment range for lung cancer as unfair. Whether or not the class member has rationally assessed the settlement's terms, the question under Rule 23(b)(3) is whether it is "superior" to put the class member to the "opt-out/stay-in" decision before he or she has been diagnosed with any disease. In light of the authorities discussed above, the answer is plainly "no" because the class member does not have the information needed to make a rational choice. *See Barry v. Barchi*, 443 U.S. 55, 66 (1979)(due process requires that potential relinquishment of state-created property rights may only be demanded "at a

meaningful time and in a meaningful manner")(quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)(emphasis added)); *see also Ivy v. Diamond Shamrock Chems. Co.*, 996 F.2d 1425, 1435 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994)(acknowledging that actual notice to future victims of mass toxic tort would "probably do little good" because of inherent inability of uninjured persons to make rational decision).

Moreover, at the time class members were forced to make the opt-out decision, they were not able to predict what their personal circumstances would be when and if they contracted an asbestos-related condition. *See* Wages Testimony, JA 845. At that time, matters such as marriage, employment circumstances, an individual's age and that of one's children, and other factors would surely affect whether a class member would want to bring a case in the tort system rather than participate in the alternative dispute process. For example, a class member who, 30 years from now, contracts lung cancer that does not meet the settlement's medical criteria, but is sufficient to obtain substantial damages under state law, would almost surely want to pursue that claim in court. Again, for present purposes, the question is not whether the settlement is "fair" in the abstract, or whether Congress might decide to require everyone to make the opt-out choice now, but whether Rule 23 allows the CCR and class counsel to bind the entire class to a settlement the consequences of which are inherently unknowable.[21]

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[21] In *Ivy*, 996 F.2d at 1435, the Second Circuit rejected a due process challenge to the "Agent Orange" class action brought by persons who did not have notice of the action. The Second Circuit held that *Shutts* does not apply to classes of unknown plaintiffs and that "society's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best. ...[P]roviding individual notice and opt-out rights to persons who are unaware of an injury would probably do little good." *Id.* Although the latter point strongly supports our notice argument, *Ivy* does not come to grips with *Shutts*, which made no exceptions for future claimants. The answer to the problem posed by *Ivy* is not that opt-out

(continued...)

In sum, by compelling the opt-out decision before an injury occurs, the potential victims of CCR's products are forced to gamble, rather than to make the informed choice contemplated by Rule 23 and due process. It is precisely to avoid this problem that Rule 23 requires full and fair notice in a (b)(3) class action. But, by the very nature of this settlement, that notice cannot be provided here. Thus, the district court's class certification fails the superiority requirement of Rule 23.

B. Representation Of The Class Was Inadequate.

CCR's question presented is most misleading as applied to the Third Circuit's finding of inadequate representation under Rule 23(a)(4). The court did not *ignore* the settlement, but looked both to the settlement and the complaint to find that the class representatives had not adequately represented the absentees' widely divergent interests.

It is necessary for a court, in considering certification of any settlement class action, to look first at the complaint, as if it were to be litigated, in assessing adequacy of representation because it is the claims in the complaint that the class members would be releasing as part of the settlement. Thus, the exposure-only class representatives' decision to release the medical monitoring claims for *all* of the class members, for instance, when such a claim may be valid in some jurisdictions, but not in others, *compare Paoli*, 916 F.2d 829, *with Ball*, 958 F.2d 36, clearly favored some class members over others. Moreover, because most class members are not currently ill, they might want to press their medical monitoring claims. But that would make no sense for already injured class members—particularly those with cancer—for whom early diagnosis and prevention is of no comfort. Thus, from the standpoint of the medical monitoring claims alone, neither the

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[21](...continued)
rights of future class members necessarily must be curtailed, but that, under Rule 23(b)(3), classes of future damage claimants may not be certified, especially where an airborne toxin is involved.

class representatives, nor their lawyers, could adequately represent a massive, undifferentiated class of the kind contemplated here. *See Falcon*, 457 U.S. at 158-59.[22]

The Third Circuit moved past its discussion of the complaint, however, and did precisely what petitioners say courts should do: It looked to the settlement terms in conducting its adequacy analysis. The court began with the settlement's "most salient conflict" (Cert. App. 49a)—that it covers both class members who have current asbestos-related diseases and those who do not. The uninjured class members would desire, for instance, a back-end opt out, which would give them access to the tort system when their injuries accrued, *see Bowling*, 143 F.R.D. at 150, while class members with current injuries would not need such protection. Even more important, the uninjured class members—some of whom may become sick decades from now—would obviously want protections against inflation, but the settlement, instead, favors current claimants, by paying all claims in 1992 dollars (JA 110), making recoveries in the latter years almost worthless.[23]

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[22] As noted earlier (*supra* at 17 n.4), the inadequate representation was particularly poignant here because the class representatives' testimony was overtly hostile to the claims of the exposure-only class members.

[23] The district court took judicial notice of statistics showing that, in the 20 years prior to the settlement, consumer prices rose 215.6%, *see* U.S. Dept. of Labor, Bureau of Labor Stat., CPI-U (U.S. city avg.—All items), while inflation for medical care—an important component of personal-injury awards—ran at 415.6%. *Id.* (U.S. city avg.—Medical care); *see* Dkt. No. 1005. Various studies have demonstrated that tort awards and settlements keep pace with, or outstrip inflation, and are highly sensitive to medical care costs. *See, e.g.*, Eisenberg & Henderson, *Inside the Quiet Revolution*, 39 U.C.L.A. L. Rev. 731, 762-63, 787 (1992); Hensler, *et al.*, *Trends in Tort Litigation — The Story Behind the Statistics* 14-17 (Rand 1987); Peterson, *Compensation of Injuries — Civil Jury Verdicts in Cook County* 46 (Rand 1984). In contrast to the settlement, programs which have actually gained Congressional approval, such as social security disability, including those that eliminate tort claims, such as black lung, make inflation adjustments on a regular basis.

The settlement also drives a wedge between class members who eventually will have claims compensable under the settlement, and those that will have claims that are valid under state law but are non-compensable under the settlement. Historically, the latter claims are settled by CCR, in virtually 100% of the cases, for substantial amounts of money. JA 124 n.18. Moreover, CCR concedes that the settlement's overall medical criteria are generally "more stringent than those required under the laws of most states...." JA 916. Thus, tens of thousands of class members who would have obtained recoveries in the tort system, but not under the settlement, had their rights bargained away for the benefit of class members that the settling parties thought were truly deserving. This drastic alteration of state tort law is particularly evident in two areas.

First, "pleural" claimants obtain no cash recovery under the settlement, but currently recover significant amounts under state law. The settling parties claim there is no conflict here because all class members obtain "insurance" for certain illnesses, but that is little solace to a class member who is now 55, gets pleural disease at age 75, and is told that his valid state-law claim was bargained-away many years earlier in order to purchase insurance for himself (which he doesn't want) and for everyone else (which he doesn't need). Again, Congress might make that policy judgment, but a court may not under the guise of Rule 23.

Second, the settlement resolves a dispute in the medical community over causation of asbestos-related lung cancer in a manner that may extinguish as many as 50% of the claims that currently obtain verdicts and settlements in the tort system. JA 838. Again, some future disease victims are benefitted to the detriment of others.[24]

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[24] It should be recalled that class counsel represented thousands of clients who were effectively opted out of the class and who obtained $215 million in settlements (including at least $70 million in fees), notwithstanding the fact that, had they been included in the class, many of them would not have received a penny under the settlement's strict

(continued...)

Similarly, the settlement binds spouses, relatives, and household members of occupationally-exposed class members, but they were given no opt-out rights, even though loss-of-consortium claims can be pursued independently in many jurisdictions. *See* Tsarouhas, *Bowen v. Kil-Kare, Inc.: The Derivative and Independent Approach to Spousal Consortium*, 19 Ohio N.U.L. Rev. 987, 990-93 & n.43 (1993). Even more startling, the settlement extinguishes the loss-of-consortium claims without any cash recovery. Thus, for example, a single asbestosis claimant is entitled to $2,500 under the settlement's simplified payment procedures (JA 79, 110), and an identically situated claimant *and* his spouse, who holds a valid state-law claim, are, collectively, entitled to the same amount. *Compare Bowling*, 143 F.R.D. at 170 (substantial separate payment for spousal claims in mass-tort settlement). The settlement thus enriches some claimants at the expense of others, by extinguishing valid causes of action in derogation of the *Erie* doctrine. *See* Carrington & Apanovitch, *supra*, ___ Ariz. L. Rev. at ___ (interpreting Rule 23 to permit global mass-tort settlements would violate Rules Enabling Act, and even federal statute authorizing such settlements would "entail a massive trespass on the *Erie* principle").

The settling parties dodge each of these representational problems by arguing at a level of generality that eviscerates the adequacy of representation requirement. It is sophistry to say, as does CCR, that there were no class antagonisms because the class members had a common desire to "achieve[] a global settlement." CCR Br. 48. There is no way of knowing what the "future" class members desired, and it is absurd to suggest that those whose state-law claims would be extinguished would have wanted this settlement. And it simply begs the question to say, as does CCR (Br. at 44), that the class members were

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[24](...continued)
medical criteria. CCR's chief operating officer testified repeatedly that the medical requirements imposed on class counsel's side settlements were far more lenient than those imposed under the settlement. JA 770, 771.

united in seeking an adequate settlement recovery. The principal question in any adequacy of representation analysis is not the *amount* of the recovery, but how the recovery is *distributed*. As the conflicts in this case powerfully demonstrate, it was not possible for one set of counsel to represent all the millions of persons for whom the CCR companies may, in the future, bear legal liability, on claims that involve an almost infinite number of legal and factual permutations.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

EXCERPTS FROM THE EVIDENTIARY RECORD

Robert Georgine

[Excerpts from February 28, 1994 court testimony, Tr. 115-16, 170-71]

[115] Q. And as we sit here today, you are not seeking money from any of these companies that you have sued in this case; isn't that right?

[116] A. That's true.

Q. And at the time the lawsuit was filed -- at the time you became class representative, you were not seeking money from them, is that correct?

A. That's true.

* * *

[170] Q. But Mr. Georgine, you've been represented by Mr. Motley in this case. Has he indicated to you that you have a current right to seek money damages from CCR --

A. Well--

Q. --because of what asbestos has done to you?

A. --I don't believe I have a current right to seek damages--

Q. That's correct.

A. --from CCR.

Q. And neither has --

A. Only because -- only because I'm not impaired, and I have [171] no damage that I know of that's caused by asbestos.

[Excerpts from January 27, 1994 deposition, Tr. 65-66, 113]

[65] Q. Well, in the present case, do you believe that the asbestos companies owe you [66] money? M-o-n-e-y.

A. Owe me personally?

Q. Yes.

A. I believe that if there was anything that happened to my lungs that was asbestos-related, that they would owe me money, yes.

Q. But as of today, nothing has happened to your lungs that's asbestos-related that you know of?

A. That letter [from my doctor] tells me that there is nothing that shows.

Q. So as of today, you are not seeking money from the asbestos companies for yourself; is that right?

A. For myself, that's right.

* * *

[113] Q. As you sit here today, you are not suffering any emotional distress because you might come down with an asbestos --

A. No, I am not. I am not.

Q. And you were not at the time you entered this lawsuit?

MR. McCONNELL: Brian, time is limited. That was the sixth time.

MR. WOLFMAN: That was the first time.

I said, as he sits here today, is he suffering any emotional distress. His answer was no. I began my next question, and you interrupted me.

BY MR. WOLFMAN:

Q. My next question is: As of the time you entered the [114] lawsuit, were you suffering any emotional distress on account of asbestos exposure?

A. No, I was not.

Ambrose Vogt

[Excerpts from February 24, 1994 court testimony, Tr. 164-65]

[164] Q. You testified under oath on January 12th, 1994, that you were not seeking money damages at the time that you agreed to be a class representative in this case, and at the time that the lawsuit was filed? You testified that way under oath then, is that correct?

A. Yes.

Q. And that was true then, is that right?

A. Yes.

[165] Q. And it is true today, is it not, you are not seeking money damages today?

A. Not today, no.

[Excerpts from January 12, 1994 deposition, Tr. 17, 34-35]

[17] Q. Are you seeking money damages in this case?

A. Not at this time. I just want the assurance that there will be some money left if anything ever develops.

* * *

[34] Q. On January 15, 1993 when this lawsuit was filed in Federal District Court in Philadelphia, did you feel like you had been harmed by asbestos?

A. Harmed? No. Just exposed.

Q. On January 15, 1993 when this lawsuit was filed in Philadelphia, did you feel like the asbestos companies owed you some money then?

A. No.

Q. When I say "some money," I mean anything more than zero.

A. Yeah.

Q. That's what you understand that to mean?

A. Uh-huh.

Q. So on January 15, 1993 it was your belief that the asbestos companies did not then owe you any money at all?

[35] A. Right.

Ty Annas

[Excerpts from February 24, 1994 court testimony, Tr. 238-39, 248, 272-73]

[238] A. I have nothing wrong with me. So therefore, I should not and will not seek any damages or actions. If my wife's breathing had not deteriorated, there would never had been a case against the [239] asbestos companies.

* * *

[248] Q. At deposition you testified that as of January 15, 1993 that you hadn't authorized anybody to sue for money for yourself because of your asbestos exposure, is that right?

A. That's right.
Q. And that is correct today?
A. Yes, sir.

* * *

[272] A. I don't believe if there is [sic] impairment that anyone needs to be trying to collect money. If there is a situation down the road five years from now with me, and my asbestos exposure develops into an impairment, certainly I can go for a settlement, and I'm concerned about my son Mike back there the same way. ... People that are not impaired [that are trying to collect money] are exactly like those on the welfare system. ...

Q. -- you then believe that people who have pleural plaques should receive no compensation whatsoever, and that was your intent in entering into this agreement, correct? ... [objection overruled]...

[273] A. If they are not impaired.

Q. If they're not impaired they should receive no compensation whatsoever?

A. That's my feelings.

[Excerpts from January 14, 1994 deposition, Tr. 15-16, 61, 91, 94]

[15] Q. Now, as of January 15, 1993, did [16] you authorize anyone to sue for money losses for yourself as a result of your exposure to asbestos?

A. No, I did not.

* * *

[61] Q. Mr. Annas, as we sit here today, do you believe that the CCR people owe you any money today?

A. I hope they don't ever owe me any money.

Q. On January 15, 1993, was it your intention to sue CCR for money damages for yourself, for your own injuries?

A. No.

* * *

[91] Q. Have you ever instructed a lawyer to sue anyone for your mental anguish for your own condition?

A. No. And I hope I never have to.

Q. Have you ever instructed a [92] lawyer to seek damages for you for your own mental anguish?

A. No.

* * *

Q. You've not filed a suit for your own damages, have you?

A. No. No.

* * *

[93] Q. Have you ever had an exam just to determine whether you have asbestos-related disease?

A. Only the x-rays.

Q. How much do the x-rays cost; do you know?

A. About $125.

Q. Do you pay for that out of pocket, or do you have somebody that pays it for you?

A. Well, I'm on Medicaid, and I pay it, but they file the claim.

Q. And then it gets reimbursed; is that right?

A. Or they refuse it.

* * *

[94] Q. Let's hope and assume that you never develop an asbestos-related disease. All right?

A. Yes.

Q. If that is the case, would you expect, then, that the asbestos companies don't owe you anything?

A: Not me.

Timothy Murphy

[Excerpts from January 6, 1994 deposition, at 22-24, 32-33, 3d Cir. Jt. App. 1122-1125]

[22] Q. What did you do when you got this document [indicating no asbestos-related abnormalities]?

A. Felt a sigh of relief.

Q. You were happy you didn't have any problems?

A. Yeah, right.

Q. When you got the letter, did you decide that you wanted to sue somebody?

A. No, I didn't.

Q. You made the decision you didn't want to sue anybody; right?

A. It never crossed my mind.

Q. When did Mr. Satterley [an attorney] call you?

A. It was shortly after that.

Q. Can you tell me what he said?

A. He basically said that I fit the profile of someone who was occupationally [23] exposed to asbestos for over a long period of time and that I could help him in their litigation.

Q. Did you ask Mr. Satterley to file a lawsuit for you?

A. No.

Q. Did you tell Mr. Satterley that you wanted to make a claim for medical monitoring?

A. No.

Q. Do you know what medical monitoring is?

A. No.

Q. Did you tell Mr. Satterley or any other lawyer that you were so anguished about your problem that you felt that defendants ought to pay for it?

MR. LOCKS: Objection to the form of the question.

BY MR. BARON:

Q. Did you ever tell anybody that?

A. No.

Q. So I can cut all of this off quickly, would it be fair to say that you have never told any lawyer that you were upset about [24] your exposure to asbestos and you wanted to sue somebody; is that right?

MR. LOCKS: Objection to the form of the question.

BY MR. BARON:

Q. Is that right?

A. I never said anything to any lawyers.

* * *

[32] Q. Let's go back, let's say, a month in time, prior to the communication that you had with Mr. Weingarten [of Gretizer & Locks] three or four weeks ago. Before that communication, did you know what it was that you were claiming in this lawsuit?

A. I know what I -- that I claimed that I was occupationally exposed to asbestos over a long period of time.

Q. Did you know that you were claiming money damages?

A. No.

Q. To this day, do you believe you are claiming money damages in this case?

A. No.

Q. So you are not seeking any recovery in terms of money damages in this case; is that right?

A. No. Not at this time.

Q. So you've decided that you don't want to seek money damages in this case, correct, at this time?

A. At this time.

Q. Has that always been your belief [33] that you did not want to seek money damages at this time?

A. Right.

Q. Until you develop asbestos-related disease, you don't want any money damages from these people, do you?

A. Well, I hope I don't get it.

Q. And you hope you don't get it, and if you don't get it, as far as you are concerned, they don't owe you anything; right?

A. Right.

Carlos Raver

[Excerpts from January 11, 1994 deposition, Tr. 84, 105-06]

[84] Q. When you filed this lawsuit, the one that was filed in January of 1993, at the time that you filed the lawsuit, had you decided that based on your condition at that time that you didn't deserve any money and didn't want any money at that time?

A. That's true sir. I didn't want any money at that time. Still don't want any money.

Q. Am I correct that you have decided that as long as your physical condition remains as it is today, you will neither deserve nor want any money in compensation for that condition; that's true?

A. That's true, sir.

* * *

[105] Q. As you sit here today, are you asking the defendants in this suit to pay for medical screenings?

A. No, sir. I'm not asking anybody to do anything.

Q. In January 1993, when you filed this suit, did you have a need for the defendants to pay for any of your [asbestos] screenings?

A. No, sir.

Q. So far as you know, you weren't asking for any payment for monitoring of your medical condition by the defendants in 1993?

A. No, sir.

[106] Q. In January of 1993; is that correct?

A. Yes, sir, that's correct.

(23)

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC. ET AL.,
Petitioners

v.

GEORGE WINDSOR, ET AL.,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS CASIMIR AND MARGARET BALONIS.

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January 15, 1997

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BRIEF OF RESPONDENTS CASIMIR AND MARGARET BALONIS

This unprecedented class action purports to adjudicate the rights of untold millions of asbestos victims before their injuries arise and before the victims may even be aware that they are members of the class. Petitioners' proposal represents a corruption of Rule 23, a violation of due process, and a threat to the integrity of the judicial system.

STATEMENT OF THE CASE

1. The Judicial Conference Ad Hoc Committee. In 1990, the Chief Justice appointed a panel of six federal judges to study asbestos litigation and produce recommendations. Cert.App. 11a. The Judicial Conference Ad Hoc Committee on Asbestos Litigation issued its Report in March 1991 (hereafter "Report of the Ad Hoc Comm."). The committee's unanimous recommendation was to urge Congress to enact a legislative solution:

> The committee firmly believes that the ultimate solution should be *legislation* recognizing the national proportions of the problem in both federal and state courts and creating a national asbestos dispute resolution scheme ....

Report of the Ad Hoc Comm. at 3. In his separate statement dissenting from some of the Committee's other suggestions, Judge Hogan agreed that "a logical and viable solution would be the passage by Congress of an administrative claims procedure similar to the Black Lung legislation." *Id.* at 42.

The Committee also suggested a "Back Up Procedure for the Federal Courts" under which Congress, if unwilling to create the national claims procedure the Committee preferred, might "authorize class action or collective trials" of asbestos cases. *Id.* at 36. The Committee recognized that "virtually all of the issues

relating to a so-called 'national solution' are primarily matters of policy for Congress." *Id.* at 3.

> In the final analysis, the committee has concluded that congressional action is necessary to enable the courts to meet the unique problems presented by asbestos litigation.

Id. at 26. The Committee acknowledged that current procedural law seems to foreclose class action solutions to asbestos damages litigation. *Id.* at 38. The Committee specifically noted the need for congressional action if class actions were to be used to resolve the claims of "future claimants." *Id.* at 35.

During the district court proceedings in this case, the Reporter to the Ad Hoc Committee, Dean Mary Kay Kane, was called as a witness by the petitioners and the settling plaintiffs. She testified that she was appointed to draft legislative proposals that the Committee could urge the Judicial Conference to recommend to Congress, and that all the solutions to the asbestos problem considered by the Committee involved the need for federal legislation. Deposition of Mary Kay Kane, Jan. 31, 1994 at 35-36, 56-58, 74. Fairness Hearing Trans., Vol. I, 187-88 (Feb. 22, 1994). In particular, the Committee considered draft legislation to rewrite Fed.R.Civ.P. 23 to cover mass tort damages actions, and recognized the need to make such an amendment "through legislative action rather than through the rule-making process." Depo. of Dean Kane at 65.

In the end, the Committee decided not to make specific legislative proposals, largely because of the political challenges posed in getting comprehensive legislative solutions enacted, and chose just to urge the Judicial Conference to issue a general call for congressional attention to the asbestos problem. Depo. of Dean Kane at 37, 60.

In particular, the Committee recognized the federalism problems presented by a national solution to the asbestos litigation situation. The Report noted that any such solution would "involve special treatment of an area of tort liability

traditionally within the province of the states." Report of the Ad Hoc Comm. at 3. State law governs the vast majority of asbestos damages actions, and the substantive law varies tremendously from state to state, *id.* at 29, 32-33, which, the Committee noted, meant that any national solution accomplished without congressional changes to current law would inevitably raise grave concerns under the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Report at 20-21.

State court judges wrote and called the Committee to object that the "back up" national solutions it was considering would invade the province of state law and the state judiciary. Fair.Hrng.Trans., Vol. I, 192-93 (Feb. 22, 1994). Dean Kane testified that the Committee recognized that the "back up" proposals "dealt with making direct changes to state law" and otherwise "intruding on state law," and that this would create "major federalism problems." *Id.* at 200-01.

Dean Kane further testified that the Committee never even considered — let alone recommended — the possibility of addressing the asbestos problem through settlement class actions. *Id.* at 189, 212.

A strong dissenting statement was filed by Judge Hogan, who objected that class treatment of state-law asbestos claims would "conflict[] with the court's obligations to apply state law" and "establish a new form of tort liability with far-reaching ramifications for other mass tort cases." Report of Ad Hoc Comm. at 41. "This contortion of traditional tort concepts and class action procedures may well cause untoward problems." *Id.* at 42. Finally, the dissent warned against the siren song of appeals to pragmatism and exigency:

> This is a crisis, but it does not justify sweeping away traditional tort and class action concepts and possibly infringing on the due process and jury trial rights of the litigants.

Id. at 43.

The Center for Claims Resolution (CCR), a consortium of asbestos defendants who appear as petitioners here, produced its own report in response to the Committee. CCR acknowledged that the "Ad Hoc Committee properly recommended that *Congress* establish a nationwide administrative claims handling program for asbestos claims ...." JA 444 (emphasis added). But CCR argued that all of the other "back up" recommendations for judicial solutions were deeply misguided. JA 430-43. CCR pointed out that class action treatment of asbestos damages claims was impossible under current law. JA 434-35. Petitioners also noted that such solutions would entail fundamental changes in state law and have grave implications for the *Erie* doctrine and for due process of law. JA 431, 439-40, 443.

Finally, CCR explained that there was no need for such drastic "remedies" because the wave of claims for "significant impairment" has "crest[ed]." JA 432. According to OSHA research, "'asbestos mortality and severe asbestosis morbidity is on the decline' due to lowered workplace exposure levels in the past few decades." *Id.* (quoting OSHA findings). CCR debunked the "references to the number of claims filed in various courts" as "misleading," because those statistics overlook the fact that these anomalous surges in filings are "caused by the fact that judges in those districts ... have employed radical consolidation or class action techniques" that "naturally encourage hundreds or thousands of new claims to be filed." JA 432-33. That is especially true with respect to this class action, which for the first time has encouraged exposure-only plaintiffs to file suit for injuries that do not yet (and will probably never) exist.

2. The MDL Transfer. The Panel on Multi-District Litigation issued an order on July 29, 1991 transferring all federal personal injury asbestos cases to Judge Weiner in the Eastern District of Pennsylvania for coordinated pretrial proceedings. Cert.App. 112a. *In re Asbestos Products Liability Litigation (No. VI)*, 771 F.Supp. 415 (J.P.M.L. 1991)("MDL 875"). The MDL Panel expressed the hope that this order might offer an

opportunity to resolve those approximately 30,000 pending claims by settlement. Cert.App. 112a-113a.

During the settlement negotiations that arose out of the MDL proceeding, CCR made clear that it was most interested in resolving not just the pending asbestos claims that were the subject of the MDL transfer order, but potential *future* asbestos claims. Cert.App. 114a. The proposal of a single global settlement for "all present and future cases" that was offered by the Defendants' Steering Committee was flatly rejected by the Plaintiffs' Steering Committee. Cert.App. 114a-115a. The CCR defendants then decided to pursue, on their own, a settlement "on behalf of future asbestos victims." Pet.Br. 4.

3. The filing of the class action and the stipulation of settlement. This "case" began with the simultaneous filing of the plaintiffs' class action complaint, the defendants' answer, a joint motion for class certification, and a 106-page "Stipulation of Settlement" in federal court in Philadelphia on January 15, 1993. The class included everyone who had ever been occupationally exposed to CCR asbestos products (and their spouses and children) who had not filed a case against CCR prior to the filing of the settlement. Cert.App. 95a-96a. In the class action complaint, each of the nine named plaintiffs sought unspecified damages in excess of $100,000 against the twenty former manufacturers of asbestos-containing products named as defendants. JA 5. Five of the nine named plaintiffs alleged that they had sustained physical injuries as a result of exposure to the defendants' asbestos products. JA 5-10. Four of the named plaintiffs, however, expressly alleged that although they had been exposed to CCR's asbestos products, they had not yet sustained an asbestos-related "condition." *Id.* These "exposure-only" plaintiffs nevertheless alleged entitlement to damages for their risk of contracting an asbestos-related disease in the future, for their fear that they would contract such a disease, and for "medical monitoring." JA 18-20.

The defendants' answer denied the allegations of the plaintiffs' class action complaint, and asserted eleven affirmative defenses.

JA 23-26. But the two other filings jointly made by the parties that day — the joint motion for class certification and the stipulation of settlement — revealed the real reason that the parties came to court: not to seek judicial resolution of the claims alleged in the complaint, but to bind non-parties to a previously negotiated contractual settlement agreement, even though the overwhelming majority of the non-parties that would be bound do not currently have a legally cognizable claim that they could individually assert against the defendants. The joint motion asked the court to certify a nationwide opt-out class of all persons who had been occupationally exposed to asbestos-containing products made or sold by the CCR defendants — *whether or not such persons currently had an actionable, physical injury*. JA 29. In other words, persons who had not yet sustained physical injury, whose claims had not yet ripened, and who were protected by state laws from the running of statutes of limitations on any claims they might develop in the future, were nevertheless included in the proposed class.

The stipulation of settlement was equally ambitious. It purported to settle all claims of class members for asbestos-related personal injury or wrongful death against the CCR members — whether or not the claims had actually accrued — that had not, as of the date of filing, been asserted in the state or federal judicial systems. JA 49. The stipulation "settled" such future claims by channeling them to an evaluative process controlled by the CCR companies which would apply strict medical and exposure criteria, not recognized in the tort system, to determine whether a claim qualified for payment. JA 51-86. For those victims that qualify, the stipulation set a limited range of damages that can be awarded by CCR for the various asbestos diseases (confirmed asbestosis, lung cancer, mesothelioma, and other specified types of cancer), and placed caps on the amount that a particular victim may recover for a particular disease and on the number of qualifying claims that may be paid in any given

year. JA 110.[1] If a claimant who qualifies for a payment is dissatisfied with the settlement offered by CCR, he or she can reject the settlement and pursue the claim in the tort system — but only 1% of claimants can do so in any particular year. JA 87. Victims who do not qualify under the stipulation's exposure or medical criteria receive no payment, and are not eligible to contest their loss of remedy. Claims for increased risk of cancer, fear of future asbestos-related injury, and medical monitoring — the claims that the named "exposure only" plaintiffs asserted in the class action complaint — receive no payment at all under the stipulation of settlement, and persons holding such claims may not appeal such loss of rights. Additionally, claims for certain malignant and non-malignant asbestos-related injuries which have substantial settlement value in the tort system are released under the stipulation for no monetary compensation (and without right to appeal).

4. Proceedings in the district court. Two weeks after suit was filed, the district court conditionally certified the proposed class as the settling parties had jointly requested — without notice to the class and without a hearing. Cert. App. 70a. Thereafter, putative class members who had learned of the class action sought to appear for the purposes of challenging the court's jurisdiction and asserting objections to the settling parties' request for a preliminary finding that the settlement was within the range of possible approval. The objecting class members argued, *inter alia*, that the district court lacked subject matter jurisdiction because (1) the case did not present the court with a bona fide "case" or "controversy" between adversaries over which it could exercise jurisdiction under Art. III, § 2, (2) the "exposure-only"

---

[1] Victims who are found by CCR to have "extraordinary" claims can be awarded more than the cap allows, but only a limited number of claims (up to 3% of compensable cancer claims and up to 1% of compensable asbestosis claims) can be found to be "extraordinary" in any particular year, and the total amount of compensation available to victims with "extraordinary" claims is itself capped. JA 71-75, 82-86.

plaintiffs, who alleged that they had not sustained a physical injury, had failed to allege an "injury in fact" and therefore lacked standing, and (3) the "exposure-only" plaintiffs had not claimed, *in good faith*, a right to recover damages in excess of the jurisdictional minimum specified in 28 U.S.C. § 1332(a).

The objecting class members also argued, *inter alia*, that the proposed settlement did not meet the threshold level of fairness required to present it to the class because (1) approval of the settlement would deny class members due process by resolving their claims before they had accrued, (2) notice to uninjured "future claimants," in any form, of the resolution of claims not yet in existence would be inherently inadequate and would not provide them with a meaningful opportunity to opt out of the class as required by Rule 23(b)(3) and the Due Process Clause, and (3) the class as defined could not properly be certified under Rules 23(a) and (b). Public interest groups, victims organizations, labor unions, other former manufacturers of asbestos-containing products, and two states appeared as amici curiae in order to join in the objecting class members' jurisdictional and/or threshold fairness objections.

In separate briefs, the objecting class members challenged the notice plan proposed by the settling parties. The objectors argued, *inter alia*, that the notice plan was not reasonably calculated to deliver individual notice to the millions of class members whose identities could be readily ascertained, and thus did not comply with Rule 23(c)(2) and the Due Process Clause. The objectors also reiterated their contention that no form of notice would be effective as a practical matter, and therefore constitutionally adequate, to alert class members who have no current injury or grievance that their future claims were being compromised in the class action.

On October 6, 1993, the district court issued a memorandum order overruling the objections to the court's exercise of subject matter jurisdiction over the class action. JA 183. Three weeks later, the court approved, with some minor modifications, the notice plan proposed by the settling parties. JA 282. The court

rejected the objectors' contention that the plan did not provide enough class members (particularly those who could be easily and readily identified) with individual notice about the class action, stating that further efforts to identify class members would be "unduly time-consuming and expensive, and not necessarily fruitful." JA 297. The court also rejected the objectors' contention that any notice, however delivered and in whatever form, would not provide presently uninjured class members with constitutionally adequate notice and a meaningful opportunity to opt out. JA 311-14.

The district court subsequently ruled that the settlement was fair and tentatively approved it. Cert. App. 88a-276a. On Sept. 21, 1994, the court entered a preliminary injunction prohibiting class members from initiating or maintaining asbestos-related claims against the CCR defendants except through the settlement. Cert. App. 67a-87a.

5. Respondent Casimir Balonis. Class member Casimir Balonis was exposed to asbestos when he worked briefly in a shipyard from 1947-48. He was in excellent health until being diagnosed with mesothelioma in May 1994, months after the opt-out period closed on January 24, 1994. On December 2, 1994, Mr. Balonis and his wife sued various asbestos makers in a Maryland state court. District Ct. Findings of Fact and Conclusions of Law, Slip op. of July 11, 1995, at 6. On April 10, 1995, some of those defendants indicated that they would name two CCR members as third party defendants, and on the same day the Balonises amended their complaint to include those CCR companies. The next day, CCR contacted the Balonises' counsel and informed him that he and his clients were in violation of the preliminary injunction because Balonis was a member of the class and had not opted out of the class settlement. Slip op. at 6-7.[2]

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[2] Although the district court's injunction precludes injured persons from suing CCR members, it does not restrict defendants from filing third-party claims against CCR companies. For Balonis, this meant that the existing defendants could defend at trial by arguing that Balonis's exposure to CCR

The Balonises moved in the the district court on April 27, 1995 to have the injunction lifted. They argued that under the settlement they would have to settle their case against CCR for between $37,000 and $60,000, as set out in the compensation schedule. They noted that, in contrast, mesothelioma cases in Baltimore courts tried to a verdict render judgments from $1 million-$9 million, with a majority of verdicts between $2 million and $4 million. *Id.* at 10.

On July 11, 1995, the district court issued an order citing the Balonis plaintiffs and their attorney for civil contempt, ordering them to cease prosecution of the Maryland state court action against CCR, and directing CCR to file, for the court's consideration, a motion for costs and attorneys' fees. The court held, citing its prior rulings, that it had subject-matter jurisdiction over the class action and that it possessed personal jurisdiction over the Balonises because they were part of a class that had been the subject of a notice campaign and because they had been adequately represented and had a chance to opt out. Slip op. at 11-12. In fact, it is undisputed that Mr. Balonis had been occupationally exposed to asbestos only briefly, for less than two years half a century ago, and had received no notice of this class action. The district court made no contrary findings, but simply held that respondents' individual circumstances did not change the court's notice and other rulings with respect to the class. *Id.*

In the same opinion, the district court denied the Balonises' motion to lift the injunction as an improper attempt to relitigate matters the court had already adjudicated. Slip op. at 18-19. The court explained that, if it granted relief to the Balonises, whose "situation is not unique," it would "lead to the disintegration of the *Georgine* settlement." *Id.* at 22 & n.13.

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products rather than their own was responsible for his disease. Plaintiff, enjoined from proceeding against CCR defendants, would be in a lose-lose situation.

Casimir Balonis died of mesothelioma on October 24, 1996. His wife continues his struggle to obtain a day in court in their state law tort action against the petitioners.

6. The Court of Appeals' decision. On appeal of the district court's decision of Sept. 21, 1994 imposing a preliminary injunction on collateral litigation by class members, Cert. App. 67a-87a, the Court of Appeals unanimously reversed. The Third Circuit vacated the injunction, and remanded the case to the district court with instructions to decertify the class. The court expressed "serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction," but elected to pretermit these issues because it deemed the class certification question dispositive. Cert. App. 19a.

The Third Circuit held that the class could not meet the Rule 23(a) requirements of typicality and adequacy of representation, or the Rule 23(b)(3) requirements of predominance and superiority. Cert. App. 40a-57a. The court explained that "[c]lass members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods." *Id.* at 41a. The court concluded that "[t]hese factual differences translate into significant legal differences," so that the typicality and predominance criteria could not be met. *Id.*

Next, the Court of Appeals held that "serious intra-class conflicts preclude this class from meeting the adequacy of representation requirement" of Rule 23(a)(4). App. 49a. "[T]the settlement makes numerous decisions on which the interests of different types of class members are at odds." *Id.* For example, "under the settlement many kinds of claimants (e.g., those with asymptomatic pleural thickening) get no monetary award at all." *Id.* "The settlement makes no provision for medical monitoring or for payment for loss of consortium." *Id.* "The back-end opt out is limited to a few persons per year." *Id.* "The settlement relegates those who are unlucky enough to contract mesothelioma in ten or fifteen years to a modest recovery, whereas the average

recovery of mesothelioma plaintiffs in the tort system runs into the millions of dollars." *Id.* Morever, the settlement exacerbates conflicts between currently injured and "futures" plaintiffs:

> [T]hose who are not yet injured would want reduced current payouts (through caps on compensation awards and limits on the number of claims that can be paid each year). The futures plaintiffs should also be interested in protection against inflation, in not having preset limits on how many cases can be handled, and in limiting the ability of defendant companies to exit the settlement. Moreover, in terms of the structure of the alternative dispute resolution mechanism established by the settlement, they should desire causation provisions that can keep pace with changing science and medicine, rather than freezing in place the science of 1993. Finally, because of the difficulty in forecasting what their futures hold, they would probably desire a delayed opt out. ...

Id. at 50a. On each of these points, the interests of "exposure-only" plaintiff class members were diametrically opposed to those of currently injured class members.

Further, the court found that Rule 23(b)(3)'s requirement that the class action be "superior to other available methods for the fair and efficient adjudication of the controversy" was not satisfied in part because the "[p]roblems in adequately notifying and informing exposure-only plaintiffs of what is at stake in this class action may be *insurmountable*." Cert. App. at 55a (emphasis added). Because asbestos-related illnesses like mesothelioma may be caused by slight and incidental exposure to asbestos, many currently uninjured class members (especially spouses and children) may not know that they have been exposed to asbestos within the terms of the class definition. *Id.* at 55a. Even if they know of their exposure, the court added, such as-yet uninjured class members "may pay little attention to class action announcements" and are "unlikely to be on notice that they can

give up causes of action that have not yet accrued." *Id.* And even if those currently uninjured class members find out about the class action and realize that they fall within the class definition, the court noted, "they may lack adequate information to properly evaluate whether to opt out of the settlement." *Id.* at 56a.

In a concurring opinion, Judge Wellford "fully subscribe[d]" to the panel's decision "that the plaintiffs in this case have not met the requirements of Rule 23," App. 60a, but wrote separately to make clear his view that the exposure-only class members had no standing to sue and could not be bound by the class action judgment *Id.* at 66a.

SUMMARY OF ARGUMENT

I. This case compels the Court to choose between approving an expedient solution to what is perceived as a major social problem on the one hand, and preserving its institutional values on the other. Although Congress has not responded to the call for a legislatively created nationwide asbestos claims compensation scheme, the petitioners and their hand-picked class counsel have taken it upon themselves to draft their own legislative solution and to submit it to the federal judiciary. The real threat to the courts and to the law is not the burden of asbestos litigation, which will pass, but the corruption of the class action process that petitioners offer as the cure for crowded dockets. Petitioners would collapse the carefully crafted safeguards of Rule 23(a) and (b) into the fairness inquiry of Rule 23(e), so that certification under Rule 23 would be possible even when the class "members" are an assortment of unrelated persons with no common interests or similarities apart from the obviously shared goal of maximizing the *aggregate* value of any proposed settlement. Defendants could thus replace the otherwise applicable law of 50 states with a new system of "law" scripted by the defendants and "enacted" by judicial decree as part of a friendly lawsuit before a federal court.

II. Petitioners' proposal for using settlements to cure defects that would otherwise prevent class certification creates perverse incentives that would deprive absent class members of due process. Absent class members are non-parties who may be represented and bound by class counsel and the class plaintiffs only if the certification standards of Rule 23 — which ensure due process — are met. Petitioners' proposal to read Rule 23 to permit class representatives, class counsel and defendants to manufacture "common" questions and other certification prerequisites by stipulating to a settlement in a case that they admit could not otherwise be certified would dilute the due process safeguards for virtual representation.

When putative class counsel cannot secure class certification without the defendants' help, class counsel lose all leverage over the defendants. Since the plaintiffs' attorney can earn a fee off the absent plaintiffs' claims only if there is a class action, and there can be a class action only if the defendants want one, rather than being adverse to the defendants the putative class counsel becomes *dependent* on them The Due Process Clause forbids representatives whose incentives are so deficient from binding a group of absent plaintiffs who wish to speak for themselves. *Hansberry v. Lee*, 311 U.S. 32 (1940); *Martin v. Wilks*, 490 U.S. 755 (1989).

III. Another unprecedented feature of this case is its extinguishment of *future* claims held by people who do not know that they have been exposed to asbestos or that they are members of the class. The meaningful notice and opt-out opportunity required by due process and Rule 23 cannot be provided to such absent class members who may currently be unaware that they have a claim or whose claim may not yet have come into existence. To ask a potential future asbestos victim to evaluate the trade-offs in a proposed settlement before she ever develops an injury and a related claim is to demand that she gaze into a crystal ball while wearing a blindfold. When there is no limited fund mandating resolution of potential future claims *now*, no class member should be forced to accept such a caricature of due

process. And even if meaningful notice could theoretically be provided to such future claimants, the notice campaign in this case was wholly inadequate.

IV. Policy concerns also militate against the petitioners' proposed interpretation of Rule 23. Lower certification standards for settlement class actions are not necessary to deal with the docket burden of asbestos litigation. According to both the district judge in charge of it and other asbestos defendants, the Multi-District Litigation process has been successful in dramatically reducing the federal asbestos caseload. Moreover, the Third Circuit expressly approved the use of settlement classes and therefore settlement classes that comply with the rigorous requirements of Rule 23 are still a viable tool of case management. Petitioners' appeals to expedience could not in any event justify overriding the limits of Article III and Rule 23.

V. Petitioners' construction of Rule 23 is wholly inconsistent with the history of class action practice. The drafters of the 1966 Amendments warned that Rule 23(b)(3) should not be used to certify mass tort class actions even for actual litigation, and there is nothing to indicate that the Rule was designed to allow certification (for settlement only) of classes of potential future claimants so that the federal courts can "adjudicate" "cases" that are not triable in those courts.

VI. Finally, at the very least the injunction against collateral attacks on the settlement must be vacated. The district court improperly enjoined class members from suing in any other court, thereby eliminating the due process right to pursue a collateral attack on a class action in which the absent plaintiffs received inadequate representation or were not subject to the court's jurisdiction. A court may not attempt to predetermine the res judicata effect of its own judgment. *Hansberry v. Lee*, 311 U.S. 32 (1940).

ARGUMENT

I. THIS UNPRECEDENTED CLASS ACTION REPRESENTS A DANGEROUS CORRUPTION OF RULE 23

Petitioners invoke the unpublished report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation as authority for the wisdom and permissibility of their future-claims class action. Pet.Br. 6, 49. Petitioners contend that they took their mission statement from the Ad Hoc Committee: to go forth and achieve a global settlement of all possible future asbestos litigation by means of a settlement class action. They contend that the "settlement terms establish the kind of claims resolution system envisioned by the Ad Hoc Committee." Pet.Br. 6. Insisting that what they have brought to the federal judiciary is precisely what it asked for in the Committee's Report, the petitioners now act miffed that the Third Circuit has, ungratefully, disavowed petitioners' quest and decertified their class action.

Petitioners' invocation of the Ad Hoc Committee Report is disingenuous — at best. As explained above, the Committee's unanimous recommendation was to urge *legislative* creation of a national *administrative* dispute resolution system. Report of the Ad Hoc Comm. at 3, 27, 42. See pages 1-2, *supra*. The Committee noted enormous federalism problems posed by the need to override state law and recognized that expanded use of class actions could not resolve the asbestos problem without legislative changes by Congress: "virtually all of the issues relating to a so-called 'national solution' are primarily matters of policy for Congress," Ad Hoc Comm. Rep. at 3. "In the final analysis," the Committee "concluded that congressional action is necessary to enable the courts to meet the unique problems presented by asbestos litigation." *Id.* at 26. Contrary to petitioners' intimations — and according to the petitioners' own witness — the Committee never considered and never recommended the

possibility of addressing the asbestos problem through settlement class actions. See page 3, *supra*.

Although Congress has not responded to the Ad Hoc Committee's call for legislative action, the petitioners have taken it upon themselves to draft their own legislative solution and to submit it to the federal judiciary. Apparently all large, white, marble buildings in Washington, D.C. look the same to petitioners. But this proposal for creation of a legislative dispute resolution scheme, whatever its merits, belongs not in this building but in the one across the street with the dome. As the Third Circuit recognized, this case compels this Court "to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other." Cert.App. 17a. "[W]hat the district court did here might be ordered by a legislature, but should not have been ordered by a court." Cert.App. 59a. The decision below must be affirmed if the Court is to "avoid a serious rend in the garment of the federal judiciary that would result from the Court, even with the noblest motives, exercising power that it lacks." Cert.App. 20a. The courts must "leave legislative solutions to legislative channels." *Id.*

Perhaps the greatest irony is that petitioners' "reforming" zeal is so misplaced. The real threat to the courts and to tort law is not the burden of asbestos litigation, which will pass, but the corruption of the class action process that petitioners offer as the cure for crowded dockets. Every month seems to bring new reports of abuses in class action settlements. The lawyers for both parties profit, wrongdoers make sweetheart deals to dispose of substantial liabilities at bargain-basement rates — but innocent victims end up with pennies on the dollar as compensation for their alleged injuries.[3]

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[3] *See, e.g., In re Ford Motor Co. Bronco II Prods. Liab. Litigation* 1995 U.S. Dist. LEXIS 3507, at 28-29, 32 (E.D. La., Mar. 15, 1995) (rejecting proposed settlement of multidistrict litigation, noting that "[n]ot only are the terms of the proposed settlement inadequate, but there is evidence that class

Petitioners' proposal would only accelerate that depressing

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counsel's representation was also inadequate" and that the proposed settlement "could possibly be the result of collusion between the defendant and class counsel"); R. POSNER, AN ECONOMIC ANALYSIS OF LAW 570 (4th ed. 1992) (no one has stake in size of class action judgment except defendant, who has interest in minimizing it; class counsel will be tempted to offer to settle with defendant for small judgment and large fee; and lawyers largely control access to information by court, which is charged with approving settlement); John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995);John C. Coffee, *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995); Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811, 813 (1995); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995); Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 13 (1995); Leubsdorf, *Co-opting the Class Action*, 80 CORNELL L. REV. 1222, 1225 (1995); Richard Marcus, *They Can't Do That, Can They?: Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995); Eichenwald, *Class-Action Suite Deadline Expired, Prudential Argues*, N.Y. TIMES, Dec. 11, 1995, at D2; Eichenwald, *Lawyers Receiving $22.6 Million of Prudential Settlement*, N.Y. TIMES, May 20, 1994, at D2; Eichenwald, *Millions for Us. Pennies for You*, N.Y. TIMES, Dec. 19, 1993 at § 3, 1; Leer, *Thanks to Lawyers, I'm 93 Cents Richer*, SAN DIEGO UNION-TRIBUNE, July 14, 1996 at G3; Meier, *Math of a Class-Action Suit: "Winning" $2.19 Costs $91.33*, N.Y. TIMES, Nov. 21, 1995, at A1; Meier, *Fistfuls of Coupons*, N.Y. TIMES, May 26, 1995, at D1; Paltrow, *Lawyers to Get 25% of Prudential Class-Action Settlement; Securities: Judge Apparently Ignores Complaints from SEC and California Officials that the Fee Requests Were Excessive*, L.A. TIMES, May 20, 1994, at D1; Phelps, *Attorneys Who Get Paid in Cash Irk Clients Who Get Paid in Scrip*, STAR TRIBUNE, April 17, 1994 at 4D; Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST. J., July 18, 1996, at A1; Schonbrun, *How Public Can Stop Class-Action Racket*, S.F. CHRON., Oct. 18, 1993, at B3; Walt, *Truck Lawsuit Shifts into Reverse: Attorney Fees Issues Cited in Ruling*, THE HOUSTON CHRONICLE, Feb. 10, 1996, at Business, 1; Walker, *Class-Action Suits Overdue for Fee Reform*, SACRAMENTO BEE, June 6, 1993, at B7; Weinstein, *Class Action Filings: Often are Lawsuit Abuse*, DALLAS MORNING NEWS,July 28, 1996 at 61.

trend. Petitioners would reinterpret Fed. R. Civ. P. 23 so that actions which could never be certified for trial in federal court could nonetheless be *settled* there. Under petitioner's proposal, the federal judicial power would be used to enforce the resulting settlement agreements and to extinguish the claims of absent class members. This proposal will likely lead to a proliferation of sham settlements and to the continued erosion of public respect for the American judicial system.

Petitioners would replace the carefully crafted Rule 23 criteria with the single "fairness" inquiry of Rule 23(e). In the petitioners' own words, once the parties have jointly proposed a settlement of a non-triable case, "[t]he legal and factual questions that remain . . . relate[] solely to the fairness of the settlement." Pet. Br. 42. Thus, certification under Rule 23 is possible even when the class "members" are an assortment of unrelated persons with no common interests or similarities apart from a shared goal (manufactured by the settling parties) in maximizing the value of the settlement.

Under the petitioners' view, virtually any tortfeasor could use a settlement class action pre-emptively to extinguish the rights of injured consumers nationwide to pursue judicial remedies. A tobacco manufacturer could seek out a compliant plaintiffs' attorney to orchestrate a nationwide class "action" on behalf of all smokers and those exposed to second-hand smoke who have not yet brought suit — and even on behalf of those who have not yet been injured by that exposure. Price-fixers, securities laws violators, and fraudsters could use the same strategy to extinguish the legal rights of their victims before they have brought suit. Doctors, hospitals and HMO's could do the same for victims of medical malpractice who have not yet filed claims.

Such hypotheticals are hardly far-fetched in the present circumstances. Before the district court decision below, no court had ever approved a class action like the one in this case, where:

- The class counsel of the plaintiff class was hand-picked by their adversaries and invited to negotiate a settlement for an action that would then be brought.
- The parties conceded on the record that they had no intent to litigate the case, but only to settle it.
- The settlement includes "futures" claims that have not yet accrued, so that their unwitting holders have their causes of action extinguished or compromised without any meaningful chance to protect themselves.
- The class is rife with conflicts of interest.
- The settlement provides that large groups of class members will receive nothing at all for their claims, even though such claims are routinely compensated in the tort system. Meanwhile, the lawyers who claim to represent the class had clients with similar claims, who were automatically opted out of the class and permitted to settle in a simultaneous side deal on terms markedly superior to those applicable to class members.

In short, this case is itself part of the parade of horribles. If a class action is permissible here, it is difficult to identify any logical stopping point to petitioners' theory. Defendants could shut off access to the judicial system, substituting claims processing regimes that they control and promulgating compensation schedules that provide only a fraction of the damages available in the tort system. Defendants could replace otherwise applicable state law with a new system of "law" scripted by the defendants and "enacted" into law by judicial decree as part of a friendly lawsuit before a federal court understandably appreciative of docket-clearing measures. Such wholesale displacement of state law by the federal courts is of course in stark violation of the principles of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Moreover, petitioners' approach is a dangerous one-way ratchet. Petitioners posit that few if any mass tort class actions are litigable, Pet. Br. 37, but that all may be certified for settlement when the defendant consents. Defendants, in other

words, are masters of the Rule, defeating mass-tort class actions when they wish to and employing them, as here, when they have hand-picked the class counsel and devised a settlement to their liking.

The institutional harm threatened by petitioners' proposal is incalculable, and it is not limited to the *Erie* principle. Petitioners' insistence that the underlying dispute need not be triable in order to permit the resulting settlement to be entered pursuant to Rule 23 would transform the federal courts into mediation forums and utterly obliterate the distinction between nonjusticiable disputes over legislative proposals and judicial "cases" and "controversies." It would corrupt Rule 23 and spawn even more highly suspicious class action settlements between well-remunerated attorneys willing to sell out the public interest. And en route to that destination, petitioners' revision of Rule 23 and relaxation of Article III justiciability requirements would open the federal courts to a tidal wave of damages lawsuits, both individual and class action, brought by plaintiffs who have only conjectural "future injuries."

II. PETITIONERS' PROPOSAL FOR USING SETTLEMENTS TO CURE DEFECTS IN CLASS CERTIFICATION WOULD CREATE PERVERSE INCENTIVE STRUCTURES THAT WOULD DEPRIVE ABSENT CLASS MEMBERS OF DUE PROCESS.

If this Court were to accept petitioners' position that judges should permit features of a settlement to cure defects in representation, commonality, typicality and the like that an objecting defendant could have invoked (on behalf of the absent plaintiffs, no less) to prevent class certification, the Court would be putting absent class members at the mercy of named plaintiffs, their attorneys, and defendants, whose ability to extinguish their rights via inadequate and even collusive settlements would be virtually unbridled. Settlement sell-outs would be encouraged. Plaintiffs' class counsel would lack incentives to maximize the

value of absent plaintiffs' claims, because named plaintiffs would fail to speak for absent plaintiffs' diverse interests as they should, and because defendants would benefit by paying less than absent plaintiffs' claims are worth. Absent class members would thus be bound without due process of law in violation of *Hansberry v. Lee*, 311 U.S. 32 (1940), and its progeny.

The only true parties to a class action are the named plaintiffs and the named defendants. Absent class members such as respondent Balonis are just that — *absent* members, not actual parties. They are emphatically *non*-parties whose interests are virtually represented by others acting under authority of the federal rules. *See, e.g., Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir., 1996) (Easterbrook, J., joined by Posner, C.J., and Manion, Rovner, and Wood, J.J., dissenting from denial of rehearing en banc) ("Absent class members are represented by the named plaintiffs and their lawyers, but they aren't parties").

It must be borne in mind that "virtual" representation, like "virtual" reality, is a simulated world, an artificial construct. The legitimacy of this fictional world depends on rigorous compliance with the rules of the simulation. Respondent Balonis hired his own lawyer; he did not authorize class counsel to safeguard his interests. The named class plaintiffs gain the power to represent and bind absent plaintiffs such as Mr. and Mrs. Balonis only by satisfying the requirements of Rule 23, which implements the Due Process Clause. And that is what class certification is all about. It determines whether a named plaintiff and his attorney can make decisions for a group of absent plaintiffs. When class certification is granted, a class representative and class counsel are thereby empowered to bind the absent class members to their conduct and resolution of a class lawsuit. Rule 23 thus creates and regulates a relationship in law between a named plaintiff and an attorney on the one hand, and a group of absent plaintiffs on the other. It expressly authorizes the former to speak and act for the latter "only if" *all* the requirements of Rule 23(a) and (b)(3) are met:

typicality, commonality, predominance, superiority and adequacy of representation.

Neither a class representative nor his class counsel is empowered to waive the requirements of Rule 23. Permitting such waiver would allow absent plaintiffs to be drafted into the class action for the convenience or ends of the class plaintiffs and their attorneys. It would be an even more suspect outrage to permit a class representative, putative class counsel, and the defendant to jointly accomplish a waiver of any Rule 23 requirement by acting together. Rule 23 does not grant any power over absent class members to the defendants with whom class plaintiffs and class counsel may choose to deal.

Petitioners' proposal to read Rule 23 to permit class representatives, class counsel and defendants to manufacture "common" questions and other certification prerequisites would in effect allow them to relax the requirements of Rule 23 by agreement. This would eviscerate the limitations on virtual representation written into Rule 23. If a named plaintiff were atypical, the atypical named plaintiff and the defendant could paper over the atypicality by forging a settlement in which all appear to have an identical stake. If the requirements of commonality, predominance, and superiority were not met, a class representative, class counsel and the defendant could meet these requirements by stipulating to a settlement in which these failures are rendered invisible to the judicial eye. If a named plaintiff or her counsel suffered a conflict of interests and could not adequately represent the class, that difficulty too could be erased.

Petitioners' argument that judges should allow the terms of a settlement to fulfill the class certification requirements is nothing more than a camouflaged version of the claim that class representatives and defendants may work together to waive the requirements of Rule 23.

Petitioners' repeated chant that the Third Circuit class certification analysis compels judges to decide hypothetical questions and to ignore facts is captious. The legitimacy and concreteness of an objection to certification depends on the nature

of the objection, not on who raises it or when it is raised. When an absent class member objects that the named plaintiff is not typical or that the predominance requirement is not met, the district court decides the same question that a defendant challenging certification might have raised, does so on the basis of the same evidence, and reaches an equally concrete conclusion. The inquiry is not the least bit hypothetical.[4] If anything, objections to certification raised by absent class members are *more* appropriate for judicial resolution than defendants' objections, since it is the virtual representation of those class members that is at stake.

The danger absent plaintiffs are most likely to complain about (and the objection raised here by Balonis and the other respondents) is that the actual parties (the named plaintiffs, their lawyers, and the defendants) are working together against the non-parties (the absent class members). This same danger existed in *Martin v. Wilks*, 490 U.S. 755 (1989), where the true parties in litigation attempted to use a settlement to purloin a benefit from unrepresented third parties and secure it for themselves. This Court permitted the third parties to attack the consent judgment, noting that their interests would be threatened if the named parties, whose interests conflicted with theirs, were permitted to bind them without their consent. *Martin*, 490 U.S. at 768. *See*

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[4] Given petitioners' proposal to allow federal judges to premise certification decisions on settlement agreements that contradict actual litigation facts, it is remarkable that they denounce the Third Circuit for requiring judges to perform a hypothetical inquiry (psychiatrists generally refer to this phenomenon as "projection"). A false or deficient assertion about class certification does not become true or sufficient simply because class counsel, the class representatives and the defendants agree upon it. Thus, the assertion that "all class members desire to get money now from a judgment against the defendant," if insufficient to establish commonality, etc. under Rule 23 to begin with, does not become sufficient by virtue of being incorporated into a settlement agreement. Although petitioners (and the class counsel they hired) accuse the Third Circuit of ignoring the facts, it is they who do so.

also Local No. 93, International Ass'n Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986).

The danger here is the same. Once a class is properly certified, there is reason to hope that the named plaintiffs and their attorneys will adequately represent the absent plaintiffs. But before certification, and especially when absent plaintiffs object to certification, there is a classic trilateral dispute in which the interests of the named plaintiffs, their attorneys, and the settling defendants conflict with those of the absent plaintiffs — and there is a palpable danger that the former will seek to profit at the latter's expense.

Permitting certification of claims for settlement that could never be tried as a class action creates economic incentives for class counsel to settle absent plaintiffs' claims too cheaply. When the Rule 23 requirements are met for trial purposes, class counsel has a powerful form of leverage in settlement negotiations: a credible threat to stick a defendant with an adverse class-wide judgment, and a fee-related interest in trying the lawsuit unless the defendant offers its expected value in settlement. The threat is a club. The desire for the largest possible recovery yielding the largest possible fee award is the incentive to wield that club. But this form of leverage disappears when, as the settling parties have formally conceded here, the Rule 23 requirements can be met only through settlement. In that instance, class counsel cannot credibly threaten an adverse class-wide judgment because the lawsuit cannot be tried as a class. Likewise, class counsel has no incentive to take the case to trial because a trial will predictably yield nothing in fees. This is especially true when the only claims alleged in the complaint are "exposure-only" claims so worthless by themselves that class counsel has never previously made them in a lawsuit and the CCR defendants have never paid them. JA 448. A plaintiffs' attorney who can obtain class certification *only* if the defendant agrees to a settlement on which certification can supposedly be predicated is a hired gun whose revolver is empty.

But a plaintiffs' attorney who has no leverage over the defendant does pose a very real threat to one group — the absent

class members who are supposed to be his clients. These perverse economic incentives flow naturally and inevitably from the vision of Rule 23 urged by petitioners. Suppose that a lawyer representing a tort victim files a class action on behalf of a hundred other victims and that the Rule 23 requirements can be met only if the defendant agrees to settle the lawsuit as a class. If the defendant makes a low-ball offer to settle the class action the attorney may well be inclined to accept it, for unless there is a class settlement that lawyer will earn only the contingent fee in his original single case. Normal economic self-interest would therefore lead the attorney to view the low-ball offer favorably, even if it settles the plaintiffs' claims for pennies on the dollar.

One might think that the plaintiffs' lawyer would hold out for more money because the fee would be even larger if the class were to receive more than the low-ball offer. Although it is true that the attorney would prefer more money to less, the problem is that the class counsel cannot extract more money from the defendant because she has no settlement leverage. The class attorney cannot threaten the defendant with a huge class-wide judgment because the lawsuit cannot be tried as a class. Her only threat is that the individual lawsuits will proceed to trial unless the case settles as a class action, but that is no threat with respect to the exposure-only claims here, which the class plaintiffs concede they never had any intention to pursue outside a class action. Cert.App. 62a-66a. Moreover, other potential plaintiffs' class counsel will be waiting in the wings to rush in if the first plaintiffs' attorney offered the settlement class action deal turns it down. The defendant can shop it to the other prospective class counsel until someone buys it. As the testimony of CCR's own officers in this case shows, a defendant is unlikely to have to "shop" for very long to get the desired bargain. JA 427, 626 (present class counsel were the very first plaintiffs' attorneys "approached" and "picked" by the CCR defendants to bring this settlement class action).

One might also suppose that the defendant's low-ball strategy would fail because absent class members would simply opt out of

an inadequate settlement. But the right to opt out is an effective safeguard only for those class members who learn of the proposed settlement and grasp its significance in time to exclude themselves. Due to the inherent defects in a notice campaign directed at people who aren't injured yet and may not even know that they have been exposed to asbestos and are therefore class members, let alone the particular defects in the notice campaign here, this safeguard was meaningless in this case, as demonstrated *infra*.

Although they are nominally counsel for the entire plaintiff class, including the absent class members, attorneys for the class representatives share an overriding interest with the defendants when, as here, they cannot secure class certification without the defendants' help. The attorneys can earn a fee off the absent plaintiffs' claims only if there is a class action, and there can be a class action only if the defendants want one. Rather than being adverse to the defendants, putative class counsel is *dependent* on them. (This is underscored in the current case by the back-seat that class counsel have consistently taken to the attorneys for CCR: counsel for CCR picked class counsel, designed and ran the notice campaign for class counsel's clients, argued class counsel's case to the Court of Appeals and sought certiorari for the class action that the Third Circuit decertified).

By reversing the Third Circuit, this Court would put its stamp of approval on incentive arrangements that encourage plaintiffs' attorneys and named plaintiffs to sell short the interests of the absent class members they are supposed to be "virtually" representing. Only when certification can be obtained without a defendant's help can class counsel be expected to demand in settlement every dollar the absent plaintiffs' claims are worth. Only when important divergent interests within the absent class are given separate voices are settlement proceeds likely to be divided appropriately. The approach urged by Petitioners would encourage low-value settlements presided over by attorneys who nominally represent a class but who, in reality, are incapable of dealing with defendants from a position of strength. It would also

encourage settlements that submerge and ignore important differences between absent plaintiffs. The Due Process Clause forbids representatives whose incentives are so demonstrably deficient from binding a group of absent plaintiffs who wish to speak for themselves. That is the lesson and the legacy of *Hansberry v. Lee*.[5]

III. THE NOTICE IN THIS CASE VIOLATED RULE 23(C)(2) AND DUE PROCESS

A. Adequate Notice Is Inherently Impossible In A "Futures" Class Action Of The Kind Involved Here.

Another unprecedented feature of this case is its extinguishment of *future* claims held by persons who often do not know that they have been exposed to asbestos or do not know that they are members of the class. Due process and Rule 23(c)(2) require that notice be tailored to allow an absent class member to "make a rational judgment on whether to exclude himself from the action." 7B Charles A. Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 1787, at 220 (1986). This standard cannot be met here. The MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.45, at 244 (1995), warns that "persons who may not currently be aware that they have a claim or whose claim may not yet have come into existence. . . cannot be given meaningful notice," and their opt-out rights may be "illusory." As the Court of Appeals noted, there are several dimensions to the notice problem.

1. "First, exposure-only plaintiffs may not know that they have been exposed to asbestos within the terms of this class action." Cert. App. 55a. Indeed, respondent Casimir Balonis was exposed to asbestos for about a year when he worked in a

[5]The parallels between the defective incentive structure in this case and that condemned by this Court in *Hansberry v. Lee* are explored in the Brief *Amicus Curiae* of Law Professors in Support of Respondents at 22-25.

shipyard a half-century ago (1947-48), and he did not have any asbestos-related illness until he was diagnosed with mesothelioma several months after the opt-out period closed.

The problem is especially severe with respect to spouses and other family members, whose loss of consortium claims are also extinguished in the settlement. Cert. App. 23a n.3. For example, class representatives LaVerne Winbun and Nafssica Kekrides and class member Margaret Balonis did not learn that their husbands had been occupationally exposed to asbestos until after the men contracted mesothelioma. Cert. App. 55a. In addition, the class contains children not yet born and spouses not yet married, who, needless to say, cannot receive effective notice.

Furthermore, family members are also susceptible to asbestos-related illnesses because of their close proximity to those who were occupationally exposed. Indeed, tragically, the wife of one of the exposure-only class representatives contracted mesothelioma from exposure to the asbestos dust carried home on her husband's work clothes. Fair.Hrng.Trans. at 228-29 (Feb. 24, 1994).

2. Second, the Third Circuit concluded that "class members who know of their exposure but manifest no physical disease may pay little attention to class action announcements." Cert.App. 55a Indeed, Casimir Balonis was in fine health until he was diagnosed with mesothelioma (an always fatal form of cancer) several months after the opt-out period closed. "Without physical injuries, people are unlikely to be on notice that they can give up causes of action that have not yet accrued." *Id.* The manner in which government — let alone ordinary citizens — manages risk has been the target of much scholarly criticism. *E.g.*, Stephen G. Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993); Stephen G. Breyer, REGULATION AND ITS REFORM (1982); John D. Graham & Jonathan B. Wiener, eds., RISK VS. RISK (1995). To expect exposure-only individual class members to read, understand, and respond to densely written class action notices dealing with theoretical legal claims that do not yet exist is nothing short of Panglossian. As the State of

Texas observed in the Court of Appeals, "Many must have treated even individual written notices — if they received any — as junk mail." Br. Amicus Curiae at 3 (filed Feb. 27, 1995).

Indeed, asbestos exposure, even in the worst case, carries with it a relatively low probability of future harm. In the pending case of *Metro-North Commuter R.R. v. Buckley*, No. 96-320, the respondent railroad worker who "ingested a massive amount of carcinogenic asbestos fibers into his lungs" while working underneath Grand Central Station — and who was known as a "Snowman" because "every day after working on the old pipe insulation in the tunnels, [he] would emerge covered head to toe with white pipe insulation dust" — alleges merely that he "now has an increased risk of dying from asbestos-related cancer of between 1% and 5%."[6] The risk is this small even though for three years he was exposed "to massive amounts of carcinogenic fibers on a daily basis."[7] When the risk is a low-level possibility of future harm — perhaps decades away — the fact that most class action notices are ignored should hardly be surprising. The unlucky few who contract mesothelioma and other asbestos-related diseases are struck by lightning; the vast majority of the class will survive unscathed.

3. "Third, even if class members find out about the class action and realize they fall within the class definition, they may lack adequate information to properly evaluate whether to opt out of the settlement." Cert. App. 55a-56a. The settlement covers some but not all the conditions caused by asbestos for which plaintiffs recover damages in the tort system. It contains no inflation adjustment, no provision to account for new medical or scientific knowledge regarding the etiology of disease, and no guarantee that the CCR defendants will even remain in the settlement after ten years. Not knowing what illness they might develop in the future, or what their personal circumstances might

[6] Br. in Opposition in No. 96-320, at 1, 4 (filed Sept. 27, 1996).

[7] *Id.* at 1.

be at that time, the choice of staying in or opting out can be no more reasoned or deliberate than placing a bet at the track on a horse that hasn't been born yet. As the State of Alabama explained in the District Court, "the class members lack any basis for making an informed decision on whether to remain in the litigation. At best, class members could only guess whether the proposed settlement would be beneficial or detrimental to their interests." Br. Amicus Curiae at 4 (filed Apr. 29, 1993).

Accordingly, "[i]n evaluating the fairness and reasonableness of any proposed settlement, the court should make certain ... that the agreement does not impermissibly waive future claims." 7B Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1797.1, at 41-42 (Supp. 1994). The difficulties of analyzing future claims have led many courts to reject the inclusion of future claimants in class actions altogether.[8] Typically, courts have included future

[8] *E.g.*, *Scott v. University of Delaware*, 601 F.2d 76, 89 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979) ("[W]e do not think that future faculty members, whose possible claims are only speculative and can only be formulated in a highly abstract and conclusory fashion, should provide, and possibly be prejudiced by, membership in the class which [the plaintiff] seeks to represent."); *Shults v. Champion Int'l Corp.*, 821 F. Supp. 520, 524 (E.D. Tenn. 1993) ("No settlement that precludes future, unknown causes of action can be considered fair, reasonable, or in the best interests of the class as a whole."), *dismissed*, 35 F.3d 1056 (6th Cir. 1994); *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974) (denying Rule 23(b)(3) class certification, in part on the ground that, "because of the nature of the injuries claimed, there may be persons that might neglect to 'opt out' of the class, and then discover some years in the future that they have contracted asbestosis"); *Foster v. Bechtel Power Corp.*, 89 F.R.D. 624, 627 (E.D. Ark. 1981) (ruling that future plaintiffs could not be included in a Rule 23(b)(2) class: "due process considerations ... permeate the decision of whether or not to certify a class"); *Freeman v. Motor Convoy, Inc.*, 68 F.R.D. 196, 200 (N.D. Ga. 1975) (ruling that a class action could not include prospective job applicants and warning that "an overbroad framing of the class may operate to deprive absent members of due process"); Note, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85 COLUM. L. REV. 397, 397 (1985) ("the inclusion of future members in class actions is inconsistent with both the explicit requirements and the theoretical

claimants only in contexts like bankruptcy or other situations where a single *res* must be divided among competing claimants, and "appointing a representative for future claimants best serves the general principles of due process by giving these claimants their day in court. . . . Without allowing representation in the reorganization proceeding, a court may be denying future claimants any remedy at all." Note, *Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims*, 38 Vand. L. Rev. 1369, 1393 (1985). Here it is undisputed that there is no limited fund or any other reason that including future claimants in a class action is necessary to protect their interests. Cert.App. 230a ("the assets of the defendants do not constitute a limited fund"). Indeed, the petitioners' own expert witness testified that CCR's maximum total payout under the settlement over the next ten years would constitute less than 1% of the CCR companies' projected gross profits for that same period. Fair.Hrng.Trans. at 88-89 (March 15, 1994).[9]

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underpinnings of Rule 23, thus posing a serious threat to the due process rights of future members"); *id.* at 398 n.7 ("future members cannot be included in (b)(3) actions"); *id.* at 403 ("The drafters of Rule 23 did not anticipate the inclusion of future members in class action suits. Indeed, upon close examination it is clear that Rule 23(a)'s prerequisites for class certification cannot be meaningfully applied to future members to protect their due process rights.").

[9] Nor do cases under other subdivisions of Rule 23(b) justify inadequate notice in the Rule 23(b)(3) context. Where there is no right to opt out, notice to the class exists principally to permit the absent class to present objections, not so that each class member can be given the opportunity to control his or her separate litigation. *See also* 3B MOORE'S FEDERAL PRACTICE ¶ 23.55, at 23-417 (1995) ("in the (b)(3) type of class suit there is no jural relationship between the members. They are legal strangers related only by some common question of law or fact and they have a right to opt out of the class. Mandatory notice under (c)(2) informs them of that right, and satisfies the presumed due process precondition to entering a binding judgment against them"); *Durrett v. John Deere Co.*, 150 F.R.D. 555, 562 (N.D. Tex. 1993) ("Rule 23(b)(3) class members are legal strangers related only by some common questions of law or fact. . . . Class

Even petitioners' own authorities concede that "[f]or class members who cannot currently identify themselves for purposes of protecting their interests with respect to a class action purportedly commenced on their behalf, an opt-out right within a court-designated period of time . . . is of no beneficial use." 1 Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 1.23, at 1-55 (3d ed. 1992). "[F]uture claims will not and cannot be bound by the class action litigation. Toxic torts giving rise to latent illnesses and defective products with latent risks are two examples." *Id.* at § 17.39 at 17-119. Petitioners' authorities also concede that future claimants

> may not even know that they have a claim, let alone its value, until after a settlement is concluded. As many commentators have noted, future claims class actions raise many vexing problems of effective notice, adequate representation, litigation management, actual or potential conflicts of interest, legal ethics, and claims administration.

Peter Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 966 (1995). Accordingly, Prof. Schuck concludes that settlements involving future claimants must contain a "back-end" opt-out right (*id.* at 967) — so that class members can decide whether to opt out *after* their injury is manifested. The settlement in this case contains no such a provision. Cert. App. 56a n.16.

In *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), the court of appeals agreed with the arguments of current Class Counsel Joseph Rice that it would be "absurd" to require "a person who had no inkling that years in the future he would be killed" to participate in a reorganization proceeding today. *Id.* at 943. In direct contrast to his position as class counsel here, Mr. Rice argued in *Schweitzer*

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members under the other provisions have interests more closely aligned").

that "[a] so-called claimant who has no injury cannot make reasonable choices about his claim, no matter what type of notice is given."[10] It was for these reasons that the court in *In re Amatex Corp.*, 37 B.R. 613 (E.D.Pa. 1983), *rev'd on other grounds*, 755 F.2d 1034 (3d Cir. 1985), concluded that "[n]o genuine or meaningful notice can be given to individuals who cannot know of a future cause of action." *Id.* at 614.

This prospect of the wholesale termination of tort claims before they exist, and before the individuals who hold them are aware of them and can intelligently evaluate and act upon them, is precisely what led to the universal adoption of the "discovery rule" for personal injury litigation.[11] The discovery rule provides that a cause of action accrues and the statute of limitations begins to run on the date a plaintiff discovers, or should have discovered,

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[10] Reply Br. of Plaintiffs/Appellants in *Schweitzer v. Reading Co.*, No. 84-1086 (3d Cir.) at 24 (filed Aug. 31, 1984). Mr. Rice also argued:

> Even if it is somehow accepted that Reading gave notice sufficient to meet due process standards, these employees' claims nonetheless cannot be constitutionally discharged. Before a right can be extinguished, those holding the right must be given a meaningful opportunity to be heard. *E.g., Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). Such an opportunity was impossible in the instant case . . . [because], before consummation of the bankruptcy, *none of the plaintiffs were injured. It would have been impossible for any of them to make an informed decision on what he or she might accept as fair compensation for an injury that might occur in the future.* A claimant would be ignorant of the extent of possible future impairment and would have no idea what his future personal circumstances would be.

Br. of Plaintiffs/Appellants in *Schweitzer v. Reading Co.*, No. 84-1086 (3d Cir.) at 32-33 (filed June 29, 1984) (emphasis added).

[11] The discovery rule is now universally applied in asbestos litigation. *See, e.g., Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151 (6th Cir. 1981); *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1102 (5th Cir.), *cert. denied*, 419 U.S. 869 (1974).

his injury. As early as 1949, in a case involving a railroad worker who had contracted silicosis, this Court adopted the discovery rule, stating that "'the afflicted employee can be held to be injured only when the accumulated effects of the deleterious substance manifest themselves. . . .'" *Urie v. Thompson*, 337 U.S. 163, 170 (1949). The Court rejected the alternative rule requiring a plaintiff to act on his claim before it accrued:

> It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, [the plaintiff] was charged with knowledge of the slow and tragic disintegration of his lungs; under this view [the plaintiff's] failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded onto his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.

Id. at 169. This Court concluded that interpreting the law as compelling such an uninformed and unknowing "waiver" of rights by potential plaintiffs who were not yet injured would make it clear that the plaintiff had been afforded "only a delusive remedy." *Id.*

The illogic of prematurely compelling such waivers of unripe, unaccrued claims was decried thirty years ago by Judge Frank when the Second Circuit refused to apply the discovery rule to Connecticut's statute of limitations:

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before you ever marry or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of logical "axiom," that a statute of limitations does not begin to run against a cause of

> action before that cause of action exists, *i.e.*, before a judicial remedy is available to a plaintiff.

Dincher v. Marlin Fire Arms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting).

It is no answer to say, as the district court did below, that a class member wishing to avoid a "premature decision" about participating in the settlement could simply opt out of the action. JA 314. First, to say that unimpaired claimants who lack sufficient information to make a rational judgment are always free to "maintain the *status quo*" by "opting out" *assumes that they are even aware of the existence of the class action in the first place*. Second, *choice* is the defining characteristic of a Rule 23(b)(3) class and the *raison d'etre* for the notice mandated by Rule 23(c)(2) and the Due Process Clause. The decision whether to opt out or stay in is *irrevocable either way* (once the opt-out period closes). If the proposed settlement is — as the settling parties maintain — a fair bargain, then the choice matters a great deal because class members should accept it. If the bargain is a poor one, choice likewise matters a great deal because they should reject it and opt out.

If the district court's and petitioners' dismissive treatment of the right to an informed choice were the law, a court could *always* defend inadequate notice by telling absent class members: "if the notice doesn't provide you with sufficient information to make a rational judgment, so what — just opt out."

Furthermore, the problem of securing informed, deliberative choice may in fact be *compounded* when a detailed settlement is sent along with notice of the class action. "[A]bsentees tend to lack a real understanding of the actions supposedly pursued in their names" and "where notice of the class action is sent simultaneously with the notice of the settlement itself" — the settlement class paradigm — "the class members are presented with what looks like a fait accompli." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 789 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) (internal quotation omitted).

> [T]he mere presentation of the settlement notice with the class notice may pressure even skeptical class members to accept the settlement out of the belief that, unless they are willing to litigate their claims individually — often economically infeasible — they really have no choice.

Id.

B. The Notice Campaign In This Case Was Wholly Inadequate.

Providing the "futures" plaintiffs in this class action with adequate notice would have been impossible even if the notice campaign had been well designed and implemented. But it was not. And petitioners' suggestion that "over six million individuals received actual notice materials" (Pet. Br. 13) (internal quotation marks omitted) is highly misleading, to say the least.

The notice campaign consisted of a television and print campaign and the placement of "clip art" announcements of the settlement in the pages of union-issued journals which are mailed to union members and, in some cases, retirees. Cert. App. 216a, 218a-219a. The district court refused to require the settling parties to obtain lists of the names and addresses of (1) present and former employees of the CCR defendants and their predecessors whose job it was to install, or work around asbestos; (2) present and former employees of naval and commercial shipyards; and (3) present and former employees of major purchasers of asbestos or asbestos-containing products from CCR defendants. JA 296-97. The district court did not believe such measures were required by Rule 23(c)(2), JA 297-98, even though this Court held in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), that "individual notice is not a discretionary consideration to be waived in a particular case," and "[t]here is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." *Id.* at 173.

The union clip art did not contain a class opt-out form, even though it would have been feasible to include one. JA 499-500. In fact, *nothing in the union clip art, television ads, or newspaper ads circulated by the notice campaign informed class members that they needed to opt out of the class if they did not want to participate in the class action or be bound by the judgment*. JA 502.

The only way for individuals to learn these critical facts was to obtain a notice packet. Such packets were distributed in two ways: through a number of labor unions, and to callers of a special "1-800" number (which was publicized through union clip art, TV spots, and newspaper ads). Cert. App. 218a-219a. In contrast to petitioners' claim of "six million" notices distributed, in fact the record reveals that only 720,000 notice packets were distributed, Cert. App. 218a-219a — *i.e.*, only 12% of the number claimed by petitioners, and less than 4% of the 21 million American workers who have been occupationally exposed to asbestos. *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1323 (5th Cir. 1985)(en banc)(an estimated 21 million Americans have been exposed to asbestos).

These inflated claims are part of a pattern. The settling parties promised the district court that they would distribute notice materials to 56 unions with 9 million members, and they promised to send individual notices to as many of the 9 million as possible. In fact, however, only nine unions distributed notice packets to approximately 400,000 persons —a success rate of less than 5%. JA 498. Moreover, the evidence indicated that many unions lack addresses for retired or laid off workers who have been exposed to asbestos in the past. JA 844.

The "1-800" number saw no better success. Of the approximately 250 million residents of the United States, and the tens of millions who have been exposed to asbestos, only 347,146 persons called the 800 number. JA 493. Only 4,223 persons requested copies of the settlement stipulation and only 320,854 requested notice packages. JA 493-94. Some callers to the "1-800" number were incorrectly told that if they did not wish to be

bound by the class action, they did not need to take any further action and were also given inaccurate information about the attorneys fees in the case. Cert. App. 220a.

Further, the notice campaign was delayed, with the result that the number of persons who could successfully opt out was minimized. The union magazines and newsletters containing the settling parties' clip art were not sent out until December 1993 (JA 505) — in some instances as late as December 20. JA 522. The magazines and newsletters were sent bulk rate, which typically takes no less than two weeks' delivery time. JA 505-06. Moreover, they were sent at the height of the holiday season, when mail delivery is especially slow.

Thus, a union member had to:

- receive the magazine by bulk mail;
- read and understand the small ad;
- request a notice packet from the "1-800" number (not surprisingly, in view of the tardy publication date, about 300,000 of the calls on the "1-800" number were made after December 2, 1993, and about 260,000 of the requests for packages came after that date, JA 497);
- receive the packet in the mail (after a call was received, the requested materials were not sent out for between five and ten business days, JA 494);
- read and comprehend the 41-page notice packet (JA 227-81); and
- mail the opt-out form to the district court by January 24, 1994. JA 496.

It is quite likely that a large number of persons requesting notice packages did not actually receive them until after the opt-out date had passed. Amazingly, the settling parties did not inform callers to the "1-800" number of the risk that they might receive their package close to or after the opt-out date. JA 496. The settling parties were receiving calls on the "1-800" number more than a year after the close of the opt out period. JA 504.

The inadequacies of the notice campaign were confirmed by the fact that *six of the seven class representatives who testified on notice issues stated that they saw neither the print nor the television media notices*. *E.g.*, JA 362 (Timothy Murphy, who watches television and reads the newspapers "every day," saw nothing about the class action); JA 369; JA 390; JA 397; JA 420-21, 693; JA 353. The *only* class representative to have seen or read any of the court-approved publications, advertisements, or the notice packet itself was the lead plaintiff, Robert Georgine, who, as president of the AFL-CIO's Building Trades Department, is far more knowledgeable about asbestos disease and legal matters than most class members.[12]

The string of deficiencies is not surprising in light of the manner in which the notice campaign was administered. It was directed by a consultant who had never before handled notice in a class action. JA 484. No one at her firm had any prior experience with class actions. *Id.* Nor did she consult with anyone with prior experience. JA 486. She did not understand that the number of potential class members might be more than 20 million. JA 487. In fact, she had no targeted number at all. JA 488. She made no effort to contact anyone at the hundreds of job sites where large numbers of asbestos claims had come in. *Id.* She could not recall ever meeting with class counsel regarding the notice campaign. JA 490. Class counsel — the guardians of the thousands of class members who will die in the future from asbestos exposure — never gave her lists of groups to contact; never gave her specified job sites where she might locate victims; and never gave her *any* input about how the notice campaign should operate. JA 492.

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[12] The Director of the Office of Workers' Compensation Programs of the U.S. Department of Labor argued below that the notice was "materially defective and incorrect" because it did not provide an acceptable explanation of rights under the Longshore and Harbor Workers' Act. Mem. in Support of Motion for Leave to File Objections to Settlement as *Amicus Curiae* in Dist. Ct. at 1 (Feb. 9, 1994).

Given the circumstances of this "futures" class action, adequate notice would have been inherently impossible, even if the notice campaign had been administered properly. But the notice program here was executed in such a woefully defective manner that the question is not even close.

IV. POLICY CONCERNS ALSO MILITATE AGAINST PETITIONERS' CONSTRUCTION OF RULE 23

The purpose of Rule 23 is not, as petitioners would have it, "efficiency" at all costs. Pet. Br. 30, 33-34, 48. Rather, the principal purpose of the Rule, particularly the Rule 23(a) and (b)(3) criteria, is protection of absent class members, by allowing their claims to be adjudicated only when their interests are aligned with those of the class representatives, and forbidding resolution of claims *en masse* when those interests diverge.

Further, it must not be forgotten that the flood of asbestos lawsuits — if such a flood exists — was created by the callous and often deliberate actions of the asbestos industry, whose misconduct caused unparalleled death and disease. The deaths and injuries of tens, if not hundreds, of thousands of Americans are attributable to asbestos. Innocent future victims will likewise suffer enough for the petitioners' wrongs, and should not be called upon for further sacrifices, including the forfeiture of their constitutional rights.

1. In any event, petitioners' professed policy concerns have no basis. Although their warnings of docket collapse from asbestos litigation may sound familiar enough to pass as conventional wisdom, in fact those claims are currently the subject of intense controversy among judges, academics, and legislators. *See, e.g.*, John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1364 (1995); John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 996, 1010-12 (1995). Indeed, these very same petitioners (in their collective voice as the Center for Claims Resolution) severely criticized what they saw

as the alarmism of the Ad Hoc Committee's 1991 report (a report petitioners now purport to embrace). Petitioners issued a "white paper" response to the Committee Report, arguing: (1) that "claims for significant [asbestos] impairment" are in fact "on the decline, due to lowered workplace exposure levels in the past few decades" (JA 432); (2) that any surges in federal asbestos filings are largely attributable to the publicity surrounding "radical consolidation or class action techniques" promoted by particular federal judges, which attract lower-value claims that might otherwise never be filed (JA 433); and (3) that proposals for mass class actions or consolidations could not be achieved under current law, would exceed the courts' legitimate authority, and would violate the separation of powers. JA 430-31, 437-44.

Even the authorities cited by petitioners maintain that asbestos cases are increasingly "mature" torts, and that, because the initial period of litigation has already established the parameters of liability and fixed the likely recovery values, the claims will increasingly be resolved through consensual settlements on a case-by-case basis. Roger Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 78-79. In fact, petitioners informed the district court that they *settle 99.8% of the asbestos cases filed against them* (JA 125 n.18), and this figure does not even include the mass inventory settlements of close to 23,000 cases that petitioners have been able to negotiate, such as the thousands of pending claims that the petitioners settled in one stroke with class counsel on the eve of the filing of this class action.

We must keep in mind that this settlement class action involves possible *future* claims, and therefore has nothing to do with the MDL 875 process that has been going on in the Eastern District of Pennsylvania, which involves the transfer of all *real* (that is, *pending*) federal asbestos cases. According to both the district judge who has been presiding over it and the other asbestos defendants who have been involved in it, MDL 875 has been a dramatic success. The original MDL transfer order consolidated 26,639 civil asbestos personal injury cases. By

May of 1991, MDL 875 had grown to 58,478 cases. *In re Asbestos Products Liability Litigation(No. VI)*, 1996 WL 239863 at *1 (E.D.Pa. May 2, 1996). Judge Weiner recently reported that more than 38,000 of those cases have been removed from the active federal docket; some 20,000 through settlements with all parties and over 18,000 by administrative dismissal. *Id.* at *1, *5. This means that 65% of all pending federal cases have been resolved as active matters as to all parties.[13]

This record of achievement was praised by asbestos defendant Owens-Illinois in a brief urging the Third Circuit to reject petitioners' dire warnings about docket collapse if this settlement class action were decertified. Brief *Amicus Curiae* of Owens-Illinois in Opposition to Petition for Rehearing In Banc at 2-3. As a major asbestos defendant that is not a member of the CCR consortium, Owens-Illinois is in a good position to evaluate the impact of decertification of this class action. Owens-Illinois pointed out that only a small fraction of the new cases purportedly filed against some defendants since the initiation of the *Georgine* action (Pet.Br. 2) were filed in the federal courts. Brief *Amicus Curiae* of Owens-Illinois in Opposition to Rehearing at 3. "Judge Weiner's stewardship of MDL 875 has thus significantly reduced the flow of new asbestos-related claims into the federal courts."

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[13] In May of 1996, Judge Weiner dismissed approximately 18,000 asbestos cases from the court's marine docket (claims by crew members exposed on board ships) because those plaintiffs "have no asbestos related injury" and their cases were consequently not "ripe and ready to proceed." *In re Asbestos Products Liability Litigation(No. VI)*, 1996 WL 239863 at *5. The court ruled that those cases "may be individually reinstated" once "[e]ach plaintiff ... has an asbestos-related personal injury." *Id.* Since the court noted that the extraordinary increase (475%) in these uninjured marine docket filings occurred after the MDL transfer and before May, 1996, *id.* at *1 — in short, during the pendency of this settlement class action raising exposure-only claims — this seems to confirm CCR's own analysis that "radical consolidation or class action" experiments induce the filing of marginal or frivolous claims and thereby create misleading surges in asbestos case filings. JA 433.

Id. Furthermore, although the CCR companies have been protected from new filings in any court by the district court's anti-suit injunction in this case, no such protection was afforded the other asbestos defendants. Therefore, although "[d]issolving the injunction may cause plaintiffs in pending cases to implead CCR companies in a significant number of those pending state court cases, ... it does not follow that there will be a flood of new lawsuits in the federal system." *Id.* at 5.

2. Petitioners' argument also rests on a misreading of the Third Circuit decision. The court of appeals did not forbid the use of settlement class actions in mass tort cases. To the contrary, the Third Circuit expressly *approved* settlement class actions "whereby the court postpones formal class certification until the parties have successfully concluded a settlement." Cert. App. 37a n.9. The Court of Appeals added that, in such circumstances, "the court allows the defendant to challenge class certification in the event that the settlement falls apart," *id.* — thus eliminating any risk that a defendant who expresses provisional agreement to a settlement class action would be estopped from challenging the same class if it were to be litigated.

Moreover, petitioners ignore non-class-action means for resolving claims on a collective basis. The Third Circuit expressly contemplated "[a] series of statewide or more narrowly defined adjudications, either through consolidation under Rule 42(a) or as class actions under Rule 23" as viable means to resolve mass tort cases fairly and efficiently. Cert. App. 57a. Other courts have agreed that "[t]here is reason to believe that even a mass tort like asbestos could be managed, without class certification, in a way that avoids judicial meltdown." *Castano v. American Tobacco Co.*, 84 F.3d 734, 747 n.24 (5th Cir. 1996).

3. Petitioners also contend that the court of appeals' decision would make it difficult for settlements to encompass damages as well as liability issues. Petitioners speculate (citing only four cases as examples, Pet. Br. 36 n.16) that in some contexts damages calculations are too individualized to permit them to be

tried on a classwide basis. Petitioners' concerns in this regard are wholly misplaced.

In the first place, even petitioners' own authorities demonstrate that they have substantially exaggerated the difficulty of trying damages on a classwide basis in litigated class actions. One of the district courts cited by petitioners predicted that "generally accepted" econometric methods could be used to determine "with a reasonable degree of certainty the fact and the amount of damages suffered by the class and each class member" in an antitrust action, so that the assessment of damages might become "an almost mechanical task." *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143, 154 (E.D. Pa. 1979); *see also Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977) ("it has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate"); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976) ("the amount of damages is invariably an individual question and does not defeat class action treatment"); *In re Plywood Antitrust Litig.*, 76 F.R.D. 570 (E.D. La. 1976); 2 NEWBERG ON CLASS ACTIONS § 9.52, at 9-144 ("In many cases, the quantum of damages for the entire class, as well as the issue of liability, may be proved by the class representative as a common issue, thus eliminating the need for individual damages proofs."); *id.* at § 10.01, at 10-2 ("When monetary relief is sought, and when data from each class member are required to assess individual recovery entitlement, it is still possible in most cases for the class representative to develop and prove common guidelines or formulae that will apply to determine the measure of recovery for each individual proof of claim.").

Further, even if petitioners' argument were accepted, it would simply demonstrate the extent to which petitioners seek to expand Rule 23 in this case. For the traditional understanding is that Rule 23 was never intended to permit federal courts to resolve mass personal injury cases, let alone to resolve damages claims that were not appropriate for class treatment. *See, e.g.* Fed.R.Civ.P.

23(b)(3) Advisory Committee Note to 1966 Amendment ("a 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action"); Fed. R. Civ. P. 23(c)(4) Advisory Committee Note to 1966 Amendment ("in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims").

4. Petitioners' policy arguments could not in any event justify overriding the limits of Article III and other fundamental principles of federal litigation. In the end, petitioners' appeals to "pragmatism" and "practicality" are nothing more than a prayer for the judiciary to rush in where Congress has feared to tread. This Court has heard — and rejected — this siren song before: "The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring). Yet even "necessity" must bow to the law when the Constitution's structural limitations on governmental power are at stake, because "the Framers ranked other values higher than efficiency." *INS v. Chadha*, 462 U.S. 919, 959 (1983).

5. Fealty to these fundamental principles is especially vital in this case, for the cure proposed by petitioners is worse than any disease they have identified. Petitioners' proposal would inevitably invite and prompt class action settlements that otherwise would not — and should not — take place. It would also likely result in the courts being flooded with legally questionable class actions. Already, public confidence in class action settlements has been eroded by growing reports of settlements of little benefit to class members, marked by outright collusion between opposing counsel or at minimum by none-too-subtle conflicts of interest on the part of class counsel. Petitioners' proposal would only accelerate that trend.

V. PETITIONERS' PROPOSAL IS AT ODDS WITH THE HISTORY OF CLASS ACTION PRACTICE

Petitioners contend that their proposal is supported by the "history" of Rule 23. Pet. Br. 26. Nothing could be further from the truth. The modern class action has antecedents in the historic practices of equity judges and the more recent phenomenon of "managerial judges" who actively participate in case handling and take a forceful role in pressing settlement. The recent application of the settlement class action to mass torts, however, involves a wholly novel combination of features that would have been unthinkable even a decade ago: "plaintiff classes" composed chiefly of hypothetical future claimants, many of whom have yet to suffer a legally cognizable injury; class "actions" with prearranged settlements that could not be certified for trial and are not intended to be tried; huge classes of tort victims "represented" by lawyers chosen by the defendants; decrees purporting to bind absent class members, most of whom have not had an effective opportunity to opt out of the class; settlement decrees that affect claims nationwide and eliminate claims governed by the laws of the 50 different States, with no accounting for variations among the different jurisdictions; and side settlements by class counsel with defendants, giving their current clients different and more favorable relief than the class settlement provides to their other clients — the class of future claimants.

Petitioners' claim that their proposal is consistent with the 1966 Amendments to Rule 23 (Pet. Br. 26-27) is simply unsupportable. There is nothing to indicate that the framers intended the federal courts to certify non-triable cases for settlement. Indeed, the Advisory Committee notes reveal a great deal of hesitancy about even *litigation* class actions, particularly in fraud and mass accident cases. *See, e.g.* Fed.R.Civ.P. 23(b)(3) Advisory Committee Note to 1966 Amendment ("a 'mass accident' resulting in injuries to numerous persons is ordinarily

not appropriate for a class action").[14] Had the Advisory Committee believed that a settlement could be used to resolve a non-triable case in federal court, it would not have inserted these caveats regarding fraud and mass accident cases.

The Advisory Committee also expressed concern about violating "the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit." *Id.* Settlement class actions — particularly those involving "future" plaintiffs whose claims have not yet arisen — involve an unprecedented intrusion on this interest. Further, had the Advisory Committee shared petitioners' view that, in the settlement context, the certification inquiry may be collapsed into Rule 23(e), it would not have devoted only a single cursory sentence to that provision. This oversight could hardly have been unintentional; as petitioners observe, settlement is in fact the most common way of resolving class actions in the United States. Pet. Br. 34.

In short, petitioners' proposal is flatly inconsistent with the history — as well as the terms, structure, and purpose — of Rule 23.

VI. AT MINIMUM, THE INJUNCTION AGAINST COLLATERAL ATTACKS MUST BE VACATED

The district court improperly enjoined class members from suing in any other court, thus eliminating the traditional due process right to pursue a collateral attack on a class action in which class members received inadequate representation or were not subject to the court's personal jurisdiction. *See Hansberry v.*

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[14] Judge Frankel conceded that "thoughtful" federal judges might question the "propriety" of opt-out Rule 23(b)(3) class actions as a "radical extension" of federal jurisdiction. Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 45 (1967); *see also* Resnick, *From "Cases to Litigation,"* 54 LAW AND CONTEMP. PROBS. 5, 9-16 (1991) (recounting drafters' intent in detail).

Lee, 311 U.S. 32, 40, 42-45 (1940); *Matsushita Electric Industrial Co. v. Epstein*, 116 S. Ct. 873, 888 (1995)(Ginsburg, J., joined by Stevens and Souter, JJ., concurring in part) ("Final judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement"); 7B Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1789, at 245 (1986 & 1995 supp.). After they filed suit against CCR in a Maryland state court, respondents Casimir and Margaret Balonis and their attorney were cited by the district court below for civil contempt of this injunction, for having the audacity to assert their due process rights under *Hansberry* and its progeny. The district court thus tried to predetermine the res judicata effect of its own judgment. This it may not do.

Accordingly, at the very least the injunction forbidding collateral challenges must be vacated.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC. ET AL.,
Petitioners

v.

GEORGE WINDSOR, ET AL.,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS GEORGE WINDSOR, *et al.*

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BRIEF OF RESPONDENTS GEORGE WINDSOR, ET AL.

This case involves an unprecedented "settlement class action" purporting to resolve the present and future unaccrued claims of millions of largely unidentifiable individuals who have been exposed to the asbestos products of the twenty companies known as the Center for Claims Resolution (CCR). Most notably, the settlement would extinguish asbestos-related causes of action of persons who currently suffer no physical injuries but who might, in the future, develop fatal diseases caused by asbestos. The settlement is a quasi-legislative measure that extinguishes "futures claims" by "exposure-only" plaintiffs even though those claims have not yet ripened and even though those plaintiffs may not know who they are.

Petitioners caricature the Court of Appeals' opinion as requiring that a district court "pretend that the settlement does not exist" in applying the criteria of Rule 23. Pet.Br. 1. But this Court reviews judgments, not opinions. It must look at what the Third Circuit actually *did*. Far from ignoring the settlement, the court in fact considered it extensively in applying the class certification criteria of Rule 23. Cert.App. 49a-57a.[1]

It is petitioners who ask this Court to recast Rule 23, in order to dispense with the safeguards in Rule 23(a) and (b) and to collapse the entire certification inquiry into Rule 23(e). Petitioners repeatedly concede that "litigation" here is only "hypothetical" and "assuredly *never* will occur." Pet.Br. 16, 19 (emphasis in original). Petitioners' view is that "mass-tort cases are too big and too unmanageable to be tried, but that doesn't mean that they can't be settled."[2]

To the contrary: the language, structure, and purpose of Rule 23, together with the requirements of Article III itself, all indicate that the criteria of Rule 23(a) and (b) — which refer to *actual, triable* cases — cannot be met solely by the terms of a settlement. Petitioners' claim that their radical proposal is needed to meet the exigencies of

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[1] Citations to the Appendix to the Petition for Certiorari are styled "Cert.App. __." Citations to the Brief of Petitioners are styled "Pet.Br. _." Citations to the Joint Appendix in this Court are styled "JA __."

[2] Edward Felsenthal, *Court to Consider Asbestos Settlement*, Wall St. J., Nov. 4, 1996, at B11 (quoting Mr. Aldock, counsel of record for petitioners other than GAF Building Materials, Inc.).

mass tort litigation is an argument for Congress, not this Court. In any event, although the Third Circuit opined that "'there is no language [in Rule 23] that can be read to authorize separate, liberalized criteria for settlement classes'" and that "'a class is a class is a class'" (Cert.App. 19a, 38a) (citation omitted), the Court of Appeals in fact *endorsed* the use of settlement class actions. *Id.* at 36a, 37a n.9. Contrary to the impression left by CCR, only one court (*see In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996)) has *ever* certified a class action like this — involving millions of persons, the vast majority of them uninjured (some of them as-yet unborn), with claims that would not be triable *even in individual actions*, and whose sole common characteristic is that they *might someday* seek damages from the same group of defendants. And even the Fifth Circuit indicated that it would not have certified a class on the facts of this case.

Moreover, this case fails the Article III case or controversy requirement because it is a feigned case brought ostensibly on behalf of persons who have suffered no injury in fact. There is no federal subject-matter jurisdiction even to consider petitioners' arguments.

STATEMENT OF THE CASE

1. Background and Procedural History. This singular proceeding began in an extraordinary fashion. After judicially sponsored attempts to negotiate settlements of *pending* asbestos cases had stalled, CCR "decided to approach" two plaintiffs' lawyers (not the other way around) in an effort to resolve *future* asbestos claims *before they accrued*. JA 626. CCR's CEO testified that he "decided to target" Gene Locks and Ron Motley, the plaintiffs' attorneys who eventually became class counsel in this case. JA 427. As CCR's executive put it, "We picked them." *Id.* Prior to suit, CCR agreed to pay class counsel's fees as part of the stipulation of settlement (JA 100) — in effect agreeing to pay the fees of an opponent for instituting a class action against them.

While putative class counsel were negotiating on behalf of the as-yet-unformed class of future claimants, they simultaneously represented 14,000 plaintiffs who had already filed lawsuits against CCR. Before the class negotiation concluded, class counsel settled

those "present" cases with CCR for a total of $215 million in cash, including attorneys fees of approximately $70 million. JA 560. Only after CCR was sure that the class action would be consummated did it agree to these inventory settlements, the most important of which were signed on the eve of the filing of the class action. JA 445-47, 530.[3] Also prior to suit, class counsel entered into contingent, side agreements, enforceable if the class action settlement fell through, that would contractually prevent class counsel from filing "exposure-only" or other claims against CCR that did not meet the stringent medical criteria ultimately included in the class action settlement. JA 445-46, 534-35, 557, 766-67. After the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 93-371 holding such agreements unethical, and after the class action had been attacked as a feigned and collusive suit, petitioners modified the agreements in June and July 1993 to bind class counsel, contractually, to "recommend" to their clients that they not file exposure-only claims but instead accept the medical criteria included in the settlement. JA 429; Cert.App. 191a-193a. CCR did not view this commitment as any less binding on class counsel; its chief operating officer testified that "in my experience in litigation over some 14 years, rarely does a client reject advice of counsel, so I didn't view the 'will recommend' as being significantly different than the 'will not file.'" JA 769.

On Jan. 15, 1993, CCR and counsel for the putative class simultaneously filed a class action complaint, an answer by the defendants, a joint motion by the parties to certify the case as a class

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[3] CCR's CEO testified that "in 1991 we had resolved not to settle large blocks of present inventories of asbestos claims absent some commitment to the future." JA 667. He explained that "we indicated to [class counsel] that once we believed that there was some rational way of dealing with the futures, that we were prepared to address the settlement of pending cases." JA 761. He added that there came a point in 1992 "when we became reasonably confident that the Georgine negotiations [in this case] would become successful," and CCR "then changed our position from not doing inventory settlements without pleural registries, to doing inventory settlements in exchange for commitments on the future." JA 667. "Without a degree of confidence that the Georgine discussions would be successful, we would not have done the present inventory settlements." JA 668.

action "for settlement purposes only," and the proposed settlement that CCR had previously negotiated with its own hand-picked attorneys for the plaintiff class. There were no motions, no discovery requests, and no preliminary litigation of any kind. In a very real sense, this case was settled before it was filed.

The class that the plaintiffs purport to represent, described by the Third Circuit as "humongous" (Cert.App. 42a), includes all persons (including their present and future family members) who were occupationally exposed to CCR's asbestos products but who (whether injured or not) had not filed suit as of Jan. 15, 1993. The selection of that date as an artificial boundary allowed class counsel to gerrymander the class to exclude their then-existing inventories of asbestos plaintiffs, whose cases were settled outside the class action on strikingly different terms. *See* Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1051-64 (1995); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1393-95 (1995). The class comprises both individuals who currently have asbestos-related illnesses (and survivors of persons who have already died of asbestos-related diseases), and other individuals (probably numbering in the millions)[4] who were occupationally exposed to asbestos but who have not yet developed, and may never develop, any physical injuries related to the exposure.

Five of the nine named plaintiffs alleged that they had sustained physical injuries from CCR's asbestos products. Four of the named plaintiffs, however, expressly alleged that they had not yet sustained an asbestos-related "condition." JA 5, 7, 9-10. These exposure-only representative plaintiffs, who were indispensable to "representing" the vast class of currently uninjured persons, conceded in discovery and in sworn testimony at the fairness hearing that "absent the settlement, they did not intend to pursue the claims in the class complaint. They claimed no damages and no present injury." Cert.App. 66a (Wellford, J., concurring).

The settlement would resolve all claims for asbestos-related physical injuries that have occurred or may occur in the future by

[4] *Jackson v. Johns Manville Sales Corp.*, 750 F.2d 1314, 1323 (5th Cir. 1985) (en banc) (estimated 21 million Americans have been exposed to asbestos).

channelling the claims to an administrative claims process to be established and operated by CCR. The administrative process requires that claimants satisfy strict medical criteria (concededly "more stringent" than otherwise applicable state law, JA 916) in order to qualify for payment of compensation. CCR will then offer compensation to qualifying claimants in amounts within a predetermined range, but the settlement caps both the number of claims that can be paid in any given year and the amount that can be paid to individual claimants. The "case flow maximums" provide, for example, that in the first year of the settlement CCR is required to pay no more than 700 lung cancer cases, 700 mesothelioma cases, and 200 "other cancer" cases. JA 108-09. If more qualifying claims are filed, a queue will result, and claimants may be required to wait for years (and possibly never be paid). By comparison, in 1992, CCR settled 25,000 claims. Cert.App. 144a; *see* Coffee, *Class Wars*, 95 COLUM. L. REV. at 1397 & n.207 (25,000 claims/year between 1989 and 1993). Although the class members are bound to the settlement in perpetuity, the defendants are not: each defendant is free to withdraw from the settlement after ten years. Cert.App. 25a-26a; *see also* JA 101-02.

Unrebutted evidence indicates that approximately half the claims that are filed in state and federal court, and currently paid by CCR, would not qualify for payment under the exposure and medical criteria contained in the settlement. JA 808, 838. The claims asserted by the exposure-only plaintiffs in the complaint — claims for increased risk of cancer, fear of future asbestos-related injury, and medical monitoring — receive no payment or other remedy under the settlement. Cert.App. 49a. In addition, "pleural" claims, which involve asbestos-related plaques on the lungs but no physical impairment, receive no cash compensation, "even though such claims regularly receive substantial monetary payments in the tort system." *Id.* at 26a.

The evidence showed that the compensation provided by the settlement was far below average awards in the tort system.[5]

[5] For all high value mesothelioma claims, for example, the national average CCR settlement is $359,715 as contrasted with the $200,000 maximum allowed under the settlement for non-extraordinary claims. JA 461. Fifteen percent of

Payment under the settlement is not adjusted for inflation. Cert.App. 25a, 50a. In addition, the class settlement is significantly less favorable than the $215 million inventory settlements negotiated by class counsel as side deals on the eve of the class action. The inventory settlements provided for cash payments to many present clients who would not have qualified for any compensation under the class settlement. JA 771. Individual clients in the inventory settlements received at least a 54% premium over the maximum average payment under the class action.[6]

The settlement theoretically allows claimants who are dissatisfied with the compensation offered by CCR to "exit" to the tort system, but drastically limits the number who can do so to "a few persons per year." Cert.App. 49a; *see also* JA 87. If even a small percentage of class members seek such relief, the backlog will shortly exceed 15 years. *E.g.*, JA 917. Further, claimants who seek to exit to the tort system must still meet the settlement's stringent medical criteria, must waive any punitive damages claim, must comply with numerous procedural requirements, and will receive any compensatory damages in excess of 150% of CCR's last offer spread out over five equal, annual installment payments. JA 87-90.

2. The District Court's Decision. Two weeks after suit was filed, the district court conditionally certified the proposed class without any notice to putative class members, without a hearing, and

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current mesothelioma claims arise in California, and the statewide average of these claims is $419,674 — or more than 209% above the maximum allowable recovery under the settlement. *Id.* Although the settlement contains an "extraordinary claim" process that would permit certain mesothelioma claims to be settled at an average of $300,000, this process could not accommodate even 25% of predicted California mesothelioma claims — even ignoring mesothelioma claims arising in other states. JA 461. And the problem of undercompensation is by no means limited to California or to mesothelioma claims. The evidence showed that, through 1991, CCR settled some 1,116 mesothelioma, lung cancer, other cancer, and non-malignant claims nationwide (for a total of almost $104 million) in amounts that exceeded the proposed maximum value for non-extraordinary claims under the settlement. JA 464-68.

[6] *See* Coffee, *Class Wars*, 95 COLUM. L. REV. at 1397. If this figure is inaccurate, it is because Coffee *underestimated* the premium received by the inventory plaintiffs. *Id.* at 1397 n.210, 1398.

without the receipt of evidence. Cert.App. 70a.

Respondents and other absent class members challenged the class action and settlement under Fed.R.Civ.P. 23, the "case or controversy" requirement of Article III, standing, the notice requirements of due process, 28 U.S.C. § 1332 (relating to amount-in-controversy subject-matter jurisdiction), personal jurisdiction, and on other grounds. Joined by labor unions, asbestos victims' groups, and the States of Texas and Alabama, respondents also vigorously challenged the fairness of the proposed settlement. Thirty-seven law professors who teach or write in the area of professional responsibility submitted an amicus brief contending that insuperable conflicts of interest existed within the plaintiff class and between class counsel and their supposed clients.[7]

For their part, petitioners conceded on the record that "this case cannot meet the various requirements of Rules 23(a) and 23(b) when viewed as a litigation class." JA 131. Petitioners acknowledged that the case had not been brought "for purposes of litigation" nor had it been "actually litigated for some period of time," but was instead "brought for purposes of settlement only," and the settlement had been reached "before a class action was commenced." JA 123. Indeed, CCR has previously averred that "asbestos claims cannot be fairly handled in mass proceedings ... because, at bottom, each claim is different with respect to most elements of each plaintiff's cause of action." JA 437.

The district court denied all objections to jurisdiction and certification, ruled that the settlement was fair to the class, and tentatively approved the settlement. The court did not enter a final, appealable judgment, in part because of the pendency of a third-party action by petitioners against their insurers seeking a declaration that their settlement did not violate any provision of their insurance policies. Cert.App. 24a n.4, 276a. The district court did, however, enter a preliminary injunction prohibiting class members from filing asbestos-related damages suits against CCR in the state or federal courts, effectively requiring class members to pursue any asbestos-related claims against CCR under the terms of the settlement.

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[7] Dist. Ct. Dkt. No. 991 (Apr. 4, 1994). The district court refused to permit the brief to be filed. Dkt. No. 1010 (Apr. 11, 1994).

3. The Court of Appeals' Decision. On appeal, the settling parties reiterated that "certification of the present class would be inappropriate in the absence of the court-approved settlement." Appellees' Br. in Ct. App. at 101 n.85. The Third Circuit unanimously vacated the injunction and remanded the case to the district court with instructions to decertify the class. It expressed "serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction." Cert.App. 19a. Ultimately, however, the Court of Appeals elected to pass over these issues because it deemed the class certification question dispositive. *Id.*

The Third Circuit held that the class could not meet the Rule 23(a) requirements of typicality and adequacy of representation, or the Rule 23(b)(3) requirements of predominance and superiority. The court explained that the class members' claims vary widely in character. "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods." Cert.App. 41a. These factual differences translate into significant legal differences. "Differences in amount of exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff." *Id.* The application of 50 different sets of state laws in this nationwide diversity class action would "exponentially" compound the problem. *Id.* at 41a-42a.

With respect to adequacy of representation, the Court of Appeals held that "serious intra-class conflicts preclude this class from meeting the adequacy of representation requirement" of Rule 23(a)(4). Cert.App. 49a. The court focused on the settlement, explaining that it "makes numerous decisions on which the interests of different types of class members are at odds." *Id.* Further, the Court of Appeals found that Rule 23(b)(3)'s requirement that the class action be "superior to other available methods for the fair and efficient adjudication of the controversy" was not satisfied in part because the settlement's denial of delayed opt-out rights to currently uninjured class members raised "serious fairness concerns." *Id.* at 57a. The court concluded that it would "leave legislative solutions to legislative channels." *Id.* at 20a. "[W]hat the district court did here might be ordered by a legislature, but should not have been ordered by a court." *Id.* at 59a.

In a concurring opinion, Judge Wellford "fully subscribe[d]" to the panel's decision "that the plaintiffs in this case have not met the requirements of Rule 23," Cert.App. 60a, but wrote separately to express the view that the exposure-only plaintiffs, who "claimed no damages and no present injury ... had no standing to pursue this class action suit" and hence could not be bound by the result. *Id.* at 66a.

SUMMARY OF ARGUMENT

I. This Court lacks subject-matter jurisdiction even to consider petitioners' arguments, because this proceeding is not a justiciable case or controversy under Article III. This was a feigned, non-adversarial proceeding between CCR and class counsel for the common purpose of binding absent persons to the Stipulation of Settlement. There was never any good faith intent to litigate this proceeding for any other aim. *United States v. Johnson*, 319 U.S. 302 (1943); *Muskrat v. United States*, 219 U.S. 346 (1911).

Further, the "exposure-only" claimants that make up the vast majority of the class cannot be bound by the judgment because they lack standing to invoke federal jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In sworn testimony quoted at length by the concurring judge below, the class plaintiffs testified that they suffered no harms that conceivably qualify as "injury in fact."

Finally, the exposure-only plaintiffs fail the "redressability" requirement of standing, because the claims they assert — emotional distress, the enhanced risk of developing asbestos-related disease, and the need for medical monitoring — are in no way remedied by the stipulation for which they seek federal judicial approval. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976).

II. This case could not be certified under Rule 23. Petitioners concede that the requirements of the Rule could not be satisfied if the case were litigated. Yet they insist that the criteria of Rule 23(a) and (b) may be met solely by reference to the settlement. But the criteria plainly refer to issues in *triable* cases. Article III, the purpose and structure of Rule 23, and the Rules Enabling Act all confirm that Rule 23 does not permit certification in non-triable cases predicated wholly on a settlement. Class certification cannot be collapsed into the

fairness inquiry mandated by Rule 23(e).

III. The judgment must be affirmed regardless of how this Court answers the question presented. Petitioners' caricatures aside, the fact is that the Third Circuit considered the settlement extensively in holding that Rule 23 could not be satisfied. The settlement only underscores that the requirements of adequate representation, superiority, predominance, and typicality cannot be met here. Petitioners err in relying on the district court's contrary findings, for they cannot bind this Court on the legal questions of whether the Rule 23 criteria are fulfilled.

ARGUMENT

I. THIS CLASS ACTION IS NOT A JUSTICIABLE CASE OR CONTROVERSY UNDER ARTICLE III

A. This Class Action Is A Feigned Suit Over Which The Federal Courts Have No Jurisdiction

Article III, § 2 provides that the jurisdiction of the federal courts extends only to "cases" or "controversies." This Court has found "unfit for adjudication" any cause that "'is not in any real sense adversary,' that 'does not assume the honest and actual antagonistic assertion of rights,'" and which thereby violates "a safeguard essential to the integrity of the judicial process." *Poe v. Ullman*, 367 U.S. 497, 505 (1961) (quoting *United States v. Johnson*, 319 U.S. 302, 305 (1943)).

The burden of proving justiciability rests on those who invoke federal jurisdiction (here, the settling parties). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). If "challenged by his adversary," the party asserting jurisdiction cannot rest on his allegations and must prove jurisdiction by a "preponderance of evidence." *McNutt v. GM Acceptance Corp.*, 298 U.S. 178, 189 (1936). *See also Lujan*, 504 U.S. at 561, 566 n. 3. Article III compels a court to look beyond the pleadings to the actual state of affairs when the complaint was filed, in light of all that has been learned. A court is not bound by what plaintiffs and defendants alleged as to adversity: "Formal agreement between the parties that collides with plausibility is too fragile a

foundation for indulging in ... adjudication." *Poe v. Ullman*, 367 U.S. at 501. *See also City of Dawson v. Columbia Ave. Saving Fund*, 197 U.S. 178, 180 (1905) ("Court will look beyond the pleadings and arrange the parties according to their sides in a dispute").[8]

In *United States v. Johnson*, 319 U.S. 302 (1943), this Court dismissed for want of a case or controversy a cooperative lawsuit brought by a tenant against a landlord, at the landlord's behest and expense, to vindicate the landlord's interests. The Court noted that the case "was instituted as a 'friendly suit' at [the defendant's] request;" that the plaintiff was represented by "counsel who was selected by [defendant's] counsel" in advance of the lawsuit; that the defendant agreed in advance to pay the plaintiffs' counsel for bringing the suit; that at some points in the litigation the plaintiff's counsel presented no brief or argument; and that the nominal plaintiff hadn't read the complaint filed in his name, had little knowledge of the suit, and had "no active participation" in it. *Id.* at 304-05. *See id.* at 304 ("Even in a litigation where only private rights are involved, the judgment will not be allowed to stand where one of the parties has dominated the conduct of the suit by payment of the fees of both."); *Cleveland v. Chamberlain*, 66 U.S. 419, 425-26 (1861) (defendant, through a friendly plaintiff, "now carries on a pretended controversy by counsel, chosen and paid by himself, ... for the evident purpose of obtaining a decision injurious to the rights and interests of third parties.").

The same sort of charade took place here. CCR selected and

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[8] These arguments were raised in both courts below and in the Briefs in Opposition to Certiorari. Windsor Opp. Cert. 26-30; White Lung Opp. Cert. 19-20. Judge Wellford concluded in his concurring opinion that the case was nonjusticiable. Cert.App. 60a-66a. Although the rest of the Third Circuit panel pretermitted the jurisdictional issues by resolving the case in favor of the objectors on other grounds (Cert.App. 34a), it expressed "serious doubts" as to justiciability. Cert.App. 19a. Since the issue goes to the basis of federal jurisdiction under Article III, this Court must address it in any event. *Metro. Wash. Airports Auth. v. Citizens For Abatement of Aircraft Noise*, 501 U.S. 252, 265 n.13 (1991). Moreover, as the prevailing party, respondents are entitled to defend the judgment on any ground raised below and preserved in the oppositions to certiorari, whether or not it was relied upon by the Court of Appeals. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 478 n. 20 (1979).

"approached" class counsel to arrange a class action to resolve future asbestos claims before they accrued. JA 626. CCR chief executive officer Lawrence Fitzpatrick testified that, before it initiated these meetings, CCR had worked out "a framework for how they wanted this class structured." JA 428. CCR "decided to target" Ron Motley and Gene Locks, the plaintiffs' lawyers who became class counsel. JA 427. In CCR's words, "We picked them." *Id.* CCR agreed before the class suit was filed to pay class counsel's fees for instituting a class action against CCR to resolve all future asbestos claims. JA 100, ¶ XIX.[9] And class counsel agreed that, even if the settlement fell through, class counsel would abide by the strict medical terms of the settlement and advise their clients not to bring exposure-only claims against CCR. *See* p. 3, *supra*. That is, plaintiffs' class counsel made contractual commitments to the defendant, CCR, which dictated the legal advice that class counsel would provide to their own clients suing CCR.

CCR and class counsel choreographed the simultaneous filing of the complaint, answer, joint motion for class certification and the stipulation of settlement. JA 2. Class counsel and CCR uniformly took the same position and sought the same relief on every motion and appeal in this case. The settling parties' coordinated pleadings are what Justice Holmes once called a "contrivance between friends for the purpose of founding a jurisdiction which otherwise would not

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[9] The district court asserted that agreements by settling defendants to pay class counsel's fees are "standard practice" (JA 222), but in *none* of the cases cited by that court as endorsing this "practice" did the defendant select class counsel and agree, as CCR did here *before* the commencement of litigation against it, to pay their fees. It is not "standard practice" for a defendant threatened with many lawsuits to pay the counsel fees of a putative opponent for *instituting* a class action against it. The district court further erred in holding that it could not deem this class action to be a nonadversarial "product of collusion" unless it involved "fraud" or a "secret combination or conspiracy." Cert.App. 260a-261a. No "fraud or trickery" on the court is required to render a friendly lawsuit nonjusticiable. *Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 344 (1892). A case need not be "'collusive' in the derogatory sense," it need only reveal "a want of a truly adversarial contest, of a collision of actively asserted and differing claims." *Poe v. Ullman*, 367 U.S. at 505. The district court's use of an faulty legal standard fatally undermines all of its factual findings on justiciability.

exist." *City of Dawson*, 197 U.S. at 181.

As in *United States v. Johnson*, class counsel here often did not bother to argue or present briefs, relying instead on CCR's counsel to make the alleged class's case to the courts below. The Third Circuit held a six-hour oral argument and sent a memo to counsel specifically inviting argument on a host of issues for which plaintiff class counsel bear responsibility, including adequacy of representation, justiciability, and adequacy of notice, yet class counsel did not participate in that argument beyond taking a minute to introduce themselves to the court. Nor did class counsel even bother to petition for certiorari when the Third Circuit decertified their class action. Furthermore, notice to the plaintiff class was handled by a communications company chosen by, paid by, and exclusively directed by CCR. JA 484-85, 491-92. The consultant who designed and implemented the notice campaign (JA 321) testified that class counsel played no role in that campaign and failed to provide "any ideas" or "any input" whatsoever on how to conduct the notification program on which class counsel relied to provide due process to the millions of absent class members whom they purported to represent. JA 490-92. Class counsel even permitted CCR's attorneys to prepare the class representatives for their depositions. Cert.App. 204a.

To their credit, petitioners concede here (as they have conceded throughout this proceeding) that adversarial "litigation" in this matter is purely "hypothetical" and "assuredly *never* will occur." Pet.Br. 16, 19 (emphasis in original). *See also* JA 123, 126 (both settling parties concede that this case "was brought for purposes of settlement only"). In his concurring opinion below, Judge Wellford quoted extensive testimony in which *all* of the "exposure only class representatives admitted under oath that they would not have continued with the litigation in the absence of a settlement." Cert.App. 62a. All of the representative plaintiffs "clearly conceded" that, "absent the settlement, they did not intend to pursue the claims in the class complaint." *Id.* at 66a. They "stated emphatically that they were not seeking damages of any kind at the time the complaint was filed" (*id.* at 65a), and that they brought suit only to obtain judicial endorsement of the settlement. *Id.* at 62a-66a. The class representatives were accordingly uninvolved in the class action proceedings. Some testified that they did not know that the class complaint sought

damages on their behalf, and that they had never authorized class counsel to sue for damages. *Id.* at 65a; JA 416. Others were unaware that the class action had been settled in Jan. 1993 until they were told this — by counsel for objectors — during depositions more than a year later. JA 353-54, 358, 389.

It is unsurprising that the class plaintiffs lacked interest in their own claims for increased risk of future injury, fear of future injury, and medical monitoring, because *class counsel had never asserted such claims on behalf of any other client in their twenty years of asbestos litigation, and CCR had never paid such a claim.*[10] Indeed, such claims do not even exist under state law in most jurisdictions. *See* n. 17, *infra*.[11] Furthermore, on the eve of filing the class action, class counsel separately agreed in writing not to prosecute such exposure-only claims against CCR in the event that the settlement were to fall through, which confirms that class counsel had no bona fide intent to litigate the claims alleged in the complaint. *See* p. 3, *supra*. It is therefore beyond cavil that the claims in the class complaint were not alleged in good faith but were presented only as a pretext for obtaining federal jurisdiction to approve a settlement that had nothing to do with those claims.

In short, this is a joint venture, not an adversarial lawsuit. A federal court's only constitutionally permissible option when such circumstances appear is to dismiss the action for lack of subject-matter jurisdiction. In *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47 (1971), both sides argued the same position and jointly sought the same ruling — a judicial determination that a statute was constitutional. *Id.* at 47. "[C]onfronted with the anomaly that both litigants desire precisely the same result," this Court held

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[10] The chief operating officer of CCR testified that CCR had never settled a claim for medical monitoring or emotional distress from asbestos exposure in which the claimant did not also allege actual physical injury, and that he did not recall that class counsel had ever asserted a claim against CCR that did not involve actual physical injury. JA 448.

[11] Whether such claims might be found under the Federal Employers' Liability Act, *see Metro-North Commuter R.R. Co. v. Buckley*, No. 96-320 (pending), is irrelevant in this diversity suit (although it may be of individual interest to those absent class members who may one day have asbestos claims under FELA).

that "[t]here is, therefore, no case or controversy within the meaning of Art. III of the Constitution." *Id.* at 47-48.

In *Muskrat v. United States*, 219 U.S. 346 (1911), this Court dismissed for want of a case or controversy a friendly suit brought by several Indians in a representative capacity on behalf of all other similarly situated members of their tribe, in order to obtain a judicial ruling on the legality of a claims resolution scheme. *Id.* at 360. The Court noted that the defendant (like CCR in the present case) had invited the lawsuit and agreed in advance to pay the plaintiffs' attorneys fees, and had "no interest adverse to the claimants." *Id.* at 360-61.

In *Chicago & G.T.Ry. Co. v. Wellman*, this Court condemned "a friendly suit between the plaintiff and the defendant to test the constitutionality of [a particular piece of] legislation." 143 U.S. at 344. Equal condemnation is in order here for the settling parties' "friendly suit" to "test" the viability of — and thereupon to impose as national law — their proposed administrative solution to asbestos litigation. The parties have not squared off in this litigation to oppose one another or to resolve a clash of antagonistic interests. They have instead joined forces to seek an identical result: court approval of the stipulation of settlement for the purpose of binding millions of "exposure-only" plaintiffs in all 50 states who have not been injured by asbestos but whom CCR fears may one day become sick and then decide to sue — thereby upsetting CCR's hopes for putting its asbestos torts behind it. But for more than a century this Court has reserved its greatest condemnation for those friendly suits brought to "obtain an opinion of this court affecting the rights and interests of persons not parties to the pretended controversy." *Cleveland v. Chamberlain*, 66 U.S. at 426.

Both the settling parties and the district court conceded that "this class action was settled before the complaint was filed" (JA 218), and the district court found that this action "lacks a dispute as to the *remedy*." JA 222 (emphasis added). The district court excused this lack of adversity in the *case itself* because it was *preceded* by "long, arduous" "*negotiations*." JA 218 (emphasis added). But tough "negotiations" are commonplace both in private contractual dealings and in the legislative process, so they can hardly distinguish those processes from federal litigation. How much struggle took place

before the pleadings were submitted to the district court — that is, before a lawsuit existed even in name — proves absolutely nothing about the existence of a justiciable controversy *in that court*.

To the same effect is the district court's argument that adversity obviously exists here because everyone knows that the "legal interests" of "asbestos manufacturers" and "asbestos victims" have been "diametrically opposed" throughout "the twenty-year history of asbestos litigation." JA 218. But that confuses an almost Marxist analysis of class struggle with the *adjudicative adversity* required by Article III.

Both the district court and the settling parties relied on consent decree cases to argue that the joint venture class action in this case is neither unusual nor nonjusticiable. JA 219-20. But the record in this case conclusively establishes (and the settling parties themselves concede) that there was *never* any intent to litigate the claims in the complaint and that this case was concocted for settlement purposes *only*. By contrast, in the consent decree cases, there was every reason to think that, if the defendants had not consented to the decrees banning future misconduct, and if those decrees had not been approved by the courts, the government and the private parties who opposed it would have gone back to litigating against each other as they had been preparing to do.[11]

The settling parties are attempting to use the federal courts not as a forum in which to litigate their differences – for they have none – but as an ad hoc, junior-varsity Congress. *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). Congress has declined the invitation to enact a legislative solution to the asbestos litigation problem. *See* Report of the Judical Conference Ad Hoc Committee on Asbestos Litigation 3 (Mar. 1991) ("committee firmly

[11] After all, the consent decree cases involved continuing conflict between the parties over *future* misconduct by the defendants that had to be addressed by an injunction. *See Swift & Co. v. United States*, 276 U.S. 311, 326 (1928) (injunction concerned "not with past violations, but with *threatened future ones*") (emphasis added); *SEC v. Randolph*, 736 F.2d 525, 527-28 (9th Cir. 1984) (case justiciable because of "prospective injunctive relief" against "future violations of securities laws" barring insider trading). *Cf. Northeastern Fla. Contractors v. Jacksonville*, 508 U.S. 656, 662 (1993) (voluntary cessation of challenged conduct does not deprive federal court of jurisdiction to determine legality of practice).

believes that the ultimate solution should be legislation ... creating a national asbestos dispute resolution scheme"). The settling parties therefore want the federal judiciary to convert their privately negotiated compensation schedule into a nationwide rule of law binding on all absent class members. But the very purpose of the case or controversy requirement is to restrict the judicial branch to the adjudication of distinct, ripe disputes between bona fide adversaries. Our Constitution simply did not grant federal courts the power to legislate solutions, even in response to the most pressing of problems: "It is not for [the federal judiciary] to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case." *Whitmore v. Arkansas*, 495 U.S. 149, 161 (1990).

B. The "Exposure-Only" Plaintiffs Lack Standing To Invoke Federal Jurisdiction

1. The plaintiffs have no injury in fact

To establish standing under Article III, a litigant must demonstrate "that he has suffered an 'injury in fact.' That injury, we have emphasized repeatedly, must be *concrete in both a qualitative and a temporal sense*." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (emphasis added). An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This requirement "confines the Judicial Branch to its proper, limited role in the constitutional framework of government." *Id.* at 581 (Kennedy, J., joined by Souter, J., concurring in part and in the judgment); *see also Allen v. Wright*, 468 U.S. 737, 750 (1984).

The most remarkable thing about the exposure-only plaintiffs is that their allegations of injury do not simply fall short of the Art. III standard — those plaintiffs affirmatively disclaim *any* concrete injury, however slight. *Plaintiffs specifically declare that they have no "asbestos-related condition" whatsoever* — no disease, no impairment of health, no shortness of breath, nothing. JA 5, 7, 9, 10 (Complaint). The only claims alleged by the exposure-only plaintiffs are: (1) "emotional distress arising from ... the fear of contracting an

asbestos-related condition" in the future (JA 18); (2) the "enhanced risk of future condition" from past asbestos exposure (JA 18); and (3) the need "to undergo medical surveillance in order to ... permit early medical diagnosis or treatment of any such condition" that might arise in the future. JA 20. In his concurring opinion below, Judge Wellford concluded that such "'futures claims' ... do not confer standing on these exposure only plaintiffs." Cert.App. 60a.

Judge Wellford reviewed in detail the sworn testimony in which the class plaintiffs flatly disavowed even these allegations of present consequences of feared future injuries. The exposure-only class representatives testified that, the allegations of the complaint notwithstanding, they were "not suffering any emotional distress" on account of their asbestos exposure. JA 450; Cert.App. 63a; JA 421. These plaintiffs further testified that, again contrary to what had been alleged in their complaint under sanction of Fed.R.Civ.P. 11, they had incurred no expenses from paying for medical monitoring and sought no payments for (or a system to provide for) future monitoring from CCR. JA 370, 375, 393. Finally, the exposure-only plaintiffs testified that they had suffered no monetary injury from their asbestos exposure (Cert.App. 63a, 64a; JA 374-74, 395, 398, 415, 449-50, 749-50, 755) and "stated emphatically" that they "didn't deserve any money and didn't want any money." Cert.App. 65a, 66a. The settling parties formally conceded below that the exposure-only plaintiffs "had not incurred monetary loss at the time the complaint was filed." Appellees' Br. in Ct. App. at 20. Even the district court described them as lacking "presently-manifested injury." JA 314.

Having forsworn the injuries alleged in their own complaint, the exposure-only plaintiffs are left with nothing more than the allegation that, like tens of millions of other Americans, they have been occupationally exposed to asbestos. They assert that, as a result of inhaling asbestos fibers, they have experienced "cellular changes in their lungs" (JA 16), changes that are undetectable by medical science. Astonishingly, the district court deemed these allegations sufficient and held that "exposure to a toxic substance constitutes sufficient injury in fact to give a plaintiff standing to sue in federal court." JA 200. The court thus equated mere exposure to something that might someday injure you with the actual resulting injury itself.

This cannot be the law. An allegation that one has been exposed

to something potentially harmful is mere autobiography that could not constitute an "injury in fact" absent a reconstruction of Article III doctrine that would transmute "injury in fact" into "hypothetical risk of injury in the future," and thereby reduce the requirement to a nullity. The plaintiffs' allegations of "fear" and "risk" of developing an asbestos-related illness in the future are "'unadorned speculation' insufficient to invoke the federal judicial power." *Whitmore*, 495 U.S. at 158. "Allegations of possible future injury do not satisfy the requirements of Art. III." *Id.* Accordingly, the concurring opinion below concluded that "[f]ear and apprehension about a possible future physical or medical consequence of exposure to asbestos is not enough to establish an injury *in fact*." Cert.App. 61a (emphasis in original).

The added assertion that, having been exposed, one has experienced undetectable "cellular changes" adds nothing whatsoever, because Article III requires a "factual showing of *perceptible* harm." *Lujan*, 504 U.S. at 566 (emphasis added). The district court's holding that alterations in biological or physical structure traceable to mere exposure constitute injuries proves far too much. Everyone in this country has been exposed to environmental toxins of one sort or another — from cigarette smoke to asbestos to dioxin to ultraviolet radiation caused by ozone depletion — and can likewise lay claim to such unverifiable "cellular changes."[13] But that does not give them standing to sue *now* on the conjecture that one day they might suffer an injury caused by that exposure. Article III's requirement of actual or imminent injury "has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury

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[13] "Asbestos is used in so many products ... that probably everyone in the civilized world has inhaled at least some of this material." J. Peterson, INDUSTRIAL HEALTH 66 (2nd ed. 1991). Yet it is undisputed that the overwhelming majority of "exposure-only" plaintiffs will never develop asbestos-related injuries. *See* Selikoff & Lee, ASBESTOS AND DISEASE 207 (1978). Until its flip-flop in the instant case, CCR itself argued that equating mere exposure to asbestos with "injury" would "revolutionize" tort law by "mak[ing] every individual in the United States a potential plaintiff, inasmuch as we all are exposed to and inhale asbestos fibers every day." JA 431.

at some indefinite future time." *Lujan*, 504 U.S. at 564 n.2.[14]

The district court dismissed *Lujan* in a footnote (JA 200 n. 11) and relied instead on *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 74 (1978), which the district court read as holding that mere exposure to radiation constitutes an injury in fact under Article III. JA 194-97. This analysis (which was properly rejected by Judge Wellford in the Court of Appeals, Cert.App. 61a) ignores the fact that the plaintiffs in *Duke Power* sought only *prospective* declaratory relief. The Court was not asked to rule on the question analogous to the one presented here: to wit, whether mere exposure to radiation conferred standing to pursue *compensatory* relief *now* for personal injuries that might arise at some point in the future. The distinction is crucial. As this Court held in *Los Angeles v. Lyons*, 461 U.S. 95, 103-108 (1983), Article III standing cannot be determined without reference to the precise relief sought by the plaintiff. There, this Court concluded that the fact that plaintiff Lyons had been the victim of a police choke-hold in the past, and therefore had standing to sue the police for damages for that palpable injury, did not confer standing to seek injunctive relief against future improper use of choke-holds, because the speculative risk of someday being choked again did not constitute a concrete, particularized and imminent injury. 461 U.S. at 105, 106 & n.7. "[S]tanding is not dispensed in gross." *Lewis v. Casey*, 116 S. Ct. 2174, 2181-82 n.6 (1996). The right to seek one sort of relief for a given injury does not necessarily confer the right to seek other relief for other injuries that have not yet (and may never) occur.

While Lyons had standing to seek compensatory but not injunctive relief, here (and, presumably, in *Duke Power*[15]) the converse is true.

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[14] While the district court below was diluting standing doctrine, in the same district court the judge presiding over the MDL proceeding involving all pending federal asbestos claims was employing the traditional concepts of ripeness and injury-in-fact to dismiss some 18,000 asbestos cases on grounds that they were not "ripe and ready to proceed" because the plaintiffs "have no asbestos related injury." *In re Asbestos Products Liability Litigation (No. VI)*, 1996 WL 239863 at *5 (E.D.Pa. May 2, 1996).

[15] The only holding, as opposed to dictum, in *Duke Power* was that the thermal pollution of a lake resulting from a nuclear power plant conferred upon occupants

Although the exposure-only plaintiffs might in some circumstances arguably have standing to seek an injunction protecting them from further exposure to an environmental toxin (*e.g.*, in a workplace), they have no standing to seek recovery now of compensatory relief for past exposure that has not yet (and will probably never) cause them concrete injury.[16]

If *Duke Power* were nevertheless read to establish that mere past exposure confers standing here and now to seek compensatory relief for speculative future injuries, the case simply could not be reconciled with more recent decisions such as *Lujan* and *Whitmore*. To hold that Article III's requirement of a concrete, imminent, non-conjectural injury "means nothing more than 'in this lifetime,'" is to undertake "quite a departure from [this Court's] precedents." *Lujan*, 504 U.S. at 564 n.2.

Even if this case did fall within constitutional boundaries, the exposure-only plaintiffs would nevertheless lack standing under prudential principles. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). It is inconceivable that healthy, uninjured exposure-only plaintiffs are the "litigants best suited to assert [the] particular claim[s]" for cancer and other ills of those unknown, unlucky class members who, ten or twenty years from now, will actually get sick and die from their asbestos exposure. *Id.* at 100.

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of the adjoining land standing to seek preventive declaratory relief against construction of the plant (by challenging the federal law that capped liability for nuclear accidents and thereby increased the likelihood that the plant would be constructed and operated). 438 U.S. at 73-74. The Court expressly reserved the question "whether all the putative injuries identified by the District Court, particularly those based on the *possibility* of a nuclear accident and the *present apprehension* generated by this *future uncertainty*, are sufficiently concrete to satisfy constitutional requirements." *Id.* at 73 (emphasis added). Two members of the Court separately opined that the alleged injuries were far too speculative and remote to warrant Article III jurisdiction. *See id.* at 95 (Stewart, J., concurring in the result); *id.* at 103 (Stevens, J., concurring in the judgment).

[16] *Helling v. McKinney*, 509 U.S. 25 (1993) (JA 197), is inapposite because the plaintiff there alleged *actual, present* health injuries from second-hand tobacco smoke, *id.* at 28, and sought *injunctive* relief to protect himself from further exposure. Moreover, the issue of standing was not addressed by either this Court or the court of appeals.

Those class members should be allowed to sue for themselves. Asbestos disease damages actions are not penny-stock fraud cases that are viable only *en masse*. Any supposed docket-clearing benefits derived from allowing this class action would be drowned in the tidal wave of remote and contingent lawsuits that relaxing prudential standing rules would unleash. "Plaintiffs would be tripping over each other on the way to the courthouse if everyone remotely injured by a violation of law could sue to redress it." *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991) (Posner, now C.J.). Thus, "[a]n important purpose of rules of standing is to identify the best-placed plaintiff and give him a clear shot at suit" — and by doing so "to cut down on the number of suits, which is no trivial consideration in this age of swollen federal caseloads." *Id.*[17]

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[17] There is also serious question whether the exposure-only plaintiffs in this diversity suit can show "an invasion of a *legally protected interest*," *Lujan*, 504 U.S. at 560 (emphasis added), sufficient to confer standing, because (as the district court conceded) many states' common law affords no cause of action to protect against mere exposure to a toxin. JA 187; *see also* Appellants' Br. in Ct. App. at 40-41 n.31 (citing cases); Scott D. Marrs, *Mind Over Body: Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress and "Fear of Disease" Cases*, 28 TORT & INS. L.J. 1, 1 (1992)(37 jurisdictions require physical injury as a prerequisite to recovery for emotional distress). This Court has unanimously held that "standing is gauged by the specific common-law ... claims that a party presents." *Int'l Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). The question of whether the plaintiff has a "legally protected interest," and hence standing, is "'a question of substantive law, answerable by reference to'" the rule of law "'whose protection is invoked.'" *Int'l Primate*, 500 U.S. at 77 (citation omitted). The question is not whether the plaintiff will win on the merits of his cause of action, but whether such a cause of action even exists under the law of the governing jurisdiction, and thus whether his allegations of injury, in the context of that cause of action, satisfy Art. III. "[W]hen a state has declined to give life to a cause of action at all, federal courts sitting in diversity also must refuse to entertain that cause of action." *In re Asbestos Litig.*, 90 F.3d at 1025 (Smith, J., dissenting); *see also Angel v. Bullington*, 330 U.S. 183, 192 (1947)(Frankfurter, J.)(*Erie* doctrine "drastically limit[s] the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts"; federal court sitting in diversity "cannot give that which [the state] has withheld."). Since the standing requirement must be fulfilled for every member of the class whom the court's order purports to bind, *see Warth v. Seldin*, 422 U.S. 490, 502 (1975); *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 66-67 (1993), the district court was required to conduct a choice-of-law inquiry to determine which states' laws applied to which causes of action asserted on behalf of both the class representatives *and* the absent class members. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-23 (1985). "Any claims not authorized by state law should have been explicitly excised" from the complaint because the district court lacked jurisdiction over them under Art. III. *In re Asbestos Litig.*, 90 F.3d at 1025 (Smith, J., dissenting).

2. The plaintiffs' claims are not redressed by the stipulation for which they seek federal judicial approval

The final element of the Art. III standing inquiry is that it must be "likely" that the injury alleged in the complaint will be redressed by "the desired exercise of the court's remedial powers." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38, 43, 45-46 (1976). In the usual case, the redressability requirement serves to flush out suits in which the federal court would be issuing an advisory opinion — if the relief sought would not redress the injury brought to the court by the plaintiff, the court's opinion would have only a theoretical connection to the issues presented.

In the present case, the prospect is not a judicial opinion having only theoretical impact on the rights of the plaintiff class, but a judicial opinion having much *more* than "judicial" impact. The approval of this class action settlement would establish a nationwide dispute resolution scheme to supplant state tort law and state courts with respect to anyone in any of the 50 states who might one day develop an injury from exposure to the CCR's asbestos. But the exercise of federal *judicial* power over the class action complaint itself would nonetheless be "gratuitous," and would therefore fail the standing requirement, *Simon*, 426 U.S. at 38, because of the huge discontinuity between the injuries alleged in the complaint and the remedy provided in the settlement, which reveals the representative plaintiffs' lack of any genuine stake in the claims alleged and the relief sought *in the complaint*. *See id.* at 38 & n. 16.

This class action would no doubt have been dismissed if the injury alleged in the complaint had been the lack of an efficient nationwide administrative claims process for asbestos claims. *See Keene Corp.*

v. Fiorelli, 14 F.3d 726, 731-33 (2d Cir. 1993).[18] The fact that the settlement would certainly redress that "injury" cannot obscure the fact that the injuries actually pled in order to provide a jurisdictional hook were very different. Article III's redressability requirement reveals the transparent jurisdictional "bait-and-switch" ploy that the settling parties are attempting.

In this case we need not speculate about redressability, because the stipulated settlement that embodies the plaintiffs' desired judicial remedy was filed simultaneously with the complaint. The exposure-only plaintiffs first allege that they need medical monitoring to "permit early medical diagnosis or treatment" of any asbestos disease they might develop in the future. JA 20. Yet the settlement provides no program for paying for or otherwise furnishing medical monitoring to the plaintiff class, nor does it reimburse class members for any medical monitoring expenses they may already have incurred.

The complaint also claims injury from "emotional distress arising from ... the fear of contracting an asbestos-related condition" in the future. JA 18. Yet the settlement provides no therapy to treat such anxiety and distress, nor does it award damages for that psychological "injury."

Finally, the complaint claims injury in the form of "enhanced risk" of developing asbestos disease in the future. JA 18. Yet the settlement provides no compensation for the allegedly distinct "injury" of this increased risk. The payments available in the event that a class member actually becomes ill cannot be seen as compensating for the increased risk, for few will actually become ill whereas, according to the complaint, all the millions who have been exposed to asbestos are suffering from, and entitled to compensation for, increased risk. Moreover, compensation for actual illness in the future cannot be deemed to redress the currently experienced

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[18] In *Keene*, an asbestos defendant filed a "settlement class action" seeking judicial assistance in negotiating, with an opposing class defined as everyone who might one day sue the defendant, a national asbestos dispute resolution scheme that could be imposed in the form of a judicially approved settlement. 14 F.3d at 728-29. The Court of Appeals vacated an injunction issued to protect this anticipated settlement and ordered the class complaint dismissed, because the only arguably justiciable claim for relief alleged by Keene in its complaint was "transparently pretextual." *Id.* at 731.

increased risk of future illness without acknowledging that "enhanced risk" is in fact not a distinct legal injury covered by a distinct cause of action, but merely a thinly veiled pretext for invoking federal jurisdiction now to resolve nonjusticiable future claims.[19] Indeed, CCR *admitted* below that the settlement does "not resolve any previously asserted claim" but is instead an "agreement structuring the future resolution of as yet unasserted claims." JA 925.[20]

The failure of redressability confirms that the "injuries" alleged in the complaint are but a pretext for conferring jurisdiction on a federal court so that it can endorse a quasi-legislative claims program resolving other, future claims that the plaintiffs have not asserted and cannot assert. Federal courts are not roving commissions empowered to redress ills that have not been brought before them in a justiciable controversy. The redressability requirement, like all "the law of Art. III standing," is "built on a single basic idea — the idea of separation of powers." *Allen v. Wright*, 468 U.S. at 752. The district court opined that "'[e]arly status for Article III standing to be heard is particularly necessary in mass-tort-latent-disease cases'" because the "'courts need to be in a position to intervene as necessary.'" Cert.App. 199a. But a federal court is not free to rewrite the requirements of Art. III to suit what it deems exigent circumstances. The "'Art. III power of the federal courts does not wax and wane in

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[19] The fact that the class plaintiffs may be willing to accept the settlement package in exchange for releasing the claims in the complaint does not prove that it "redresses" those injuries. An insurance scheme may redress a fear of future bankruptcy if one gets ill and cannot work and runs up huge medical bills, but it does not redress current emotional distress about future cancer, nor does it provide medical monitoring to try to treat and defeat any disease in its early stages. To accept that the redressability standard is met whenever plaintiffs would be content with the relief granted is to embrace tautology and to render the redressability element of standing a nullity.

[20] Consequently, the district court explained that exposure-only plaintiffs are forbidden access to the settlement's claims procedure "unless and until they become ill." Cert.App. 273a. Indeed, the court predicated its finding that the settlement was workable and adequately funded on the proposition that these "unimpaired class members" have no injuries to compensate and no benefit claims to present and therefore "do not currently impact significantly upon the case flow predictions under this settlement." *Id.*

harmony with a litigant's desire for a 'hospitable forum.'" *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 476 n. 13 (1982)(citation omitted).

II. THIS CLASS ACTION CANNOT BE CERTIFIED UNDER RULE 23

The issue in this case — even if one *assumed* justiciability for Article III purposes — would *not* be whether a court should consider the substantive terms of a proposed settlement when evaluating class certification, for the Court of Appeals did that. Petitioners instead contend that, once a class action has been settled, the threshold *certification* inquiry mandated by Rule 23(a) and (b) is effectively subsumed by the back-end *fairness inquiry* of Rule 23(e). Once a case is settled, we are told, "the legal and factual questions that remain therefore relate solely to the fairness of the settlement." Pet.Br. 42. The *only* relevant "common question" under Rule 23(a)(2) is "the fairness of the settlement." *Id.* at 42-43. The "predominant questions" under Rule 23(b)(3) "concern the benefits of the settlement." *Id.* at 17. Class members are automatically "typical" under Rule 23(a)(3) because they "now have the same interest in achieving fair compensation." *Id.* at 17. The class action is necessarily "superior" under Rule 23(b)(3) whenever the settlement provides "fair compensation." *Id.* at 11. And representation is adequate under Rule 23(a)(4) so long as "the terms of the settlement are fair." *Id.* at 46.

Petitioners' revision of Rule 23's certification criteria operates at too general a level of abstraction to fulfill the requirements of the Rule and simply begs the crucial question: *Is* this a "class" whose absent members can fairly and properly be bound to *any* settlement negotiated and agreed by the representative plaintiffs, the defendants, and counsel for each? A class consisting of every potential victim that an automobile manufacturer wronged in a given calendar year — whether as a customer injured by price-fixing, an employee injured by racial discrimination, a subcontractor injured by breach of contract, a pedestrian who will be run over in the future by a car built this year with defective brakes, or an unborn child of a neighbor of the defendant's factory, who will someday suffer birth defects from

a toxic spill at the factory — would still have a "common" and "typical" and "predominant" "interest" in the fairness of a settlement that resolved all of their claims. There is no difference in principle between that hopelessly flawed class action and the one at issue here.

To be sure, a court need not close its eyes to the substantive terms of a settlement. For example, a settlement might convince a court that its concerns over manageability (Rule 23(b)(3)(D)) were ill-founded. But that the settlement terms may be *considered* for such limited purposes does not alter the conclusion that a "case" like the instant one cannot be certified under Rule 23.

A. The Criteria of Rule 23(a) and (b) Cannot Be Satisfied Solely by the Substantive Terms of a Settlement

The plain language of Rule 23 does not permit certification predicated solely on the terms of a settlement. Instead, the Rule's criteria refer to issues in *triable* cases. Rule 23(a)(2) (commonality) and Rule 23(b)(3)(predominance), for example, both refer to "questions of law or fact common to the class." This language necessarily is confined to questions of "law or fact" that would arise *in a triable civil lawsuit*, not to "a generalized common *interest*" in securing compensation from a defendant in a settlement. *In re Asbestos Litig.*, 90 F.3d at 1007 (Smith, J., dissenting). Thus, petitioners simply miss the point when they argue that whether their proposed administrative compensation scheme is "'fair, reasonable, and adequate'" (Pet.Br. 10) is a common question of fact. That cannot suffice to meet the requirements of Rule 23. Simply selecting 500 people from the telephone book at random and promising to distribute cash benefits among them will create precisely the same kinds of "common questions" as petitioners have manufactured here.

Similarly, Rule 23(a)(3) (typicality) refers to "the claims or defenses of the representative parties" and "the claims or defenses of the class." The words "claim or defense" in this context — just as in the context of Rule 24(b)(2) — "manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." *Diamond v. Charles*, 476 U.S. 54, 76-77 (1986) (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in part and in the judgment). Rule 23(b)(3) also requires

a court to determine whether "a class action is superior to any other available methods for the fair and efficient *adjudication* of the *controversy*." Further, the factors enumerated as part of the superiority inquiry reaffirm this conclusion. Rule 23(b)(3)(A) refers to the "prosecution or defense of separate actions"; Rule 23(b)(3)(B) refers to "any *litigation* regarding the *controversy* already commenced"; and Rule 23(b)(3)(C) requires an inquiry into the desirability of "concentrating the *litigation* of the claims in the particular forum."

Petitioners' heavy reliance on Rule 23(c)(1), which authorizes district courts to "alter[] or amend[]" their initial rulings on class certification, is wholly misplaced. That provision in no way suggests that a case which could not be *tried* in class form (were defendant to object to certification, for example) should nonetheless be *certified* (if defendant favors certification) solely by reliance on the substantive terms of the settlement. In fact, it authorizes a court to *decertify* a class when subsequent developments indicate that it would *not* be triable in class form. Petitioners also argue that Rule 23 requires a court to examine the actual status of the case before it. But when the actual status of a "case" reveals that it is not a case at all, but a private agreement attempting to gain quasi-legislative effect as a public "law" enforceable against absent persons, there is nothing in Rule 23 to suggest that a federal court thereby acquires jurisdiction to adjudicate it solely because of "questions" fabricated by means of a settlement.

B. Petitioners' Fixation on the Substantive Terms of the Settlement Ignores the Structure and Purpose of Rule 23

1. Petitioners' proposed rule of "settlement cures all" is alien to Rule 23. The class action device is a limited exception to the traditional due process rule that individuals cannot be bound by a judgment in a litigation to which they are not parties. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). In order for the exception to retain constitutional validity, it is vital that the procedural protections afforded absent "parties" by Rule 23 be scrupulously observed. For these protections were "carefully drawn to meet constitutional requirements." 7B Charles Alan Wright, Arthur R. Miller, & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE § 1789, at 251 (1986 & 1995 supp.).

Under the text and structure of Rule 23, each of the provisions of subdivisions (a) and (b) is an independent requirement that must be satisfied, quite apart from the additional barrier created by Rule 23(e), which requires court approval of any settlement. Rule 23's requirements are cumulative, not alternative. Class members are entitled to *all* of the protections provided by Rule 23 and due process, and courts may not pick and choose which of those protections to apply in a particular case. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974). Further, the structure of Rule 23 forbids collapsing the fairness inquiry of Rule 23(e) into Rule 23(a) and (b)(3). Rule 23(e) refers to the settlement of "a class action" — a term whose requirements are set forth in subdivisions 23(a) and (b) — indicating that the drafters intended that the criteria for a class action be satisfied *before* the court engages in the fairness inquiry mandated by Rule 23(e).

The requirements of Rule 23(a) and (b)(3) are what make the virtual representation of an absent class consistent with due process. They provide overlapping assurances of adequacy of representation, by guaranteeing that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). For example, the commonality and typicality requirements of Rule 23(a) are tests for determining "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be *fairly and adequately protected in their absence*." *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (emphasis added). Indeed, the existence of "identical" and "substantial interests" between class representatives and absent class members is so central to the due process requirement of adequate representation that a class action judgment may be collaterally attacked for want of such aligned interests. *Hansberry v. Lee*, 311 U.S. 32, 43-45 (1940); *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 888-90 (1996) (Ginsburg, J., joined by Stevens and Souter, JJ., concurring in relevant part).

Accordingly, there is no basis for collapsing the entire certification inquiry into an examination of the settlement's fairness. Indeed, it is petitioners' proposal that would require a court to engage in a "wholly

artificial inquiry" (Pet.Br. 16) by closing its eyes to the respective positions of the class representatives, members, and counsel during the crucial period of negotiations that led up to the consummation of the settlement agreement. "[T]he Due Process Clause of course requires that the named plaintiff *at all times* adequately represent the interests of the absent class members," *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 812 (emphasis added) —not merely at the end of the day through the narrow lens of Rule 23(e).

"[E]valuation of the merits of the settlement" cannot compensate for inadequate representation "because an inadequate representative 'taint[s]' the entire settlement process." *Matsushita*, 116 S. Ct. at 889 (Ginsburg, J., concurring) (citation omitted). "'[A]n adequate representative, . . . vigorously prosecuting an action without conflict and bargaining at arms-length, may present different facts and a different settlement proposal to the court than would an inadequate representative.'" *Id.* Thus, even apart from the axiom that a defect in procedural due process cannot be redeemed by a substantively acceptable result,[21] here there would be no way to use the substance of the settlement, after the fact, to cure defects in the adequacy of representation during the negotiating process. "No one can tell whether a compromise found to be 'fair' might not have been 'fairer' had the negotiating [attorney] . . . been animated by undivided loyalty to the cause of the class." *In re Asbestos Litig.*, 90 F.3d at 1009 n. 42 (Smith, J., dissenting) (internal quotation omitted).

The primary decision relied upon by petitioners (Pet.Br. 29) for their view that adequacy of representation should be collapsed into the fairness inquiry of Rule 23(e) in fact stressed that "the adequacy of settlement terms cannot ordinarily redeem a settlement that was bargained by a party in a conflict position." *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 n.25 (5th Cir. 1981).

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[21] *See, e.g., Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86-87 (1988) ("Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, 'it is no answer to say that in his particular case due process of law would have led to the same result.'") (citation omitted); *Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions").

Here, it cannot be said that the proof of the pudding is in the eating. "A poisoned or tainted pudding may taste okay, if not delicious."[22]

Furthermore, Rule 23(e) is not designed to substitute for the other safeguards of the Rule. As petitioners' own authorities demonstrate, judicial evaluation of settlements is a "limited inquiry," and "courts have consistently noted the necessity of restraint in their inquiry into proposed settlements." *Smith v. Vista Organization, Ltd.*, 1991 U.S. Dist. LEXIS 10484, *13-14 (S.D.N.Y. July 30, 1991) (cited at Pet.Br. 23 n.10). A court does not "'substitute its business judgment for that of the parties who worked out the settlement.'" *Id.* at *15 (citation omitted). To the contrary, it accords the opinion of counsel "'considerable weight.'" *Id.* at *16 (citation omitted). "There is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974) (cited at Pet.Br. 24).[23] The framers of Rule 23 therefore properly declined to put all the due process eggs in the relatively small 23(e) basket.

2. Petitioners would erode the protections of Rule 23 precisely when they are needed most. In an adversarial class action, the defendant has a powerful incentive to expose problems with class counsel, the definition of the class, and other matters. Usually, defendants mount such challenges (on behalf of absent members of the plaintiff class),[24] which help filter out instances in which class

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[22] Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 18 (1995).

[23] *See also Woodward v. NOR-AM Chem. Co.*, 1996 U.S. Dist. LEXIS 7372, at *46 (S.D. Ala. May 23, 1996) (trial court "'should be hesitant ... to substitute its own judgment for that of counsel.'") (citation omitted) (cited at Pet.Br. 25 n.10); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985) ("In deciding whether to approve this settlement proposal, the court starts from the familiar axiom that a bad settlement is almost always better than a good trial.").

[24] At least half of all class action defendants challenge certification, usually contesting the representativeness of the named plaintiffs and the commonality of the issues facing different class members. Thomas E. Willging, Laura L. Hooper & Robert J. Niemic, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL

counsel and named plaintiffs will not adequately protect the interests of absent class members.

In the settlement class action context, however, a defendant's incentives are exactly reversed. A defendant who has already settled will not thereafter dispute certification to protect absent class members. Instead, it will join with class counsel to urge certification of the class and approval of the settlement. When a court is deprived of adversarial presentation on the issues surounding the class action, even the unusually industrious judge labors under a handicap. *See*, e.g., MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.45, at 243 (1995) (early settlement decreases the amount of information available to the court).

Moreover, petitioners' proposed rule gives class counsel every incentive to disserve their purported clients. In practice, class members have little or no control over class counsel, who in fact often choose the class representative. *See In re Asbestos Litig.*, 90 F.3d at 1009 (Smith, J., dissenting). In this case, for example, the class representatives had only the vaguest ideas about the class action and the settlement. *See* p. 14, *supra*.

Yet petitioners' proposal encourages class counsel to compete to sell out the claims of absent persons in order to gain the defendant's acquiescence to a settlement class action. Or the defendant could simply hand-pick purported plaintiffs' counsel for settlement "negotiations," as occurred in this case. A reverse auction — a race to the bottom — would ensue, in which defendants could "sell" the lucrative right to be plaintiff class counsel to the lowest bidding attorney. *See* Coffee, *Class Wars*, 95 COLUM L. REV. at 1354, 1372-73. If the first plaintiffs' lawyers approached by the defendants refused an unfair offer of settlement, the defendants could simply offer the settlement to another lawyer, and so on, until the defendants found an attorney willing to play along. Faced with these alternatives, even the most scrupulous lawyer might feel justified in accepting a

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DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 36 (Federal Judicial Center 1996) ("1996 Federal Judicial Center Study"). In fact, disputes regarding the ability of the representatives were the most frequent objections. *Id.* at 37. These are serious challenges, usually involving substantial briefs and judicial opinions. *Id.* at 36-37.

poor settlement offer, because the next firm approached by the defendants might be willing to accept an even lower offer from the defendants.

When a settlement class action cannot be be tried, a plaintiffs' lawyer cannot use the threat of litigation as leverage to encourage the defendant to strike a fair deal. The only bargaining strategy available to plaintiffs' lawyers is one of concessions: to agree to divest absent class members of the right to sue in other proceedings (either in individual proceedings or in class actions in state court) and to propose greater and greater discounts of the victims' claims. A system of all "carrots" and no "sticks" is not likely to produce a fair bargaining process for absent members of the class. And the problem is compounded by petitioners' insistence that it would be wholly improper for a court even to inquire, as part of the adequacy of representation review, as to the "resources, willingness, and experience to see the litigation through discovery, trial, and any appeals." Pet.Br. 29 n.12. It is difficult to see how absent class members could be adequately represented by an attorney hand-picked by the defendant who is unable and unwilling to threaten to take the case to trial.

Further, even the most independent plaintiff's attorney is subject to a crippling conflict of interest: the attorney can profit only if the proceeding is settled, whereas the absent clients may fare much better if their claims were resolved elsewhere. *See In re Asbestos Litig.*, 90 F.3d at 1001 (Smith, J., dissenting) ("a defendant may pick his opposing counsel and then negotiate with absolutely nothing to lose from walking away from the deal; class counsel, on the other hand, work *pro bono* unless they consent to a settlement"). Because a genuine class action is not an option, the class attorney gains *only* if the settlement class is certified (however unsatisfactory the relief), while the class may do much better if the settlement class is *not* certified (and they sue later, for example, when their individual claims mature). Class counsel may often be the lawyers most willing to join with the defendant to help convince a court to accept a settlement providing inadequate benefits to class members by undervaluing their own clients' claims and by arguing that the stingy recovery provided by the settlement should be valued at some inflated rate.

Thus, the petitioners' vision is one in which the plaintiffs' lawyers

least committed to the class's interest and most willing to cooperate with the defendant in exchange for an award of attorney's fees, are most likely to serve as class counsel. Moreover, a court's fairness judgment is heavily dependent on the joint petition of class counsel and the defendant. *See* MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.43 (1995) ("Counsel for the parties are the court's main source of information concerning [a class action] settlement."). Accordingly, the lack of an adversary relationship between class counsel and the defendant greatly undermines the ability of courts to assess the proposed settlement in fairness hearings. This system, which "creates an unparalleled opportunity for collusion between defendants and class counsel," *In re Asbestos Litig.*, 90 F.3d at 1000 (Smith, J., dissenting), virtually guarantees *inadequacy* of representation.

3. The empirical evidence confirms the importance of the procedural protections afforded by Rule 23 — and the danger of petitioner's proposal to collapse those various safeguards into the fairness inquiry of Rule 23(e). A recent study by the Federal Judicial Center showed that, in more than half of the fairness hearings (more than 60% in some jurisdictions), the court hears from no objector. 1996 Federal Judicial Center Study at 57, 178. Further, "[t]he most frequent type of objection was to the amount of the attorney's fees." *Id.* at 57. Thus, in the vast majority of cases the court hears only a non-adversarial presentation by two sets of lawyers (class counsel and the defendant's attorneys) explaining that the settlement is fair and that counsel represented the class in exemplary fashion. The district court spends minimal time on the fairness issue, and significantly more time encouraging the parties to settle.[25] Not surprisingly, even in litigated class actions, courts approve more than 72% of proposed settlements, and in one district the figure is 100%. *Id.* at 179. There can be little doubt that the approval rate in settlement class actions is even higher.[26]

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[25] On average, a district judge spends only 0.4 hours on the issue of the notice to class members, and only 2.8 hours reviewing and ruling on the proposed settlement. 1996 Federal Judicial Center Study at 169. By contrast, the typical judge spends 7.2 hours on class certification issues in contested cases, 3.5 hours facilitating settlement, and 2.3 hours ruling on attorney's fees. *Id.*

[26] Commentators analyzing the Federal Judicial Center data have concluded that the average class member recovers nearly 50% more ($848, compared to $573) in settlements reached after a case was certified for litigation than in settlements reached before certification — even though the average award of attorneys' fees is basically the same in both kinds of class actions. In other words, class members typically receive significantly less from "settlement class actions" but pay about the same amount in attorneys' fees. Letter of Anne W. Bloom and Trial Lawyers for Public Justice to Hon. Alicemarie Stotler, Standing Committee on Rules of Practice and Procedure (June 14, 1996) (on file at Admin. Office of U.S. Courts, Washington, D.C.).

In these circumstances, it is simply unrealistic to expect Rule 23(e) to bear the enormous weight that petitioners would assign to it. As Chief Judge Posner has explained, the danger of a "premature, even a collusive, settlement is increased" when the status of the action as a class action is not determined until a settlement has been negotiated, "with all the momentum that a settlement agreement generates." *Mars Steel Corp. v. Continental Illinois National Bank*, 834 F.2d 677, 680 (7th Cir. 1987). Judge Friendly agreed that "[a]ll the dynamics conduce to judicial approval of [the] settlement[] once the adversaries have agreed." *Allegheny Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting), *aff'd en banc by equally divided court*, 340 F.2d 311 (2d Cir. 1965), *cert. dismissed*, 384 U.S. 28 (1966). And the parties "may even put one over on the court in a staged performance." *Kamilewicz v. Bank of Boston*, 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., joined by Posner, C.J., and Manion, Rovner, and Wood, JJ., dissenting from denial of rehearing en banc).

C. Article III, the Separation of Powers, Principles of Federalism, and the Rules Enabling Act All Strongly Militate Against the Petitioners' Construction of Rule 23

1. This Court has always understood the federal judicial power to be confined to the adjudication of cases and controversies *triable* in federal court. *See* Part I(A), *supra*; *see also Gordon v. United States*, 117 U.S. 697, 699-706 (1865); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 48-52 (1852) (claims processing under international treaty is not judicial function); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.† (1792) (resolution of pension claims asserted

by Revolutionary War soldiers fell outside federal judicial power).

Petitioners' approach would convert federal courts into mediation forums with essentially lawmaking powers. Any tortfeasor could impose an administrative compensation scheme on its future victims by orchestrating a nationwide class "action" with the cooperation of compliant plaintiffs' attorneys. And any party could evade the limits of Art. III by presenting a non-triable matter in class action settlement form for federal judicial approval. Even if "[s]eeking out and notifying sleeping potential plaintiffs" of their claims were wise policy, the federal courts are confined to the "'passive' role" of ruling on the claims that come before them, as part of "the natural components of a system in which courts are not inquisitors of justice but arbiters of adversarial claims." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 181 (1989) (Scalia, J., joined by Rehnquist, C.J., dissenting).

2. Petitioners' argument is also problematic under the Rules Enabling Act, 28 U.S.C. § 2072, which restricts the judicial rulemaking power to "general rules of practice and procedure" and explicitly forbids this Court from making rules which "abridge, enlarge or modify any substantive right." § 2072(b). This restriction rests on fundamental principles of separation of powers and federalism. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 412 (1990) (Stevens, J., dissenting).[27]

Although the line between "general rules of practice and procedure" and substantive law is at times a shadowy one, it sheds bright light here. *See* Paul D. Carrington & Derek Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Invalidity of Proposed Rule 23(b)(4)*, 38 ARIZ. L REV. (forthcoming 1997).

• Approval of a settlement eliminates valuable state-law causes of action. The settlement replaces state law — which currently supplies the appropriate standard of care, damages, statutes of limitations, and

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[27] *See Hanna v. Plumer*, 380 U.S. 460, 469-70, 472 (1965); *Byrd v. Blue Ridge Electrical Cooperative, Inc.*, 356 U.S. 525, 536-37 (1958); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 202-05 (1956); *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-10 (1945); *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943); *see also* Fed. R. Civ. P. 82.

the appropriate law of judgments — with strict medical criteria and compensation schedules, which in effect establish a nationwide applicable law. The Judicial Conference Ad Hoc Committee on Asbestos Litigation recognized in its March 1991 Report that any "national solution" to the asbestos problem would intrude on "an area of tort liability traditionally within the province of the states." Report at 3. After receiving strong objections from state judges, the Committee declined to make any specific legislative proposals because of these "major federalism problems."[28]

• A settlement overrides myriad variations in substantive state-law rights and duties, creating a hybrid creature which operates "in accordance with no actual law of any jurisdiction." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995). Indeed, one of the alleged advantages of the settlement-only class action is that it enables a court to dispose of thousands or even millions of potential cases without even having to stop to notice the substantive differences among them. Here, for example, the uncontradicted evidence is that mesothelioma victims in California are able to proceed promptly to trial and receive on average verdicts that are 53% higher than those in other states. JA 351-52. The California average is more than 209% above the maximum allowable recovery in the settlement. JA 461. Even petitioners concede that plaintiffs in a few states are currently able to assert, in individual actions, claims for medical surveillance, emotional distress, and increased risk of cancer, while other plaintiffs are unable to do so. Pet.Br. 6-7 & n.3. The settlement ignores all of these differences.

• The settlement in this case purports to resolve the rights of "future" claimants, even though they may well not know that those rights exist and even though, under the laws of at least some states, "[a] general release is inapplicable to an unknown claim."[29] In addition, the settlement extinguishes claims by families of class

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[28] Testimony of Comm. Reporter Mary Kay Kane, Fairness Hrgs. Tr. Vol. 1, at 200-01.

[29] *Farm Credit Bank of St. Louis v. Whitlock*, 581 N.E.2d 664, 667 (Ill. 1991). *See also* Cal. Civ. Code § 1542; *Fair v. International Flavors & Fragrances, Inc.*, 905 F.2d 1114, 1115 (7th Cir. 1990).

members, including the claims of children yet to be born and spouses yet to be married. Cert.App. 23a n.3. For example, the minors in the class receive no representation and no compensation for loss of consortium claims — even though they are recognized by the laws of at least thirteen states, *see Guenther v. Stollberg*, 495 N.W.2d 286, 287 (Neb. 1993) (citing cases), and even though under the law of many states, a waiver of liability entered into by a parent before the minor child's cause of action accrued is invalid. *See, e.g., Meyer v. Naperville Manner, Inc.*, 634 N.E.2d 411, 414 (Ill. App. 1994) (citing cases); *cf. Clark v. Jeter*, 486 U.S. 456, 463-64 (1988); *Mills v. Habluetzel*, 456 U.S. 91, 99-100 (1982).

• A settlement class action depends on the creation of a fictional contract of employment and a fiduciary agency relationship between members of the class and class counsel. MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.45, at 244 (1995). It is elementary agency law that, in ordinary cases, a client is entitled to reject a settlement negotiated without explicit advance approval. *E.g.*, RESTATEMENT OF THE LAW GOVERNING LAWYERS § 33(1) (1996). In the typical (b)(3) situation, the predominance of preexisting common questions is held to modify the substantive right of a client to reject a settlement, by implying an authority in law to settle claims, subject to court approval. But petitioners would take matters an enormous leap further, by implying settlement authority even in the absence of predominating common questions. According to petitioners, the settlement itself can be used to bootstrap common interests among the class members and thereby confer unprecedented authority on class counsel. A handful of lawyers meeting alone in a room can decide amongst themselves the benefits to be accorded to millions of persons who will be killed or seriously injured by asbestos — without any express negotiating authority from these persons (indeed, without any knowledge, for the most part, of their identity). Such an extraordinary unilateral assumption of power effects a huge and problematic change in the substantive law of agency.

A reinterpretation of Rule 23 that is fraught with such serious substantive consequences is not appropriate for promulgation by this Court.[30] For the last quarter century, there has been growing mistrust

[30] The Judicial Conference Advisory Committee on Civil Rules is currently considering changes in Rule 23 with respect to settlement classes. Cert.App. 58a-59a; Pet.Br. 18. The Rules amendment process devised by Congress should be allowed to run its course. Indeed, proposals to liberalize settlement class actions have been harshly criticized. Judge John McBryde of the Northern District of Texas objected to the amendment because it would "tend to defeat safeguards built into Rule 23 against improper class action activity." Letter to Peter G. McCabe, Secretary of the Committee on Rules and Practice (Oct. 4, 1996) (on file at Admin. Office of U.S. Courts, Washington, D.C.). More than 150 law professors have written various letters to the Advisory Committee to urge that the measure be rejected. *See, e.g.*, Letter to Hon. Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure, from 145 Professors of Law (May 28, 1996) (on file at Admin. Office of U.S. Courts, Washington, D.C.). The proposed amendment would not change the result in this case. *See* Part III, *infra*.

of judicial rulemaking, in Congress and among the profession.[31] The 1966 revision of Rule 23 had a substantial impact on substantive rights and sparked a "holy war" over the creation of opt out classes.[32] As Professor Wright has said, the rule has been put "in jeopardy" by "those who embrace it too enthusiastically." Charles Alan Wright, LAW OF FEDERAL COURTS 520 (5th ed. 1984); *see also* 7A Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE § 1753, at 46 (1986) (noting that "Rule 23 has come into disrepute" and "rumblings of discontent have been heard from certain members of the bench and bar ever since the promulgation of the new rule").[33]

[31] *See, e.g.*, Paul D. Carrington, *The New Order in Judicial Rulemaking*, 68 JUDICATURE 131 (1991); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993); Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1 (1994).

[32] Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 664 (1979).

[33] The 95th and 96th Congresses, for example, considered proposals to amend Rule 23 at the behest of the U.S. Department of Justice. *See* S. 3475, 95th Cong., 2d Sess. (1978); H.R. 5103, 96th Cong., 1st Sess., Tit. I (1979); *see also* Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299 (1980). In the 1980s, two sections of the American Bar Association simultaneously advanced different suggested reforms of the rule. *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195 (1986). The ABA House of Delegates took no position on either, but referred the issue to the Civil Rules committee where they were tabled along with

That Rule 23 was, and remains, one on which factions divide is itself a telling signal. Professor Carrington has observed that, "[i]n hindsight, it might have been wise for the committee, and the Court, in 1966, to have drawn paragraph (b)(3) more narrowly to avoid the risk of altering substantive entitlements, or to suggest its enactment by Congress in lieu of its promulgation by the Court."[34] As Professors Arthur Miller and David Shapiro have commented, "[t]he whole field of class actions is one that has always fallen on the edge of the rulemaking power delegated to the Supreme Court under the Enabling Act."[35] Petitioners' proposal for a radical expansion of Rule 23 would only exacerbate the concerns of many that the rulemaking process has overstepped its bounds to the point where substantive state-law rights are being extinguished.

D. The Lower Court Consensus on the Meaning of Rule 23 Undermines — Not Supports — Petitioners' Proposal

Petitioners insist that there is a "judicial consensus" regarding their interpretation of Rule 23. Pet.Br. 22. "But it has never been the rule that federal courts, whose jurisdiction is created and limited by statute, acquire power by adverse possession." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 839 (1989) (Kennedy, J., joined by Scalia, J., dissenting). In any event, the fact is that *no court has ever certified a class action like this one*. Even the Fifth Circuit, in its recent decision in *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), explained that, if it had confronted the facts of this case, it "would likely agree with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy the typicality requirements due to the huge number of individuals and their varying medical expenses,

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all earlier suggestions.

[34] Letter to the Standing Committee on Rules of the Judicial Conference of the United States (May 21, 1996) (on file at Admin. Office of U.S. Courts, Washington, D.C.).

[35] Letter to Hon. Alicemarie H. Stotler (May 23, 1996) (on file at Admin. Office of U.S. Courts, Washington, D.C.).

smoking histories, and family situations." *Id.* at 976 n.8.

There is no legitimate support for petitioners' view that a class may be certified solely by reference to a settlement, even if it is not triable in court. The first version of the Manual for Complex Litigation disapproved of the use of settlement class actions altogether — whether or not they were triable in federal court. MANUAL FOR COMPLEX LITIGATION § 1.46, at 60 (4th ed. 1977). The Manual explained that "[t]here can usually be no assurance that the class members will be adequately represented in the settlement negotiations" and no assurance "that the tentative class will be composed of members without conflicting interests." MANUAL FOR COMPLEX LITIGATION § 1.46 (5th ed. 1982).

The Manual, Second, warned that "[o]rdinarily, a class action determination should be made not only before a settlement is reached, but indeed before settlement discussions are commenced." MANUAL FOR COMPLEX LITIGATION (SECOND) § 30.45, at 243 (1985). "[T]he fairness of the settlement may be very difficult to assess." *Id.* "Settlement classes should be considered only in connection with settlements that are likely to have little opposition from class members." *Id.*

The current version of the Manual lends no support to petitioners' theory. It states only that defendants may provisionally consent to certification for settlement purposes while preserving the right to contest it if the settlement is not approved. MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.45, at 243 (1995). The Manual cautions that settlement class actions "raise numerous issues, including conflicts of interest," "conflicts between class counsel and counsel for individual plaintiffs," and "administration of claims procedure." *Id.* at 244. It further warns that "persons who may not currently be aware that they have a claim or whose claim may not yet have come into existence. . . cannot be given meaningful notice," and their opt-out rights "may be illusory." *Id.*

None of the cases cited by petitioners holds that the criteria of Rule 23(a) and (b) may be satisfied solely by reference to the terms of a seemingly fair settlement, so that a non-triable class action may nonetheless be certified. For example, in *Weinberger v. Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982) (cited in Pet.Br. at 22 n.9), the court held merely that Rule 23 permits courts to approve settlements

despite their having been reached prior to class certification. Nowhere in *Weinberger* did the court license the settlement of non-triable cases. In fact, the court of appeals warned of "the possibilities of collusion or of undue pressure by the defendants on would-be class representatives." 698 F.2d at 73.[36] The Third Circuit itself canvassed the cases cited by petitioners and found that, although some of them appeared in dicta to have "assumed that lower standards apply in settlement class cases," no prior court had squarely addressed the question. *GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 798 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) (*GM Trucks*). The primary "authority" for a different certification

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[36] *White v. National Football League*, 41 F.3d 402 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995), held only that a settlement's terms may inform the court's findings with respect to adequacy of representation — a proposition that is not in conflict with the Court of Appeals' decision in this case.

• *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989), analyzed certification as if the class were going to be litigated. *Id.* at 727-28. It upheld certification because "the question whether Aetna was a jointfeasor here was the critical issue common to all the cases against Aetna, and one which, if not established, would dispose of the entire litigation." *Id.* at 747.

• *In re Dennis Greenman Securities Litig.*, 829 F.2d 1539 (11th Cir. 1987), noted that "this case is meaningfully different" from a "settlement certification" because "[t]he district court certified a class action prior to the commencement of settlement negotiations." *Id.* at 1543. "None of the parties challenge[d] the district court's holding that [the Rule 23(a)] prerequisites were satisfied." *Id.* at 1544 n.5.

• In *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615 (9th Cir. 1982), the district court had *already* certified the class for litigation purposes, both under Rule 23(b)(2) and Rule 23(b)(3), before the parties reached a settlement.

• In *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167 (5th Cir. 1979), the court approved the use of "temporary" or "tentative" settlement classes to promote settlement negotiations without requiring a defendant to waive possible objections to certification. *Id.* at 177. No party denied that the case was "triable in class form." *Id.* at 174. The court acknowledged that even this use of settlement classes (which the Third Circuit in the instant case endorsed) was "'controversial,'" *id.* at 178 (citation omitted), and presented the danger that "temporary class members [could be] forced to accept settlement absent an informed choice." *Id.* at 176.

approach in settlement-only classes is found not in the case law, but in the treatise of Professor Newberg, NEWBERG ON CLASS ACTIONS (3d ed. 1992). *See GM Trucks*, 55 F.3d at 799. Not surprisingly, petitioners rely heavily on this commentator.

Petitioners also cite a series of district court decisions (Pet.Br. 23-25 n.10), but none held that the criteria of Rule 23(a) and (b) may be satisfied solely by a settlement. In some of the cases, courts expressed uncertainty about whether the class before them could be certified for litigation, but in none of the cases did the parties *concede* that the case would not and could not be tried in the absence of the settlement.[37] In fact, the cases prove our point. There was usually no opposition by objectors. There was no adversarial presentation. Both class counsel and defendants sought to win approval of the settlement by detailing the many purported barriers to class certification. Paradoxically, the difficulty of maintaining suit in class form was treated as a reason *in favor of* extinguishing the claims of absent class members through settlement — even though class members' interest in managing their own claims through separate lawsuits is typically at its zenith precisely where class litigation is most impracticable. Because the cases were settled, class counsel's self-deprecating observations about their own prospects for maintaining a litigation class were only untested speculation — and were in fact self-serving. In short, none of the lower court cases supports petitioners' efforts to effect an unauthorized expansion of Rule 23.

E. Petitioners' Policy Argument is Misdirected

Finally, petitioners are left to arguing policy. More than fifteen times, their brief cites the supposed "practical" and "efficiency"

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[37] Some decisions noted the "risks" of settlement class actions and the possibility of "collusion." *E.g., In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301, 307-08 (D. Mass. 1987) (cited in Pet.Br. at 23 n.10); *In re First Investors Corp. Sec. Litig.*, 1993 U.S. Dist. LEXIS 18044, *11 (S.D.N.Y. Dec. 22, 1993) (cited in Pet.Br. at 23 n.10); *see also Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1560 (1976) (cited in Pet.Br. at 24 n.10) (settlement class should not be permitted "if the expanded class includes unresolvable conflicts which would have prevented the class suit from going forward").

values served by their proposal. But Fed. R. Civ. P. 1 provides that the Rules are to be construed to secure the "just" — and not simply the "speedy" or "inexpensive" — determination of every action. And, in any event, petitioners' policy arguments are deeply flawed.

Petitioners maintain that the judgment below would "foreclose the use of class actions to settle mass tort cases." Pet.Br. 37. On the contrary, the Third Circuit expressly endorsed settlement class actions. Cert.App. 37a n.9. Further, petitioners' own statistics reveal that more than 60% of all class actions were certified for litigation rather than for settlement purposes only. Pet.Br. 24. And in only 18% of certified class actions was a proposed settlement submitted to the court before or simultaneously with the first motion to certify. Willging, Hooper, & Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Changes*, 71 N.Y.U.L. REV. 74, 112 (1996). It is likely that even many of these 18% were in fact litigable, and only the class counsel's desire to win approval of the settlement led them to stress the difficulties of certification.

Petitioners also ignore the fact that only the Fifth Circuit, in *In re Asbestos Litig.*, has embraced a "settlement cures all" approach. And even the Fifth Circuit indicated that it would have reached the same result as the Court of Appeals in this case. Accordingly, it simply cannot be said that affirming the judgment here would alter the current administration of Rule 23 in the federal courts.

Petitioners also predict docket congestion as a result of the Court of Appeals' decision. Yet the instant class consisted almost exclusively of "futures" claimants who do not suffer (and will likely never suffer) from any asbestos disease. The vast majority of these "claims" are phantoms that will never materialize as viable lawsuits. CCR itself has pointed out that asbestos claims have "crest[ed]" and that references to the number of claims filed in various federal courts are "misleading" because they fail to take into account the fact that "hundreds of thousands of new claims" have been filed only because of "radical consolidation or class action techniques." JA 432-33. In any event, the only claims that would be settled here exert minimal docket pressure: historically, CCR has settled 99.8% of its cases. JA 125 n.18.

In fact, petitioners' proposal — far from offering a pragmatic solution — itself carries great risks of docket congestion and other

incalculable harm that would be directly triggered by exceeding the limits of Art. III, due process, and Rule 23. Petitioners would expose the federal courts to the potential claims of tens of millions of Americans who have been exposed to asbestos and other toxins, but who have not yet, and probably never will, manifest any injuries. Petitioners would expose the federal courts to sham "settlement" class actions — and myriad other proceedings — that could never be litigated. In short, yielding to the siren song of expediency would in the end prove as foolish from a purely pragmatic viewpoint as it is unprincipled.

III. THE JUDGMENT WOULD HAVE TO BE AFFIRMED EVEN IF PETITIONERS PREVAILED ON THE QUESTION PRESENTED

Even if petitioners were to prevail on the question presented, the judgment below would still have to be affirmed, because it is plain that this unprecedented "futures" class cannot be certified even if the settlement is fully considered. Indeed, contrary to petitioners' repeated chant, the Court of Appeals below did *not* "ignore the existence of the settlement." Pet.Br. i. The court carefully examined the settlement's terms in the course of holding that the Rule 23 criteria could not be satisfied. Cert.App. 49a-57a. Even petititoners' own amicus concedes that the Third Circuit "acknowledged that '[c]ertainly, evaluating the settlement can yield some information relevant to the adequacy of representation determination under 23(a)(4).'" Wash. Legal Found. Br. 12 (citation omitted).[38]

1. Adequacy of representation. The Third Circuit explained that intra-class conflicts are reflected in the details of the settlement

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[38] In the Court of Appeals, respondents and other objecting class members directly challenged only the preliminary injunction; attacks on the district court's non-final determination that the settlement was fair were reserved for any appeal from a final judgment. Cert.App. 24a n.4, 34a-3a, 276a. Thus, petitioners' repeated attempts to argue the supposed fairness of the settlement (Pet.Br. 4-6, 13-15) improperly raise a matter not before this Court. The Third Circuit considered aspects of the settlement as part of its inquiry into certification under Rule 23(a) and (b); it did not pass on the overarching question (which was not before it) of the settlement's fairness. We follow the Court of Appeals' approach.

agreement itself. Even if it could be said that class members share a general interest in obtaining compensation (Pet.Br. 46-47) and in "achieving a global settlement" (*id.* at 48), a *structural* conflict among class members as to how that settlement is distributed would remain. "[T]he settlement does more than provide a general recovery fund" — "it makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others." Cert.App. 49a (emphasis in original). For example, the settlement makes compensation available for some claimants at the expense of others: "under the settlement many kinds of claimants (e.g., those with asymptomatic pleural thickening) get no monetary award at all," and "[t]he settlement makes no provision for medical monitoring or for payment for loss of consortium." *Id.* Morever, the settlement aggravates the intractable conflict of interest between "present" and "futures" plaintiffs because it contains no inflation adjustment, no method of accounting for future developments in scientific knowledge, no back-end opt-out (so that class members can choose whether to opt out when and if their injury occurs), and no guarantee that the defendants will remain in the settlement after ten years. *Id.* at 50a.

Adequacy of representation is a conclusion of law which cannot be insulated from appellate review by wishfully labelling the district court's determinations "factual findings." Pet.Br. 44 n.22. Indeed, virtually all of the supposed "findings" on which petitioners rely (especially with respect to adequacy of representation) (Pet.Br. 10-12, 42-44) were conclusions of law *and labelled as such by the district court*. Cert.App. 223a ("Conclusions of Law"). The Court of Appeals' holding of inadequate representation did not depend on any disagreement with the district court's findings as to class counsel's credentials (Cert.App. 48a-49a), but rather on the presence of inherent conflicts among class members. The clearly erroneous rule does not apply where findings of fact are made under an erroneous view of controlling legal principles or where they represent disguised conclusions of law.[39]

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[39] *Davis v. Bandemer*, 478 U.S. 109, 142 n.20 (1986) (plurality opinion); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 323 (1974); *United States v. General Motors Corp.*, 384 U.S. 127, 141 n.16 (1966); *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 194 n. 9 (1963); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); *see also Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986) (cited at Pet.Br. 44 n.22) (if court of appeals "believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment").

Moreover, the undisputed evidence — and even some of the district court's findings — confirm the conflicts of interest and inadequacy of representation. For example, that court found that the plaintiffs' bar was aware that CCR would not settle inventories of pending cases "without some protection for the future." Cert.App. 183a. CCR itself admitted that it entered into the inventory agreements only because of the *Georgine* settlement (p. 3, *supra*) — creating an intractable conflict of interest because the present and future claims were settled on vastly different terms. For example, the Ness Motley individual claims that were settled in the inventory side agreement received $138 million, while "[u]nder the terms of the class settlement, the individual plaintiffs would have been entitled to a *maximum* of about $90 million." *In re Asbestos Litig.*, 90 F.3d at 1011 (Smith, J., dissenting).[40]

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[40] • There was no documentary evidence that class counsel adequately represented absent class members during the purported negotiations that led to the settlement. The objectors were not permitted to depose class counsel. The objectors were denied time records of class counsel during the relevant period. JA 326.

• During the negotiation of the case flow numbers, class counsel did not present CCR with data indicating that the caps would not compensate enough victims. As a CCR officer testified, "I don't recall any review of data." JA 448.

• Class counsel did not participate in designing or administering the notice campaign, JA 490-92, even though class counsel's ethics advisor testified that he had repeatedly "emphasized" to class counsel the vital importance of the notice campaign and the gravity of class counsel's responsibility for ensuring notice to as many class members "as humanly possible." JA 907.

• The class representatives did not represent the interests of exposure-only plaintiffs and pleural claimants. JA 356-57 (Baumgartner's view that pleural claimants should not receive compensation because "I think they are not suffering from that yet" and "I don't believe they should be compensated by anyone"); JA 692, 694-95 (Annas concedes that he was not "an appropriate spokesman" for

2. Superiority. The Third Circuit also considered the settlement in concluding that this case does not satisfy the "superiority" requirement of Rule 23(b)(3). Cert.App. 54a-57a. The Court of Appeals focused on the fairness prong of the superiority requirement: "it is obvious that if this class action settlement were approved, some plaintiffs would be bound despite a complete lack of knowledge of the existence or terms of the class action." Cert.App. 57a. "Problems in adequately notifying and informing exposure-only plaintiffs of what is at stake in this class action may be *insurmountable*." *Id.* at 55a (emphasis added).

Because asbestos-related illnesses like mesothelioma may be caused by slight and incidental exposure to asbestos, many currently uninjured class members (especially spouses and children) may not know that they have been exposed to asbestos within the terms of the class definition. Cert.App. 55a. Even if they know of their exposure, such as-yet uninjured class members "may pay little attention to class action announcements" and are "unlikely to be on notice that they can give up causes of action that have not yet accrued." *Id.* "Many must have treated even individual written notices — if they received any — as junk mail." Br. of the State of Texas as Amicus Curiae in Ct. App. at 3 (filed Feb. 27, 1995). And even if those currently uninjured class members find out about the class action and realize that they fall within the class definition, "the class members lack any basis for

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pleural claimants who continued to work because he believed that "[p]eople that are not impaired are exactly like those on the welfare system" and should receive "no compensation whatsoever").

• Class counsel gerrymandered the boundaries of the class "improperly [to] manipulate[] the scope of the class for reasons of their own." *GM Trucks*, 55 F.3d at 787. The boundaries of this class were drawn not in terms of the supposedly common issues of law and fact alleged in the class complaint, but entirely in terms of which plaintiffs the class counsel chose to include in the inventories they would settle on the eve of the class settlement, and which plaintiffs class counsel chose instead to put on the class settlement side of the boundary. Thus, Nafssica Kekrides was placed in the class even though she had authorized her counsel to bring suit on Sept. 8, 1992, JA 384, which was fully four months before the Jan. 15, 1993 class action cut-off date. Her testimony reveals that she was never informed by class counsel that she might have been put in the inventory rather than the class. Yet the inventory side deals included a number of unfiled claims. JA 765.

making an informed decision on whether to remain in the litigation. At best, class members could only guess whether the proposed settlement would be beneficial or detrimental to their interests." Br. of State of Alabama as Amicus Curiae in Dist. Ct. at 4 (filed Apr. 29, 1993).

Similar concerns animated this Court's decision in *Urie v. Thompson*, 337 U.S. 163, 170 (1949), which held that an individual who had contracted silicosis could not be required to act on his claim before it accrued. The same concerns underlie the insistence of petitioners' own authorities that "futures" class actions contain a back-end opt out right. Peter Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 967 (1995) (cited in Pet.Br. at 47); *see also Bowling v. Pfizer*, 143 F.R.D. 141, 170 (S.D. Ohio 1992), *appeal dism'd*, 995 F.2d 1066 (6th Cir. 1993). The Court of Appeals explicitly cited the absence of a back-end opt-out right in the settlement in holding that the superiority standard could not be met. Cert.App. 56a n.16.

There is no reason for this premature extinguishment of "futures" claims. The vast majority of claims will not come to pass. *See* pp. 19-20, *supra*. The CCR defendants are "in very good financial condition," Cert.App. 161a; their assets do not constitute a limited fund. *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246, 318 (E.D. Pa. 1994). When claims do arise, they can be settled individually or *en masse* (CCR traditionally settles 99.8% of the claims against it, JA 125 n.18) or litigated in consolidated proceedings or more narrowly defined class actions. Cert.App. 57a.

In fact, because most if not all class members were also exposed to asbestos products of non-CCR defendants, class members will in any event have to pursue many other asbestos defendants in the tort system in order to obtain full compensation for their injuries. They will, therefore, have to file *both* administrative claims against CCR *and* tort suits against other defendants, which makes the settlement more burdensome than the present system. And the strict case flow controls in the settlement mean that there is no assurance of timely administrative compensation, even at the inadequate levels provided.

3. Predominance and typicality. As the Court of Appeals properly found in holding that the typicality requirement was not met, "this class is a hodgepodge of factually as well as legally different

plaintiffs." Cert.App. 53a. Class members will sustain different injuries, giving rise to different claims under the laws of all 50 States.

Petitioners contend that the "fairness of the settlement" is a common question among the class members. Pet.Br. 42. But such a generalized (indeed, tautological) interest obviously cannot suffice to meet the criteria of Rule 23. *See* Part II(A) and (B), *supra*. Even if it could, viewing the class members through the lens of the settlement simply underscores the lack of commonality among them. The settlement severely undercompensates California mesothelioma victims and other class members who, depending on the state law applicable to their claim, would receive far more than the settlement schedules provide. The settlement denies all compensation to those with loss of consortium, medical monitoring, and pleural claims — in order to achieve greater compensation for others. The settlement exacerbates the differences between present and future claimants. In short, if each claimant has an interest in the settlement's being fair to *her*, such an interest is at odds with that of her fellow class members.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., et al.,
Petitioners,

—v.—

GEORGE WINDSOR, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS ROBERT A. GEORGINE, et al. AND THE PLAINTIFF CLASS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

When the parties to a putative class action enter into a settlement, must the district court nevertheless pretend that every legal and factual issue in the case will be contested, and ignore the existence of the settlement, in determining whether class certification is appropriate under Federal Rule of Civil Procedure 23.

PARTIES TO THE PROCEEDING

The respondents who join in this brief are the named plaintiffs and class representatives, Robert A. Georgine; Laverne Winbun, Executrix Of The Estate Of Joseph E. Winbun, Deceased, And In Her Own Right; Ambrose Vogt, Jr.; Joanne Vogt, His Wife; Carlos Raver; Dorothy Raver, His Wife; Timothy Murphy; Gay Murphy, His Wife; Ty T. Annas; Anna Marie Baumgartner, Executrix Of The Estate Of John A. Baumgartner, Deceased; Nafssica Kekrides, Individually And As Administratrix Of The Estate Of Pavlos Kekrides, Deceased; William H. Sylvester, Executor Of The Estate Of Fred A. Sylvester, Deceased, individually and on behalf of all others similarly situated. The other parties to the proceeding are set forth at Pet. App. 292a-317a.

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ARGUMENT

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BRIEF FOR RESPONDENTS ROBERT A. GEORGINE, et al. AND THE PLAINTIFF CLASS IN SUPPORT OF PETITIONERS*

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 83 F.3d 610. The opinion and order of the district court granting the preliminary injunction (Pet. App. 67a-87a) are reported at 878 F. Supp. 716. The opinion and order of the

* The plaintiff class members, though allied with petitioners in seeking reversal of the judgment below, are technically respondents herein because they were not parties to the petition for certiorari. *See* Sup. Ct. R. 12.6. For ease of reference, the term "respondents" as used in this brief refers only to those respondents (the Objectors below) who support the judgment below, while the respondent plaintiff class members are referred to as the "Plaintiff Class."

district court approving the settlement and certifying the class (Pet. App. 88a-276a) are reported at 157 F.R.D. 246.

JURISDICTION

The judgment of the court of appeals (Pet. App. 277a-282a) was entered on May 10, 1996, and a timely petition for rehearing was denied on June 27, 1996 (Pet. App. 283a-288a). The petition for a writ of certiorari was filed on August 19, 1996, and was granted on November 1, 1996. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RULE INVOLVED

Pertinent provisions of Federal Rule of Civil Procedure 23 are set forth in the addendum to this brief.

STATEMENT

The issue in this case is whether the Federal Rules of Civil Procedure forbid the federal courts from approving a class *settlement* of claims — no matter how fair that settlement may be — unless those claims would also qualify to be *litigated* on a class basis. Conceding the settlement at issue here to be "arguably a brilliant partial solution to the scourge of asbestos that has heretofore defied global management in any venue" (Pet. App. 18a), and admitting that "the better policy" might be to allow such a settlement (Pet. App. 19a), the court below nonetheless held that the Federal Rules *required* the settlement's invalidation. It read Rule 23 as imposing a flat requirement that a court considering certification of a settlement class must ignore the settlement, and may instead consider only the hypothetical facts and circumstances that would have existed if there were no settlement and the "case were to be litigated." Pet. App. 19a. The court below, however, was silent as to what language in Rule 23 it thought to

have enacted this counterintuitive requirement, and its holding in this regard is belied by the text and purposes of that Rule, by settled practice and by the decisions of every other court to have considered the point.

The pertinent facts and procedural history underlying this case are largely set forth in the brief being concurrently submitted by petitioners, and will not be repeated at length here. Instead, we briefly address here respondents' repeated reckless and unsubstantiated assertions (most recently advanced on opposition to certiorari) about the adequacy of Class Counsel, about the negotiations leading to the settlement in this case and about the settlement itself.

Respondents' assertions are, to begin with, completely irrelevant to the issue before the Court: the court below did not pass upon any of respondents' insinuations, instead adopting the broad position that Rule 23 bars this settlement no matter how well class counsel represented the class in achieving it. Beyond this, however, respondents' allegations are all flatly refuted by the thorough and considered findings of the district court.

1. The fairness hearing and the district court's findings of fact.

After affording objectors "unprecedented discovery" (Pet. App. 269a), during which "thousands of pages of documents were produced and over thirty depositions took place" (Pet. App. 101a n.8), the district court held a fairness hearing that "was extensive and protracted, involving the testimony of some twenty-nine witnesses (live or by deposition) during 18 hearing days over a period of over five weeks." Pet. App. 101a. Respondents had full opportunity to participate in this hearing, including putting on witnesses themselves and cross-examining those testifying in favor of the settlement. The hearing addressed all of their central accusations: those concerning "the competence and adequacy of Class Counsel," "the negotiation and operation of the proposed settlement"

and "the negotiation and operation of settlements reached between Class Counsel and the CCR defendants to settle in the present tort system the inventory of pending claims of clients represented by Class Counsel and their affiliated law firms." Pet. App. 101a-102a.

Following this elaborate hearing, "voluminous post-hearing submissions" by all of the participants and "day-long final oral arguments" (Pet. App. 102a), the district court issued an exhaustive opinion containing 300 paragraphs of factual findings. Pet. App. 103a-223a. These findings expressly rejected respondents' claims of collusion and improper conduct by Class Counsel, and also found respondents' expert witnesses to be "unpersuasive" (Pet. App. 126a), "immoderate" (*id.*), lacking in relevant experience (Pet. App. 198a), and devoid of any credible evidence in support of their opinions (Pet. App. 210a-216a).*

Not a single one of these findings was set aside or even questioned by the court of appeals. It is these findings — and not respondents' innuendo — that form the facts of record before this Court. *See, e.g., Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986) (district court factual findings are binding absent properly supported appellate determination that they are clearly erroneous). And those findings show respondents' insinuations for what they are:

* The district court in particular rejected the opinions given by two law professors (Susan Koniak and John C. Coffee, Jr.) on whose testimony and subsequent writings respondents relied heavily in their oppositions to certiorari. It determined that Professor Koniak "is not a class action expert, and was generally unfamiliar with the asbestos litigation . . . when she agreed to be an expert witness in this case" (Pet. App. 197a), and that she did not know or understand the facts (JA 198a, 202a, 203a). It also rejected Professor Coffee's conclusions as "unpersuasive" (Pet. App. 214a) on the grounds that they were based on "no credible evidence" and "no . . . data at all" (Pet. App. 211a-212a), that Professor Coffee was unaware of and "did not know or consider" the true facts (Pet. App. 212a, 214a), that his views were "not supported by the record evidence" (Pet. App. 213a), and that he was "not qualified" to draw the conclusions that he did (Pet. App. 214a).

baseless attempts to divert attention from the unsupportable legal conclusion reached by the court below.

2. The district court's findings regarding the selection of class counsel.

Respondents have contended that Class Counsel — three of the most prominent members of the plaintiffs' asbestos bar — were actually "hand picked" by the CCR as part of an alleged collusive scheme. The district court found just the opposite, terming Class Counsel to be "unquestionably experienced, highly respected leaders of the plaintiffs' asbestos bar" who were "extraordinarily competent" to represent the class. Pet. App. 258a, 271a. All three counsel "had played prominent roles in representing thousands of asbestos victims in various national proceedings." Pet. App. 177a. Two of them — Messrs. Motley and Rice — are members of a law firm that "was widely known . . . to represent more asbestos victims . . . than any other law firm in the country" and "had been involved in all the major events in the asbestos litigation"; the third, Mr. Locks, "also had played a prominent role in various national matters for asbestos victims." Pet. App. 178a.*

The district court also found that, far from respondents' sinister portrayal, counsel's involvement in this case arose from a "natural" evolution from Multidistrict Litigation ("MDL") proceedings in the Eastern District of Pennsylvania. Pet. App. 113a. In 1991, the Judicial Panel on MDL transferred all federal asbestos personal injury cases to the Eastern District of Pennsylvania for coordinated pretrial

* For example, Messrs. Motley's and Rice's firm had participated in consolidated asbestos trials, class actions and bankruptcies (including the Manville bankruptcy proceeding). Mr. Motley had personally served for twenty years as Chair of the Asbestos Litigation Group, a national organization of asbestos plaintiffs' counsel, and had been active in representing unions whose members had been occupationally exposed to asbestos over the years. Pet. App. 178a. Mr. Locks was actively involved in both the Manville and Unarco bankruptcy proceedings, and had served as Chairman of the Board of UNR.

proceedings. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). Thereafter, Messrs. Motley and Locks were elected by their colleagues in the plaintiffs' asbestos bar to serve as co-chairs of the plaintiffs' MDL Steering Committee, and were appointed to that position by the MDL Judge (Honorable Charles R. Weiner).* Following this appointment, at the urging of Judge Weiner and other members of the federal judiciary, Messrs. Motley and Locks undertook lengthy negotiations with counsel for all of the major asbestos defendants, seeking an "all-encompassing" settlement of the "asbestos mess." Pet. App. 111a, 113a-115a, 270a-271a; *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. at 424.

By November 1991, however, it became evident that the MDL settlement talks would not lead to a global resolution of all asbestos litigation against all defendants nationwide. Accordingly, CCR decided to pursue independent global settlement negotiations on its own behalf and, toward that end, to "continue the discussions" with Messrs. Motley and Locks, along with Mr. Motley's partner, Mr. Rice. Pet. App. 115a, 177a-179a.

Indeed, the district court found that CCR's decision to "continue the discussions" with these three lawyers was not only a "natural" but a potentially *necessary* one: a settlement of the sort under discussion could have credibility with the plaintiff's bar and be approved by the courts under Rule 23(e) only if class counsel were the most respected and experienced plaintiffs' asbestos attorneys; as the district court put it, if CCR "wanted to succeed in reaching a global settlement that a Court would approve, they had no choice but to hope to negotiate with such counsel." Pet. App. 258a; *see also* Pet. App. 179a.

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* It was Judge Lowell Reed, however, not Judge Weiner, who was the district judge below and approved the class certification and settlement herein.

These are the *only* reasons why CCR negotiated this settlement with Class Counsel as opposed to other, potentially less-qualified attorneys. As the district court found on the full record:

> CCR commenced negotiations with Class Counsel based on their reputation and experience in the asbestos litigation. There is *no* suggestion in the exhaustive discovery and litigated record that CCR executives or attorneys met and decided to "choose" plaintiffs' counsel with the largest inventory of unsettled claims in order to facilitate a global settlement by creating an atmosphere of collusion. *That never happened.*

Id. (emphasis added).

3. The district court's findings regarding class counsel's conduct of the settlement negotiations.

Equally without merit are respondents' accusations of collusion once the negotiations commenced. The year-long negotiations that led to this settlement were, as the district court found, "difficult, lengthy, and time-consuming. . . . Virtually no provision of the Stipulation [of settlement] was not the subject of significant negotiation. The terms of the Stipulation changed substantially during the negotiations." App. 116a. In particular, the district court noted the hard-fought nature of the negotiations concerning the medical criteria to govern compensation under the settlement, criteria about which respondents complain at length. Indeed, negotiations on that subject alone lasted several months and, in the end, "changes were made in the medical criteria that made them more favorable to claimants." App. 118a.

In conducting these "protracted and vigorous" negotiations, class counsel were able to draw on their own "many years of extensive and sophisticated experience" with asbestos litigation: as the district court put it, "the asbestos litigation [is] probably the most mature mass tort litigation in this country,"

and the "liability and medical issues had been the subject of massive discovery and trial and settlement experience, the results of which were known to Class Counsel." Pet. App. 118a, 115a. But class counsel did not rest on this extensive body of knowledge alone; instead, they demanded and obtained "a substantial exchange of information," including "confidential data" — never before shared with any plaintiffs' counsel — concerning the CCR defendants' historic settlement averages and the numbers of claims settled and filed against the CCR defendants over time. Pet. App. 116a-117a. Class Counsel also were able to obtain information regarding the insurance coverage available to CCR members, and employed consultants who met with representatives of the firm that handles all insurance billing and coverage analysis for CCR members. Consultants for Class Counsel also met with financial personnel of the individual defendants. Finally, class counsel consulted other members of the plaintiffs' asbestos bar to obtain their views on various provisions of the proposed settlement. Pet. App. 117a.

4. The district court's rejection of respondents' allegations of conflicts of interest

Perhaps the most pervasive (and scurrilous) accusation levelled by respondents is that Class Counsel's representation of the class of future asbestos claimants was compromised by their pre-existing representation of individual asbestos plaintiffs in presently pending cases. The district court squarely rejected this contention, finding — consistent with the testimony of Yale (now University of Pennsylvania) Law Professor and American Law Institute Director Geoffrey Hazard and University of South Carolina Law Professor John P. Freeman — that Class Counsel "acted responsibly, diligently, and ethically in representing their present clients while negotiating on behalf of the . . . class." Pet. App. 188a-189a.*

* The court, moreover, specifically rejected the contrary testimony offered by an objectors' expert on this issue, on the grounds that the "credible evidence in the record [did] not support his factual predicate" for his opinions and that he "ha[d] no asbestos litigation experience, or any litigation experience, and has had no experience as a lawyer or expert in mass tort cases." Pet. App. 184a.

The heart of respondents' allegations is the unsubstantiated and expressly rejected assertion (repeated on opposition to certiorari) that Class Counsel settled their "inventory" of presently pending cases against the CCR defendants at a premium, and then proceeded to "sell out" the class. What they do not reveal, however, is that at the very outset of the case, at the parties' request, the district court appointed a independent Special Master — Professor Stephen Burbank of the University of Pennsylvania Law School — to evaluate these inventory settlements. Professor Burbank conducted a meticulous inquiry; his conclusions, as stated and adopted by the district court, were that the inventory settlements "were generally consistent with the historical settlement averages for comparable settlements with CCR, were not inflated, did not include a premium paid to Class Counsel in exchange for the [class] settlement, and were not the product of collusion." Pet. App. 213a. The district court's further findings on the subject included that:

— "Class Counsel did not enter into the *Georgine* negotiations for the purpose of settling their pending cases."

— "the settlement of the inventory cases was not conditioned upon an agreement being finally reached in *Georgine*. It is clear on the face of the inventory settlement agreements, that if the Stipulation of Settlement had not been concluded after the negotiation of the inventory settlements, the inventory settlements nevertheless remained in full effect."

— "in negotiating the inventory settlements for the present clients and the *Georgine* Stipulation for the futures class, Class Counsel and CCR bargained vigorously and at arms-length. The settlements

> reached for both groups of claimants were not negotiated against each other, and Class Counsel worked diligently to negotiate what they considered to be the best possible settlements achievable for each group of claimants."

App. 183a, 189a.*

In short, the evidence and the district court's findings demonstrate that Class Counsel did no more than accept a fair settlement offer for their present clients — something that they were under an *ethical duty* to those clients to do — and that their having done so in no way affected their representation of the class. Indeed, since no plaintiff's attorney could ethically refuse to settle his present cases on the ground that he was also representing a class of future claimants, the upshot of respondents' allegation is the bizarre proposition that such a class may be represented only by attorneys without any current practice in the particular field at issue, to the class's obvious detriment. It is thus not surprising that — as the Third Circuit itself noted — "Judge Reed resolved th[e] issue [of a claimed sell-out of the class by conflicted counsel] in favor of class counsel," and did so "largely on the basis of fact findings that the objectors *have not challenged*." Pet. App. 49a (emphasis added).

Respondents have also raised one other purported conflict: the claim that Class Counsel had, as part of the inventory settlement agreements, contractually bound themselves not to file future claims that did not meet the class settlement's minimum medical criteria. But the district court expressly found

* Respondents' allegations are factually unfounded for two further reasons. *First*, contrary to their implicit suggestion, "inventory" settlements of a law firm's present cases against a defendant are not uncommon in the asbestos litigation — indeed, as the district court noted, petitioners have entered into such settlements with numerous other plaintiffs' attorneys who are not affiliated with class counsel. JA 182a. *Second*, class counsel did *not* settle their entire inventory of present cases with petitioners; they have many thousands of such cases remaining unresolved.

that these so-called "futures" provisions complained of by respondents contained no such contractual promise,* and — consistent with the testimony of Professors Freeman and Hazard and that of Professor Samuel Dash (of Georgetown University) — that these provisions were ethically proper and gave rise to no conflict of interest. Pet. App. 189a-196a. Indeed, as the district court found, counsel entered into the agreements containing the futures provisions only after obtaining (and following) expert ethics advice regarding those provisions. Pet. App. 189a.

5. The district court's findings regarding the benefits provided by the settlement.

Respondents' final effort to tarnish the conduct of class counsel consists of a series of unsubstantiated aspersions on the settlement itself. The district court's finding that this settlement is fair to the class is not before the Court (nor, for that matter, was it before the court below). Nonetheless, it should be noted that respondents' implicit assertions that class members had nothing to gain in a class settlement are once again totally contrary to the findings of the district court. As the district court found:

(a) the settlement "should" reduce the substantial delays that mark the tort system, in which, "on average, claims against the CCR defendants . . . take almost three years to resolve, and . . . delays in certain jurisdictions are much longer." Pet. App. 139a & n.23; 144a.

(b) the settlement would greatly reduce the immense transaction costs that have plagued the tort system,

* Rather, the district court found, the complained-of provisions reflected only counsel's good faith commitment to *recommend* to their tort system clients — in accordance with "their own independent professional judgment" — that claims not meeting the minimum medical criteria should not be filed. Pet. App. 198a.

in which such "costs exceed the victims' recovery by nearly two to one." Pet. App. 106a, 139a.

(c) the settlement would cap plaintiffs' attorney's fees at 20-25%, far less than the "33-40% contingency fee contracts [that] are the norm in the asbestos litigation." Pet. App. 139a n.23, 158a.

(d) the settlement would establish a practice of "limited release" — whereby class members who receive compensation for a non-malignant disease could obtain additional compensation if they subsequently were to develop a malignant disease. This likewise contrasts with tort system practice, in which over 90% of the settlements of non-malignant claims require *full* releases from the claimants. Pet. App. 155a.

(e) the settlement would create a simplified process in which claimants could quickly obtain compensation without the risks of litigation, again in sharp contrast to the tort system's tendency to produce huge recoveries for some and inadequate recoveries for others. Pet. App. 13a-14a, 176a.

These benefits, however, were simply deemed irrelevant by the court below. In that court's view — even where the federal courts are beset by tens of thousands of similar cases, even where the plaintiffs in those cases could be greatly benefitted by a class settlement, and even where a potentially fair such settlement is in fact proposed — the federal courts are powerless to approve and implement that settlement unless the claims could be litigated as a class action. As we now show, there is absolutely no basis for that view.

SUMMARY OF THE ARGUMENT

The holding of the court below — that in determining whether to certify a settlement class the court must ignore the

settlement and address certification as if the action were hypothetically going to be litigated — is as unsupported as it is counterintuitive. It would radically transform established practice, under which actions are routinely settled on a class basis where questions would exist as to whether they could be litigated on that basis, and would thereby create a major obstacle to the best and most efficient means of resolving disputes: fair settlements among the parties.

It would do this, moreover, without any good reason at all. The text and purposes of Rule 23 plainly instruct the district courts to consider class certification based on the actual circumstances before them — here, the settlement — and not based on some imaginary litigation that by definition is not going to occur. Likewise, the court below's speculative fear of collusive settlements is fully addressed by Rule 23(e)'s requirement that the district court and court of appeals find a class settlement to be fair and non-collusive prior to approving it. The concerns raised by the court below — whether founded or otherwise — are thus addressed by thorough application of the *existing* requirements of Rule 23(e); they do *not* warrant its revisionist and tortured reading of the remainder of the Rule, or the massive roadblock it has thereby established to fair settlements that would greatly benefit plaintiff class members.

ARGUMENT

THE COURT BELOW ERRED IN READING RULE 23 TO REQUIRE THAT COURTS MUST IGNORE THE EXISTENCE OF A SETTLEMENT IN DETERMINING WHETHER TO CERTIFY A SETTLEMENT CLASS.

The linchpin of the decision below is the Third Circuit's unique rule that courts addressing class certification in cases where a settlement has been reached must do so "as if the

case were going to be litigated" (Pet. App. 36a) — *i.e.*, they must ignore the *actual* posture of the case and pretend that no settlement exists.* As demonstrated below, this inflexible and counterintuitive approach flies in the face of the decisions of every other Circuit to address the issue; cannot be squared with the text or purposes of Fed. R. Civ. P. 23; is totally at odds with longstanding practice under that Rule; and disserves the very policy concerns cited by the Third Circuit as a basis for crafting that approach. Moreover, in the name of protecting plaintiffs, it would in many circumstances require the federal courts to invalidate even the most beneficial and noncontroversial settlements in favor of wasteful, repetitive individual litigation that disserves the interests of plaintiffs, defendants and the courts themselves.

A. The Third Circuit approach is contrary to the text and purposes of Rule 23.

Every Circuit to address the issue, other than the Third, has reached the common-sense conclusion that courts must apply the Rule 23 class certification criteria to the actual facts and circumstances of the case before the court — including the fact of settlement, where one has been reached. As the Fifth Circuit recently observed, in rejecting the Third Circuit's approach and certifying a settlement class of asbestos plaintiffs, "[m]ost circuits to decide the issue have held that courts should consider the settlement in determining whether Rule 23 prerequisites are satisfied," and "[o]nly the Third Circuit has refused to look at settlements before it when deciding class certification issues." *In re Asbestos Litig.*, 90 F.3d 963, 975 (5th Cir. 1996), *citing White* v. *National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) ("adequacy of class representation . . . is ultimately determined by the settlement

* The Third Circuit first created this standard in its 1995 opinion in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir.) ("*GM Trucks*"), *cert. denied sub nom. General Motors Corp.* v. *French*, 116 S. Ct. 88 (1995). Both *GM Trucks* and the opinion below were authored by the same circuit judge.

itself"), *cert. denied*, 115 S. Ct. 2569 (1995); *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1543 (11th Cir. 1987) ("in assessing the propriety of class certification, the courts evaluate the negotiation process and the settlement itself"); and *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir.) ("if not a ground for certification per se, certainly settlement should be a factor, and an important factor to be considered when determining certification"), *cert. denied*, 493 U.S. 959 (1989).*

The leading treatise on class actions endorses this near-universal approach: "Class action determinations are made in the context of *all the circumstances* of the case *as it is then postured*. . . . Accordingly, it is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty in reaching this determination in a different context." 2 H. Newberg & A. Conte, NEWBERG ON CLASS ACTIONS § 11.27, at 11-54 to 11-55 (3d ed. 1992) (hereinafter "NEWBERG ON CLASS ACTIONS") (emphasis added). *Accord* MANUAL FOR COMPLEX LITIGATION (THIRD) 236 (1995).

This overwhelming authority rejecting the Third Circuit's approach** is, in and of itself, sufficient reason to reject that

* *See also Officers for Justice* v. *Civil Serv. Comm'n*, 688 F.2d 615, 633 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983) (approving class settlement despite "serious doubts . . . whether all aspects of this cause could have been litigated to a conclusion entirely within the class action mode," because "certification issues raised by class action litigation that is resolved short of a decision on the merits must be viewed in a different light"); *Malchman* v. *Davis*, 761 F.2d 893, 900 (2d Cir. 1985) citing, in upholding class certification, "the interests of the members of the broadened class in the settlement agreement"), *cert. denied*, 475 U.S. 1143 (1986); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 178 (5th Cir. 1979) (Wisdom, J.) (stating that "it is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context"), *cert. denied*, 452 U.S. 905.

** A more complete listing of the extraordinary number of cases rejecting the Third Circuit's approach is compiled in the Brief for Petitioners.

approach. *See Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 733 (1975); *see also Owen* v. *Owen*, 500 U.S. 305, 310 (1991) (relying on "uniform practice of bankruptcy courts" in rejecting proposed contrary rule). Moreover, the authority for considering the fact of settlement in determining whether to certify a class is not only weighty. It is also plainly correct.

1. The Third Circuit's approach lacks any support in the language of Rule 23. Rule 23(a), for example, requires only common "questions," typical "claims or defenses" and "fair[ ] and adequate[ ] protect[ion]" of absent class members' "interests." *Nothing* in the language of the Rule states (1) that the common questions and typical claims may not arise from a settlement, or (2) that a district court must blind itself to the terms of a settlement that the class representatives were actually able to achieve on absent class members' behalf, and to the manner in which that settlement was negotiated, in determining whether those class members' "interests" were "fairly and adequately protect[ed]." And Rule 23 contains *no* language directing district courts to base their certification decisions on what a hypothetical, fully litigated class action would look like.

In light of this, in light of Federal Rule 1's overriding command that the Rules all "be construed and administered to secure the *just, speedy, and inexpensive determination of every action*" (emphasis added), and in light of the "overriding public interest in favor of settlement" of "class action suits,"* there is simply no basis for the court below's assertion that the "language" of "the current Rule 23 does not permit" consideration of the settlement in assessing class certification. Pet. App. 19a. Indeed, the Third Circuit's construction of that language is itself internally inconsistent: on the one hand, it has concluded that the Rule's language *permits* a court to certify a class for settlement purposes only,

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* *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *see also McDermott, Inc.* v. *AmClyde Inc.*, 114 S. Ct. 1461, 1468 (1994).

thereby necessarily *reserving* the question whether the action could proceed as a litigated class action (*see GM Trucks*, 55 F.3d at 792-93); but on the other hand, it has also held that the same language mandates that the same court ignore the settlement and determine class certification "as if the case were to be litigated" (Pet. App. 19a), thereby *deciding* the very question it was ostensibly reserving.

Moreover, the remainder of Rule 23 likewise demonstrates that certification decisions are practical, real-world determinations to be made in view of the *actual* circumstances of the case. For example, Rule 23(c)(1) authorizes district courts to "alter[ ] or amend[ ]" their initial rulings on class certification — *i.e.*, such rulings are subject to modification "*in the light of subsequent developments in the litigation*," *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 160 (1982) (emphasis added). This provision makes clear that the appropriateness of class certification is keyed to the *actual* posture of the case (and the fact of settlement is plainly part of the actual posture of the case), not to some hypothetical construct. Similarly, subdivision (b)(3) of the Rule directs the court to consider "the difficulties *likely to be encountered* in the management of a class action" (emphasis added) — and *not*, as it might have read under the Third Circuit's approach, "the difficulties that *would* be encountered, *if* the case were litigated to a conclusion, in the management of a class action."

By contrast, while proclaiming that its result was mandated by the language of Rule 23, the court below never specified the language to which it was referring. The closest it came was the statement that " '[t]here is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes.' " Pet. App. 38a (quoting *GM Trucks*, 55 F.3d at 799). This argument, however, is aimed at a straw man. Neither the Plaintiff Class nor petitioners have ever sought "separate" or "liberalized" Rule 23 criteria for settlement classes. Rather, what the Plaintiff Class seeks — and what Rule 23 commands — is merely the application of the *same*

criteria to settlement classes as are applied to all other classes. Those criteria remain the same; the court is simply entitled to consider *all* of the evidence relevant to them. For example, the Third Circuit's approach would have the district court assess attacks on the adequacy of class counsel's performance, such as those respondents have made throughout this case, by ignoring counsel's *actual* performance as reflected in the terms of a settlement that counsel was actually able to achieve for the class and in the conduct of the negotiations leading to that settlement.

To be sure, the Rule 23 criteria can often be met more easily in the settlement context than in the litigation context (*see, e.g.*, MANUAL FOR COMPLEX LITIGATION (THIRD) 236 ("it may be easier for settlement classes to satisfy Rule 23(a)")), but this is simply because the fact of settlement can increase the commonality of, or eliminate divergences in, class members' interests. Indeed, in *GM Trucks*, the Third Circuit itself conceded that "settlements can reduce differences among class members." 55 F.3d at 790.

For example, the court below found that common issues would not have predominated over individual issues, as required by Rule 23(b)(3), if this action were to be litigated because individual class members have different diseases, different work histories, different "knowledge and appreciation of the danger of breathing asbestos dust," different "lifestyles" and are subject to different "affirmative defenses." Pet. App. 40a-48a. But this calculus — whether common or individual issues predominate — is obviously greatly affected by the existence of a settlement that (a) reduces the number and significance of individual issues by, among other things, waiving certain affirmative defenses (such as specific causation) that would otherwise give rise to individual issues; (b) produces great *common* benefits to the class by way of reduction of delays, excessive transaction costs and risks that all class members face; and (c) gives rise to predominant common issues of fact and law regarding,

inter alia, the fairness of the settlement. The calculus is also changed with respect to reasons other than "predominance" that courts have cited for declining to certify mass tort litigation classes (*e.g.*, a perceived difficulty in satisfying constitutional jury trial requirements*): these concerns are simply not present in the settlement class context.

In short, as NEWBERG ON CLASS ACTIONS explains:

> It is true that some courts, in approving class settlements . . . have observed that the class might not have been certified were it not for the proposed class settlement. *This observation does not mean that Rule 23 criteria were not applied strictly in these circumstances.* On the contrary, these tests were applied, and *the observation that a different ruling might have resulted in the absence of the settlement offer refers to the fact that Rule 23 criteria would have been applied in a different context* and thus may have led to a different result.

2 NEWBERG ON CLASS ACTIONS § 11.27, at 11-54 to 11-55 (emphasis added). It is thus the court below, by *departing* from the usual rule that class certification decisions are to be made in light of actual circumstances, that is applying separate, *il*liberalized criteria to settlement class actions. This separate standard is utterly without basis in the language of Rule 23.

2. The correctness of the general rule that the existence of a settlement should be considered in class certification decisions is also confirmed by the *purposes* of the criteria set forth in Rule 23(a) and 23(b). These criteria — unlike their counterparts in the pre-1966 version of Rule 23, which determined the propriety of a class action by reference to "the abstract nature of the rights involved"** — were designed as

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* *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297-1302 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

** Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 98 (1966).

"*functional* tests." 7A Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE § 1753, at 42 (1986) (hereinafter "WRIGHT & MILLER") (emphasis added). Their purpose is to "describe in . . . *practical* terms the occasions for maintaining class actions." Advisory Committee's Note, 39 F.R.D. at 99 (emphasis added). As noted by the reporter to the Advisory Committee, "[t]he object is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party."* These purposes, and the "functional," "practical" approach of the current version of Rule 23, are far better served by considering the existence of a settlement than by ignoring it.

Thus, the principal purpose of the Rule 23(a) criteria (numerosity, commonality, typicality and adequacy of representation) is twofold: to determine, "*under the particular circumstances of the case*," (a) whether "maintenance of a class action is economical" and (b) whether absent class members "will be fairly and adequately protected" by the class representatives and class counsel. *Falcon*, 457 U.S. at 157 n.13 (emphasis added). In insisting that a settlement be ignored in conducting these inquiries, the Third Circuit thus would have a court (a) determine "economi[es]" with respect to a circumstance — a litigated class action — that by definition it will not confront; and (b) assess the "protect[ion]" provided by the class representatives and class counsel by blinding itself to some of the best evidence on that issue — the process by which the settlement was negotiated and the actual terms of the settlement.

This illogical result misperceives the point of Rule 23(a): congruence of interests between class members and their representatives is necessary only as to those issues that — "under

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* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 390 (1967).

the particular circumstances of the case" — are *actually* to be addressed in the class action. It therefore makes absolutely no sense "under the particular circumstances of [such a] case" to focus the class certification inquiry on hypothetical divergences of interest that are not presented (or, indeed, are mitigated) by the settlement, but that might possibly come to the fore in a fictional trial that will never take place.

Because the Rule 23(a) criteria thus aim to protect *actual* interests of the class members, it is only logical that the overwhelming majority of the courts to address the issue have chosen to apply those criteria in light of the *actual* facts before them — including the fact of settlement — rather than apply them to a hypothetical litigated action. "Settlements and the events leading up to them add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint." *In re Asbestos Litig.*, 90 F.3d at 975; *see also GM Trucks*, 55 F.3d at 796 (conceding that "evaluating the settlement can yield some information relevant to the adequacy of representation determination").

By contrast, the Third Circuit's mechanical approach — which focuses on whether class members' interests *would be* aligned in a hypothetical litigation, while studiously ignoring whether they *are* aligned in the actual case before the Court — "would require a court to ignore important and relevant information that sits squarely in front of it when deciding whether to certify a settlement class." *In re Asbestos Litig.*, 90 F.3d at 975. It is difficult to imagine how a court's willfully blinding itself to one key circumstance of a case (settlement), while simultaneously pretending that nonexistent (trial-related) circumstances *do* exist, rationally advances the Rule 23(a) goal of determining whether, "under the particular circumstances" (*Falcon*, 457 U.S. at 157 n.13), class members' interests are adequately protected.

The need to focus on actual rather than hypothetical circumstances is, if anything, even more obvious with respect to

the requirements of Rule 23(b). By way of example, Rule 23(b)(3), the provision under which the class at issue here was certified, requires the court to base its decision on two criteria: (1) whether common questions "of law or fact" "predominate over any questions affecting only individual members," and (2) whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The purpose of these "predominance" and "superiority" criteria is overtly pragmatic: to determine whether "*the actual interests* of the parties can be served best by settling their differences in a single action." 7A Wright & Miller § 1777, at 516 (emphasis added).*

In a proposed Rule 23(b)(3) class action, in other words, the court is asked to weigh the advantages and disadvantages of proceeding on a class basis, and to decide whether, in light of all relevant circumstances, "the class action is the most efficient and effective means of settling the controversy." *Id.* § 1179, at 562. *See* Advisory Committee's Note, 39 F.R.D. at 103 (court's task under Rule 23(b)(3) is "to assess the relative advantages of alternative procedures for handling the total controversy"). The inherently practical nature of this determination, which requires the court to determine whether class resolution of the case will *in fact* serve the interests of the parties and of the system of justice as a whole, necessarily calls for the court to consider the actual circumstances of the class action that is before the court. In a case where there is a settlement, consideration of the merits of a hypothetical litigated class action cannot possibly result in an accurate assessment of these interests.

In fact, the Third Circuit's own analysis in the present case illustrates how disconnected its approach is from the purposes of Rule 23(b)(3). For example, the district court held, based

* *See also, e.g., Amalgamated Workers Union* v. *Hess Oil Virgin Islands Corp.*, 478 F.2d 540, 543 (3d Cir. 1973) (the factors "pertinent to the two findings all relate to the desirability of having one suit instead of multiple suits . . . . [and] the advisory committee notes on the requirement focus on the question whether one suit is preferable to several").

on express findings of fact, that the class action settlement in this case was "superior to other available methods" within the meaning of the Rule because the settlement "will provide class members with fair compensation for their claims while reducing the delays and transaction costs endemic to the asbestos litigation process as it occurs presently in the tort system." Pet. App. 227a-228a. The Third Circuit — *without disputing the district court's conclusion that the class action settlement was more efficient than the available alternative methods of adjudication* — nonetheless held that for purposes of class certification the class action should be regarded as *in*efficient, stating (Pet. App. 54a):

> In terms of efficiency, a class of this magnitude and complexity could not be tried. There are simply too many uncommon issues, and the number of class members is surely too large. Considered as a litigation class, then, the difficulties likely to be encountered in the management of this action are insurmountable.

What the Third Circuit court did not (and could not possibly) explain is what conceivable relationship there is between the hypothetical difficulties of managing a hypothetical trial and the fundamental Rule 23(b)(3) purpose of promoting class resolution in those cases in which class resolution is *in fact* superior to alternative methods.*

B. The Third Circuit approach would greatly impede the settlement of class actions generally.

As this Court and other courts have often noted, there is a strong public policy favoring promotion and facilitation of settlement. *See, e.g., McDermott, Inc.* v. *AmClyde Inc.*, 114 S.Ct. 1461, 1468 (1994); *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); Fed. R. Civ. P. 16(a)(5). This policy is

* Indeed, in *GM Trucks*, the Third Circuit *conceded* that "[i]n settlement situations, the superiority requirement arguably translates into the question whether the *settlement* is a more desirable outcome for the class than individualized litigation." 55 F.3d at 796 (emphasis added).

at its strongest — indeed it becomes "overriding" — with respect to class actions. *Kincade* v. *General Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981); *see Officers for Justice* v. *Civil Serv. Comm'n*, 688 F.2d 615, 633 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

The Third Circuit explicitly recognized this overriding public policy interest, and in fact cited it in *GM Trucks* as its principal ground for upholding the permissibility of settlement classes. *See* 55 F.3d at 790-91 ("Settlement classes . . . increase the number of actions that are amenable to settlement"; "[i]n mass tort cases, in particular, use of a settlement class can help overcome certain elements . . . that otherwise can considerably complicate efforts to settle"; "a defendant considering a settlement may [otherwise] resist agreeing to class certification because, if the settlement negotiations should fail, it would be left exposed to major litigation"). Its ignore-the-settlement approach to certification of such classes, however, is totally at odds with these statements: that approach would throw great obstacles in the way of settlement, and would overthrow established practice regarding settlement of most class actions.

First, notwithstanding the Third Circuit's stated desire to facilitate class settlement of mass tort cases, its approach would make such settlements difficult, if not impossible, in many jurisdictions. Several courts of appeals have recently refused to certify certain mass-tort litigation classes. *See, e.g.*, *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Medical Systems, Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995). Whether or not those cases were correctly decided, the fact remains that, in those circuits, the court below's approach would preclude their *settlement* as well. The cases would simply *have* to be litigated individually — no matter what the burden on the

courts, no matter what the delays to the plaintiffs and no matter how beneficial to all involved an overall settlement would be.

Second, and more fundamentally, the Third Circuit's approach would cast doubt on routine practice with respect to settling *non*-mass-tort class actions. Even in those actions, such as securities fraud actions, that are regularly certified as litigation class actions, class treatment in a litigation context is potentially *not* appropriate with respect to the individual damages class members will receive. As the Advisory Committee's Note to Rule 23(c)(4) explains this practice:

> an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

39 F.R.D. at 106; *see also, e.g.*, *In re Fine Paper Antitrust Litig.*, 82 F.R.D. 143, 154 (E.D. Pa. 1979), *aff'd*, 685 F.2d 810 (3d Cir. 1982), *cert. denied sub nom. Alaska* v. *Boise Cascade*, 459 U.S. 1156 (1983); *In re Home-Stake Production Co. Sec. Litig.*, 76 F.R.D. 351, 372 (N.D. Okla. 1977); *Seiden* v. *Nicholson*, 69 F.R.D. 681, 686 (N.D. Ill. 1976).

These very actions, however, are *routinely* settled as to *all* issues, damages included. *See, e.g.*, *Class Plaintiffs* v. *City of Seattle*, 955 F.2d 1268 (9th Cir. 1992) (approving class settlement of securities class action). Such settlements, however, would apparently be impermissible under the Third Circuit's approach, whereby parties may only settle on a class basis what they could litigate on that basis. Indeed, it is unclear how, under that approach, the majority of class actions could be settled at all, since rational parties — plaintiff or defendant — would rarely, if ever, agree to compromise liability without also settling damages. Nor, in the unlikely event that lia-

bility-only settlements would occur, would such settlements serve the public policy interests at stake — the burden, delay and risk of a spate of individual damages resolutions would remain unabated.

Third, even in those circumstances in which a class settlement would continue to be a theoretically viable option, it would be a practical impossibility. As noted above, the Third Circuit in *GM Trucks* identified as a primary benefit of, and justification for, settlement classes that defendants would be more willing to settle if doing so did not mean conceding the viability of a litigated class action against them. *See* 55 F.3d at 790. But if a defendant, in order to get a settlement approved, must agree that the criteria for a litigated class action are met — and if the court must so find — the purported reservation of rights becomes meaningless indeed. On *GM Trucks*' own logic, then, its approach would have the polar opposite effect of *deterring* settlement. This penalization of settlements, which applies regardless of their fairness, serves the interests of no one.

C. The Third Circuit's justifications for ignoring the settlement are uniformly unpersuasive.

In light of the language, structure and purposes of Rule 23, the overwhelming authority contrary to its approach, and the severe consequences of that approach, one would expect the Third Circuit to have offered powerful reasons for striking off on its own path. Neither the opinion below nor the prior decision in *GM Trucks*, however, offers any substantial justification for ignoring the settlement in determining whether to certify a settlement class.

The Third Circuit offers two ostensible justifications, neither of which provides even a colorable basis for the court's approach.*

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* A third justification offered by the court below — the argument that Rule 23 contains no "special, liberalized criteria" for settlement class actions — is addressed at pp. 17-19, *supra*.

1. The *GM Trucks* court expressed the fear that certifying a settlement class that would not qualify for certification as a litigation class somehow "perverts the class action process and converts a federal court into a mediation forum for cases that belong elsewhere, usually in state court," thereby threatening "a result inconsistent with [the federal courts'] mission and limited resources." 55 F.3d at 799. The court below may have been echoing this view in suggesting that its approach was necessary to preserve "the integrity of the judicial system" and its "institutional values." Pet. App. 17a-18a.

This argument has things exactly backwards. It apparently operates on the premise that the cases resolved by settlement class actions would, but for the availability of that mechanism, proceed "elsewhere, usually in state court." The fact, however, is that a large proportion of the cases that settlement class actions aim to resolve is *already* being litigated in the federal courts, through diversity jurisdiction or otherwise. For example, asbestos claims — the subject of this settlement — constituted fully *six percent* of all federal civil cases filed in 1990, and almost *30,000* federal asbestos cases were pending as of mid-1991. *See, e.g.*, Pet. App. 112a-113a. Indeed, as noted above, the negotiations leading up to this settlement originated as part of the *federal* MDL efforts to attain an overall resolution of the deluge of asbestos cases plaguing the *federal* courts. *See* pp. 5-6, *supra*. Moreover, as also discussed above (pp. 25-26), the Third Circuit's blanket rule affects not only tort actions, but also securities fraud, antitrust and other actions arising under federal law that are by definition subject to federal jurisdiction.

And the court below's related suggestion that restrictions on the availability of settlement classes are necessary to avoid depletion of the federal courts' "limited resources" is truly odd. As courts and commentators have repeatedly lamented, the greatest threat to the limited resources of the federal courts is the wasteful and repetitive *individual* litigation of similar claims, in asbestos and other areas. *See In re Joint E.*

& S. Dist. Asbestos Litig. ("Johns-Manville"), 129 B.R. 710, 746 (E. & S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993) ("The large number of asbestos lawsuits pending throughout the country threatens to overwhelm the courts and deprive all litigants, in asbestos as well as other civil cases, of meaningful resolution of their claims."); Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation at 26 (1991) ("The delays and burdens on the judicial system caused by the massive number of claims result in a denial of access to justice to Americans throughout the country."). One of the signal advantages of the settlement class action is its ability to *preserve* judicial resources by resolving these claims efficiently in a single proceeding.

Finally, the Third Circuit's suggestion that it is somehow not part of the legitimate business of the federal courts to promote the settlement of disputes — a suggestion implicit in its pejorative use of the phrase "mediation forum" — is simply incorrect. Not only is there a strong public interest favoring settlement generally, *e.g.*, *McDermott, Inc.* v. *AmClyde Inc.*, 114 S. Ct. 1461, 1468 (1994), but the Federal Rules of Civil Procedure specifically contemplate an active role for federal district courts in this regard. *See* Fed. R. Civ. P. 16(a)(5) ("facilitating . . . settlement" a proper purpose of pretrial conference); Fed. R. Civ. P. 16(c)(9) ("court may take appropriate action, with respect to . . . settlement").

2. The second basis cited in support of the Third Circuit's approach is the assertion that settlement class actions are susceptible to collusion on the part of class counsel pursuing attorneys' fees: "because the court does not appoint a class counsel until the case is certified, attorneys jockeying for position might attempt to cut a deal with the defendants by underselling the plaintiffs' claims." *GM Trucks*, 55 F.3d at 788; *see also id.* at 795-96.

The Plaintiff Class fully supports vigorous, non-collusive representation, but does not understand how the Third Circuit's approach is an appropriate way to respond to its articulated concerns. To the extent there is any fear that attorneys will "jockey[ ] for position" by "cut[ting] a deal with the defendants," the same concern exists in *all* class settlements reached prior to an official appointment of class counsel, *regardless* of whether the particular action could or could not be certified as a litigation class action.*

For example, in securities fraud actions — the paradigmatic area of litigation class actions — it has become common for numerous similar complaints arising out of the same fraud to be filed by numerous counsel each claiming to represent the same class. *See, e.g., San Leandro Emergency Med. Group Profit Sharing Plan* v. *Philip Morris Cos.*, 75 F.3d 801, 805 (2d Cir. 1996). Often, class settlements are negotiated with some of those counsel prior to a formal class certification ruling. The Third Circuit's stated concern about counsel "jockeying" for position is, if anything, *more* applicable to these actions, but that court paradoxically would view these settlements with *less* suspicion on the entirely irrelevant ground that the cases could likely be litigated (at least as to liability issues) on a class basis. The Third Circuit's focus on whether a hypothetical litigation class could be certified, in other words, is not rationally related to its stated goal of weeding out those class settlements that are more likely to suffer from collusion.

More fundamentally, the Third Circuit's approach is not only an arbitrary response to concerns about collusion, it is an entirely unnecessary one as well. Rule 23(e) *already* contains safeguards against collusive class settlements, requiring dis-

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* We stress, moreover, that this theoretical concern is completely misplaced as applied to this case. As set forth above, the district court's findings, none of which was reversed by the Third Circuit, squarely refute any notion that class counsel acted collusively or did not adequately represent the class.

trict courts and courts of appeals to find class settlements to be fair and non-collusive prior to approving them*; moreover, these safeguards are supplemented in the settlement class context by the court's additional obligation to determine, at the same time, whether Rule 23(a) and 23(b) requirements (including adequacy of representation) have been satisfied. Nor is there any reason to think that the fairness hearing process — which is relied upon to protect class members against collusive settlements in all other contexts — becomes somehow inadequate in the case of pre-class-certification settlements.** Indeed, in *GM Trucks* itself, the Third Circuit determined as an alternative holding that the class settlement before it was unfair and hence invalid under Rule 23(e) (*see* 55 F.3d at 804-19), thus demonstrating graphically the lack of need for its adoption of a prophylactic bar to class certification. In any event, if any augmentation of the fairness hearing process is deemed necessary it should consist of additional procedures sharpening the review of the *particular* settlement before the court — such as requiring special masters or guardians ad litem to evaluate specific aspects of the settle-

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* That inquiry, in fact, is the entire purpose of a fairness hearing on the settlement, such as the elaborate one conducted by the district court here. *See, e.g., GM Trucks*, 55 F.3d at 785; *Reed* v. *General Motors Corp*, 703 F.2d 170, 172 (5th Cir. 1983). Indeed, fairness hearings are a *particularly* effective means of ferreting out collusion of the sort feared by *GM Trucks*, in which potential class counsel bid against each other (at the class members' expense) to reach a settlement with the defendant. If any such "jockeying" were ever to take place, counsel whose offers were rejected in favor of the one ultimately accepted would be highly likely to appear at the fairness hearing and expose the negotiation process to the court.

** The claim that class action settlements are susceptible to collusion and conflicting interests of class counsel hardly applies only to the "settlement class" context at issue here; it is also regularly made, by critics like respondents' expert Professor Coffee, with respect to settlements reached *after* a ruling certifying the class. *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 714-18 (1986).

ment (as was done here) — and not the arbitrary and overbroad prohibition adopted by the court below that precludes class settlements *without* regard to their individual merit.

Indeed, the Third Circuit's approach is affirmatively *harmful* to the interests of plaintiff class members. In its zeal to protect class members from even the slightest theoretical risk of a collusive settlement, the court below has truly thrown out the baby with the bathwater. Its approach surely protects plaintiffs against collusive pre-certification settlements, but only at the enormous cost of "protecting" them against even the most indisputably *beneficial* of class action settlements. This "protection" will be cold comfort to asbestos plaintiffs relegated to the extraordinary transaction costs and endless delay that the tort system has in store for them.

* * *

The Plaintiff Class submits that once the settlement in this case is taken into account, it is plain that the district court's decision to certify the class herein was correct, and this Court should so find. Rather than belabor this point, the Plaintiff Class adopts the legal arguments of petitioners in this regard.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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December 16, 1996

ADDENDUM

ADDENDUM

RULE INVOLVED

Federal Rule of Civil Procedure 23 provides:

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corre-

sponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained: Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order

under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Supreme Court, U.S.
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No. 96-270

In the Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners

v.

GEORGE WINDSOR, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONERS

Respondents' briefs are notable in three respects. *First*, despite the deluge of paper filed with the Court, there is *no defense* of the Third Circuit's ruling on the sole issue on which certiorari has been granted. Indeed, most respondents *explicitly admit* that a court *should* take the parties' settlement into account in applying the class certification standards of Rule 23. Unable to justify the Third Circuit's actual holding, respondents attack a straw man; they falsely claim that we are arguing that the settlement overrides or weakens the requirements for certification. But that emphatically is not our contention. Our point, instead, is simply that a court, in applying the standards spelled out in Rule 23, should not close its eyes to the reality of a settlement.

Once the settlement is taken into account, it is clear that the district court did not abuse its discretion in certifying this class. Respondents' argument that there are intra-class conflicts is refuted by the district court's factual findings that class members were not competing for limited funds and, because of the nature of asbestos-related injuries, share an interest in maximizing the compensation provided for each disease category. Likewise, the district court's findings as to why this settlement is fair to all class members and better for all of the parties than continued case-by-case litigation foreclose respondents' challenge to the superiority determination.

Second, respondents advance a variety of constitutional arguments that were not addressed by the court of appeals. Those contentions, which were thoroughly refuted by the district court, are meritless. The plaintiffs, who allege bodily injury and other concrete harms, plainly have standing; the amount in controversy requirement is amply satisfied where, as in this case, plaintiffs have recovered sums in excess of the jurisdictional amount for claims of the type now advanced; and respondents' challenges to the adversarial nature of the parties and to the class notice are simply irreconcilable with the district court's unchallenged factual findings.

Third, seeking to twist the equities in their favor, respondents resort to numerous assertions about the settlement that are contrary to the district court's exhaustive findings of fact (*e.g.*, Pet. App. 103a-223a). For example:

- Respondents assert that "the compensation provided by the settlement [is] far below average awards in the tort system." Windsor Br. 5; see also WLA Br. 3; Cargile Br. 6, 39. *In fact*,

the district court, based on six pages of detailed findings (Pet. App. 136a-142a), found that "the values in the Compensation Schedule are indeed a reasonable reflection of the CCR defendants' historical settlement averages from the tort system" (*id.* at 139a).

- Respondents assert that there "likely" will be too many claims and that payments "could be delayed for many years." WLA Br. 4; see Windsor Br. 5. *In fact*, the district court found that the settlement "will result in less delay for asbestos claimants than that experienced in the present tort system" (Pet. App. 146a) and will "result in the CCR defendants paying more claims, at a faster rate, than they have ever paid in the past" (*id.* at 143a).

- Respondents assert that non-impaired class members will "receive nothing at all" under the settlement (*e.g.*, Balonis Br. 20), whereas they receive "substantial amounts of money" in the tort system (WLA Br. 44; see also Cargile Br. 6). *In fact*, the district court found that the settlement provides benefits of "significant value" to non-impaired class members (Pet. App. 174a) — including tolling of the statute of limitations, waiver of defenses to liability, prompt and efficient payment if and when they become sick, assurance that such funds will be available, and the right to be compensated twice if their medical condition worsens. *Id.* at 172a & n.39, 173a-175a. The court also found that, *in fact*, "non-impaired claimants [in the tort system] usually settle their claims for small amounts and a full release of all claims for any future asbestos-related injury, including cancer." *Id.* at 175a.

- Respondents assert that petitioners paid a "premium" to settle some of class counsel's previously filed cases (Windsor Br. 6; see also WLA Br. 2). *In fact*, the district court found that the terms of those settlements were "generally consistent with historical settlement averages." Pet. App. 213a.

- Respondents assert that the asbestos litigation crisis is abating (Balonis Br. 42-43). *In fact*, the district court found that "[n]ew filings continue unchecked, there is much uncertainty as to liability and verdict results, claims are often resolved only after long delays, transaction costs are high, and victims receive only a fraction of the funds expended." Pet. App. 240a; see *id.* at 270a.

As these examples show, respondents' scattershot attacks on the settlement are meritless. The district court approved the settlement based on exhaustive findings (Pet. App. 88a-276a); respondents did not seek to challenge those findings on appeal; and none of the findings was set aside by the Third Circuit. The settlement has been supported by the national AFL-CIO, whose members include a "substantial percentage" of the class (*id.* at 247a), and by numerous plaintiffs' asbestos attorneys (J.A. 862). Its terms create the kind of claims resolution system that was endorsed by the Judicial Conference committee appointed by Chief Justice Rehnquist. Pet. App. 112a, 270a. And, as the district court found, there were "few actual objectors to the settlement"; indeed, most of them "were submitted as *one* group represented by *one* law firm." *Id.* at 247a & n.60 (emphasis in original).

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING THE CLASS.

Although respondents make a number of mutually inconsistent arguments, they all agree on one point: a settlement *may* be taken into account in deciding whether to certify a class. They thus concede the issue on which this Court granted certiorari. See Cargile Br. 1, 13 (disavowing the Third Circuit's "extreme" holding and "agree[ing] that the settlement and its fairness should not be ignored in assessing class certification"); Windsor Br. 27 ("a court need not close its eyes to the substantive terms of a settlement"); WLA Br. 36 n.17 ("Rule 23's text permits the district court to consider a settlement's effect on case management"). The Balonis respondents make the concession by silence; they offer no defense of the Third Circuit's holding.

All aspects of the Third Circuit's decision were fatally infected by its concededly erroneous holding that the requirements of Rule 23 "must be satisfied without taking into account the settlement." Pet. App. 39a. Respondents plainly err in their remarkable assertion (Windsor Br. 2, 26; Cargile Br. 9-10, 14) that the court of appeals disregarded its own holding and took the settlement into account in deciding that the requirements of Rule 23 were not met: the court *twice* expressly held that "this class, *considered as a litigation class*, cannot meet the [Rule] 23(a) requirements of typicality and adequacy of representation, nor the 23(b) requirements of predominance and superiority." Pet. App. 39a-40a (emphasis add-

ed); see also *id.* at 19a-20a.[1] The decision below therefore must be set aside.

A. Rule 23 Permits The Court To Take The Settlement Into Account.

Rather than defend the Third Circuit's ruling that the settlement must be *ignored*, respondents argue at length that the certification standards "cannot be satisfied *solely* by the substantive terms of a settlement," *i.e.*, that the fairness inquiry under Rule 23(e) "is not designed to substitute" for those standards. Windsor Br. 27 (emphasis added), 31; see also *id.* at 27-31; WLA Br. 34-35; Cargile Br. 24-25; Balonis Br. 19. These caricatures misstate our argument and the district court's decision. As we made clear throughout our opening brief, "a district court that takes settlement into account is still obligated to conduct the certification inquiry specified in Rule 23." Pet. Br. 40; see also, *e.g.*, *id.* at 28-29. Our *actual* argument, and the district court's *actual* holding (see Pet. App. 223a-233a), is that a court must apply the criteria spelled out in Rule 23(a) and (b) to the real case before it. The court should take into account the settlement-related facts (including the settlement terms and history of negotiations) that shed light on the Rule 23 standards. But it need not deny certification based on manageability and similar problems that will never come to pass. As the Fourth Circuit put it, "settlement should be a factor, and an important factor, to be considered when determining certification." *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989).

Respondents' Rule 23 arguments are directed primarily at their mischaracterization of our position. The Windsor respondents suggest that a case that is not "triable" should not be certified "*solely* by reliance on the * * * settlement" (Windsor Br. 27-28 (emphasis added)) — but that is not our position. And contrary to respondents' vague suggestion that the Rule is directed to cases that are "triable," nothing in the inclusive language of Rule 23 says that the "questions of law or fact" and the "claims" referred to in Rule

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[1] Respondents made this same argument in opposing the petition for certiorari (Windsor Op. 10; WLA Op. 10-12), and we rebutted it in our reply (at 6 & n.6). This Court presumably rejected respondents' argument when it granted review.

23(a) must be part of a suit determined to be "triable"; likewise, nothing in the Rule excludes questions or claims that *are* before the court as a consequence of settlement. Respondents do not even attempt to rebut the showing in our opening brief (at 18-25) that the text of Rule 23(a), (b), and (c) directs the certification inquiry to the *actual* status of the case, including settlement, rather than to the purely hypothetical question of whether the now-settled case was "triable." See 7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1785, at 107 & n.34 (1986) (the certification "determination usually should be predicated on more information than the complaint itself affords," including the "factual circumstances of a particular case").[2]

Likewise, respondents' argument that settlement classes pose an inordinate risk of collusion is premised on their false assumption that we advocate "collapsing the entire certification inquiry into an examination of the settlement's fairness." Windsor Br. 29. In fact, some possibility of collusion exists in *all* settlement classes, not only those in which the case could not be certified for trial. But as the decision upon which respondents principally rely itself makes clear, the courts uniformly have rejected the proposition that this danger renders the settlement class procedure "a per se violation of Rule 23," holding instead that the possibility of collusion is adequately addressed by "careful scrutiny" on the part of the district court. *Mars Steel Corp.* v. *Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 681 (7th Cir. 1987); see also Pet. Br. 40. And as we explained in our opening brief (at 22-25),

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[2] The Cargile respondents argue (at 15, 21) that the predominance requirement of Rule 23(b)(3) should be resolved without reference to the settlement in order to ensure a "cohesive" class. That argument finds no support in the language of the Rule. Indeed, many of the factors that Rule 23(b)(3) expressly lists as pertinent to the predominance and superiority inquiries are significantly affected by a settlement. Pet. Br. 30-31. Moreover, the Advisory Committee Notes establish that the predominance requirement is designed to achieve "economies" by ensuring that the class action will not break down "into multiple lawsuits separately tried" — a danger that cannot materialize when the case has settled. Pet. Br. 30. A "cohesive" class is assured by the typicality and adequacy requirements of Rule 23(a).

lower courts have taken settlement into account in applying the Rule 23 criteria for three decades and have had no difficulty preventing abuses. See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979) (class action abuses will not occur if district courts "exercise sound discretion and use the tools available" under Rule 23).[3]

In fact, as we also explained in our opening brief (at 28-29 40), and as respondents do not deny, taking the settlement into account *improves* the quality of the certification decision and gives *enhanced* protection to absent class members. It allows the district court to assess the actual performance of the class representatives and counsel. It gives the court the opportunity to review the course of the negotiations and the substance of the settlement, which may "expose diverging interests or common issues that were not evident or clear from the complaint." *In re Asbestos Litig.*, 90 F.3d 963, 975 (5th Cir. 1996). And review of the settlement terms makes concrete the inquiry into whether a class action is superior to other means of adjudication. Consideration of the settlement thus throws considerable light on many of "the imponderables that make the [class-action] decision so difficult early in [the] litigation." *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 406 n.12 (1977) (citation omitted).

Nor can respondents rebut the demonstration in our opening brief (at 34-39) that requiring the district court to find that the case could have been tried would have enormous adverse consequences for the parties and the courts. Such a rule would make it virtually impossible for the parties to settle any case before class certification; it would bar classwide settlements in the many securities, civil rights, and antitrust cases where damages and other issues are

[3] Respondents attack the same straw man in arguing that the fairness of the settlement should not override the certification inquiry because class counsel in a settlement case "cannot use the threat of litigation as leverage." Windsor Br. 33. Plaintiffs ordinarily do not — and plaintiffs in this case did not — concede that their case could not be certified for litigation; thus such leverage exists unless and until the court determines that the class is *not* triable. Moreover, the threat that, absent a class settlement, the defendants would continue to face an onslaught of literally thousands of individual cases gave the plaintiffs here abundant leverage to secure a fair settlement.

too varied to try as a class (thus denying *any* relief to plaintiffs in many such cases); and it would foreclose the use of class actions to settle mass tort cases. Nothing in the Rule requires such an untoward result.[4]

B. Taking The Settlement Into Account, The District Court Did Not Abuse Its Discretion In Certifying The Class.

While the court of appeals refused to consider the settlement, the district court took the settlement into account in applying the criteria of Rule 23(a) and (b). Not surprisingly, most respondents fail to mention the standard that governs review of the district court's decision; the Windsor respondents assert (at 46) that adequacy of representation is subject to de novo review. It is black-letter law, however, that "the court's [certification] decision will not be disturbed on appeal unless it is shown to be an abuse of * * * discretion." 7A FEDERAL PRACTICE AND PROCEDURE § 1765, at 273; see *Califano* v. *Yamasaki*, 442 U.S. 682, 703 (1979) (certification upheld where "we cannot conclude that the District Court * * * abused [its] discretion"); *Reiter*, 442 U.S. at 345 (district courts "have broad power and discretion * * * with respect to matters involving the certification" of class actions).

Deference to the district court's decision is especially appropriate here. "Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard" mandated by Rule 23. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 402 (1990). Here, the district judge "lived with the controversy for weeks or months instead of just a few hours." *Bose Corp.* v. *Consumers Union, Inc.*, 466 U.S. 485, 500 (1984). The court held a five-week hearing, heard from 29 witnesses (including medical, financial, and ethics experts), and made truly exhaustive findings of fact. Pet. App. 101a-223a. Those findings necessarily underlay the district court's certification decision: "[w]hat constitutes ade-

[4] Respondents' radical argument that our position is "problematic" under the Rules Enabling Act (Windsor Br. 36-40) was not raised below, is equally applicable to *all* settlements of nationwide class actions, and lacks any remotely relevant supporting authority.

quate representation is a question of fact that depends on the circumstances of each case." 7A FEDERAL PRACTICE AND PROCEDURE § 1765, at 271.[5]

The court of appeals, however, made no "mention * * * of the factual findings of the District Court, much less discuss or analyze them." *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 713 (1986). Instead, the Third Circuit engaged in plenary review of the certification question. Indeed, as we noted in our opening brief (at 44 n.22) — and as respondents pointedly do not deny — the court of appeals premised its holding on factual assertions that are *flatly contradicted by the district court's findings of fact*.[6] The court of appeals did so, moreover, without acknowledging those findings, without determining that any of them were clearly erroneous, and without so much as citing the evidentiary record. Thus, even apart from its erroneous decision to ignore the settlement, the court of

[5] The Windsor respondents make much of the fact that a few of the district court's findings appear under the heading "conclusions of law." Br. 46. In fact, the court emphasized that "[t]o the extent that these conclusions of law include findings of fact or mixed findings of fact and conclusions of law, those findings and conclusions are hereby adopted by this Court." Pet. App. 223 n.53. In addition, "[a]n appellate court will regard a finding or conclusion for what it is, regardless of the label the trial court may have put on it." 9A FEDERAL PRACTICE AND PROCEDURE § 2579, at 537 & n.2.

[6] For example, in reaching its conclusion that there are intra-class conflicts, the court of appeals asserted that the settlement "relegates" mesothelioma victims "to a modest recovery, whereas the average recovery of mesothelioma plaintiffs in the tort system runs into the millions of dollars." Pet. App. 49a; see *id.* at 50a n.14. Respondents repeat this assertion, arguing that mesothelioma claims from California are undercompensated by the settlement. Windsor Br. 5-6 n.5. In fact, however, the district court found that the compensation values for *each* disease category correctly reflect the actual historical settlement data. Pet. App. 136a-142a. Thus, the evidence shows that petitioners' average tort system payment for California mesothelioma claims ($52,405, see J.A. 562) is well within the schedule set by the settlement (non-extraordinary claims are paid an *average* of up to $60,000, with extraordinary claims *averaging* $300,000). See Pet. App. 274a.

appeals' application of the Rule 23 factors is fatally flawed and must be set aside. See *Icicle Seafoods*, 475 U.S. at 714.

When considered under the deferential standard of review required by Fed. R. Civ. P. 52(a) and this Court's precedents, the district court's decision to certify the class was unassailable.

1. *Adequacy of representation*. Respondents parrot the court of appeals' assertion that "serious intra-class conflicts" preclude a finding of adequate representation, with the "most salient conflict" between "presently injured and futures plaintiffs." Pet. App. 49a; Windsor Br. 45-46. The Windsor respondents assert (at 46) that some plaintiffs got recoveries "at the expense of others," while the WLA respondents claim (at 44-45) that some plaintiffs' claims were extinguished without adequate compensation. None of these assertions can be squared with the district court's factual findings.

First, the district court found that "the assets of the defendants do not constitute a limited fund, and so Class Counsel was able to negotiate compensation schedules for varying diseases *without competition between medical categories for the same dollars*." Pet. App. 230a (emphasis added) (citing Findings of Fact 142-170). As a consequence, the district court found, there was "no antagonism between persons in various categories" (*ibid.*; see also *id.* at 232a), a ruling that comports with recent decisions of the Second and Fifth Circuits in class actions involving "present" and "future" disease victims. See *Ivy* v. *Diamond Shamrock Chem. Co.*, 996 F.2d 1425, 1435-1436 (2d Cir. 1993) ("*Agent Orange*"); *In re Asbestos Litig.*, 90 F.3d at 978-982.[7] To be sure, all plaintiffs might not have had the same immediate goal in mind; the court of appeals, for example, speculated that presently impaired class members might be interested in getting full value for their claims immediately, while non-impaired plaintiffs would want to preserve funds for people who become sick in the future. But those goals simply were not "antagonistic" because, as the district court found,

[7] A conflict exists only where class members' interests are "antagonistic." *E.g.*, *In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764, 778 (2d Cir. 1996); *Kanter* v. *Casey*, 43 F.3d 48, 55 (3d Cir. 1994); *Rosario* v. *Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992).

there was no competition between the groups "for the same dollars." Pet. App. 230a.

Respondents' hypothetical conflicts between "present" and "futures" class members are further refuted by the district court's factual finding that the distinction between those groups is "illusory" because "[c]lass members with no current asbestos-related condition may develop serious conditions in the future." Pet. App. 232a. As such, non-impaired claimants "have a strong interest that recovery for *all* of the medical categories be maximized because *they may have claims in any, or several categories*." *Id.* at 231a (emphasis added). Thus, both "present" and "futures" class members had an interest in maximizing the scheduled payments and obtaining favorable eligibility conditions for *each* medical category. Equally important, respondents have no response to our demonstration that all plaintiffs were united by their interest in achieving a global settlement. See Pet. Br. 48.

The absence of any conflict among class members was confirmed by the district court's factual finding that *each* category of class members will receive "fair and reasonable" value for their claims. Non-impaired class members secure a package of benefits (including tolling of limitations, waiver of defenses, quick payment when they become sick, reduced transaction costs, and assurance that funds will be available) that is superior to what they would get in the tort system. Pet. App. 139a & n.23, 141a, 172a & n.39, 173a-176a. Sick class members receive compensation, based on objective, historical settlement data, faster and with lower transaction costs. *Id.* at 136a-139a, 268a. Many witnesses testified that this formula is advantageous for everybody. *E.g.*, J.A. 354-356, 363-364, 395-396.

In this factual setting, where the various plaintiffs' aims are not in conflict, respondents' arguments involve nothing more than second-guessing the sort of compromises that are inherent in all settlements. Respondents complain, for example, that non-impaired plaintiffs did not obtain relief in the forms of programs for medical monitoring or inflation adjustments (Windsor Br. 46) — but respondents ignore the district court's finding that those plaintiffs received a set of benefits with more value than the "small amounts" they typically get in return for complete releases in the tort system.

Pet. App. 173a-175a.[8] Respondents' grousing about these trade-offs simply does not raise an issue of adequacy of representation.

The district court's fact-intensive adequacy determination plainly is due the greatest deference. The district court reviewed the history of settlement negotiations in this case, finding that they were "difficult, lengthy, and time-consuming" (Pet. App. 116a) and that the settlement is "the product of non-collusive negotiations." *Id.* at 204a. See also *id.* at 177a-179a, 204a-216a. The court also found that there was no intra-class conflict because the various groups of plaintiffs were pursuing consistent goals. *Id.* at 229a-231a. And the court was able to *confirm* that conclusion by looking to the actual results of the negotiations, finding that under the settlement non-impaired class members fare better than they do in the tort system, while presently-impaired class members receive payments that reflect historical tort system averages. Against this background, the district court's adequacy determination plainly has not been shown to be an abuse of discretion.

2. *Superiority*. Respondents argue that the superiority requirement of Rule 23(b)(3) is not satisfied because the purported difficulties in giving notice outweigh any advantages stemming from the settlement. Windsor Br. 48-49. This argument ignores the district court's many factual findings and flies in the face of the deference due that court on the question of superiority.

Based on more than 100 subsidiary findings, the district court found that the settlement is superior because, *inter alia*, it "will provide class members with fair compensation for their claims while reducing the delays and transaction costs endemic to the asbestos litigation process as it occurs presently in the tort system." Pet. App. 227a-228a; see also *id.* at 270a (in the tort system, "the

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[8] The WLA respondents' complaint (at 45) that "the settlement extinguishes the loss-of-consortium claims without any cash recovery" and "thus enriches some claimants at the expense of others" typifies respondents' persistent disregard of the district court's factual findings. The court found that "the CCR defendants' historical [settlement] averages, upon which the compensation values are based, *include payments for loss of consortium claims*, and, accordingly, the Compensation Schedule is not unfair for this ascribed reason." Pet. App. 141a (emphasis added).

lawyers are well paid" but "victims' recoveries are delayed [and] excessively reduced by transaction costs"; also, "[t]he sickest of victims often go uncompensated" while "funds go to others who remain unimpaired"). Needless to say, respondents are unable to demonstrate that these many findings are clearly erroneous.

Similarly, the purported inadequacies in the notice to class members do not undermine class certification. As discussed at pages 26-30 below, the assertions about notice contradict the district court's factual findings and its "confident" conclusion that class members got fair notice. Pet. App. 272a. Indeed, because the notice complied with the express requirements of Rule 23(c)(2), it would be anomalous to conclude that it was so deficient as to bar certification under the general superiority test of Rule 23(b)(3). Moreover, those concerns do not cast doubt on the district court's discretionary judgment that the settlement is superior to continued case-by-case litigation in the tort system.

3. *Typicality*. Respondents' passing reference to typicality echoes the court of appeals' theory that "the futures plaintiffs share too little in common [with one another] to generate a typical representative." Pet. App. 53a. The WLA respondents argue (at 34) that "because the settlement releases the future claims of class members whose injuries, desires, and even identities are unknown and unknowable, no class representative can be typical of the 'futures' class." But that argument is plainly wrong. As the district court found, each non-impaired class member "may in the future develop a condition in any one or more of the compensable medical categories." Pet. App. 231a. As a consequence, they *currently* are situated *identically* to one another, and they currently have precisely the *same* interests. *Id.* at 232a.

The WLA respondents (at 34) also seek to rely on *General Telephone Co.* v. *Falcon*, 457 U.S. 147 (1982), where, they assert, "the Court held that a Mexican-American employee, who was denied a workplace *promotion*, was not typical of a class of Mexican-American job *applicants*." In fact, the Court made clear in *Falcon* that, if an employer uses "a biased testing procedure to evaluate both applicants and current employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." 457 U.S. at 159 n.15.

That reasoning plainly applies in this case, where all plaintiffs complain that they were wronged by the same conduct (exposure to asbestos) and all benefit from the same negotiated remedy.[9]

More generally, as the district court found, "the representative plaintiffs hail from a variety of jurisdictions and represent a wide range of occupations, medical conditions, and exposure to the CCR defendants' products." Pet. App. 105a. These class representatives include both non-impaired and sick claimants, as well as their spouses. *Id.* at 103a-105a. Hence the typicality requirement is amply satisfied.[10]

4. *Predominance of common questions*. As we showed in our opening brief (at 42-43), the settlement made irrelevant all of the disparate issues as to liability, defenses, and damages on which the Third Circuit relied in finding that common issues do not pre-

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[9] For this reason (among others), the Windsor respondents are incorrect when they assert (at Br. 26) that the class in this case is identical to one consisting of "every potential victim that an automobile manufacturer wronged in a given calendar year," including potential traffic accident, antitrust, and toxic tort plaintiffs. In contrast to the class here, respondents' hypothetical group would not have been injured by the same conduct. In addition, as a consequence of the wrongful conduct here, every member of the class ultimately may develop the same diseases, and each therefore has an interest in maximizing recovery in all disease categories; that manifestly is not true of respondents' amorphous group of accident, price-fixing, and toxic spill victims.

[10] Given the district court's finding that there is no conflict among class members, the "typicality" requirement "may be satisfied even though varying fact patterns support the claims * * * of individual class members." 7A FEDERAL PRACTICE AND PROCEDURE § 1764, at 235-236. The trial court has considerable discretion whether to create subclasses, and as the district court found here, creation of subclasses in this situation is both unnecessary and disfavored. Pet. App. 231a-233a. The court also found that "the representation of the class has been enhanced by the AFL-CIO's involvement in this litigation and its agreement to participate, along with Class Counsel, in auditing and supervising the compensation system established under the settlement." *Id.* at 231a.

dominate.[11] The questions that remained in the case were common to class members: whether it is fair and reasonable to compromise tort claims for asbestos-related injuries, with their attendant uncertainties, delays, and high transaction costs, in exchange for the specific compensation system established by the settlement. *Ibid.* The district court's finding that these common questions predominate over any individual ones was surely not clearly erroneous. See MANUAL FOR COMPLEX LITIGATION (SECOND) § 30.45, at 243 (1985) ("although 'common questions' may predominate and justify the class if the case is settled, the standards of Rule 23(b)(3) may not be met if the case must be tried").

In short, once deferential review is properly afforded to the district court's meticulous findings of fact, it is clear that the court did not abuse its discretion in certifying the class. The Third Circuit's order decertifying the class and vacating the preliminary injunction therefore cannot stand.

II. RESPONDENTS' ALTERNATIVE ARGUMENTS ARE MERITLESS.

Seeking to avoid resolution of the question on which this Court granted review, respondents advance four constitutional objections to this class action — none of which was resolved by the court of appeals and all of which were rejected by the district court. They are all unpersuasive.

A. All Class Members Have Standing.

The Windsor respondents argue (at 17-26) that class members who do not yet have either an impairing condition or pleural plaques — whom respondents call "exposure-only" plaintiffs — lack standing to sue. This argument is plainly wrong. Standing ensures that the plaintiff has a "personal stake in the outcome of the controversy." *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975) (citation omitted). Such a "personal stake" is indisputable here: each class member alleges that his or her own body has been

[11] See 1966 Advisory Committee Note to Rule 23 ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense * * * ." The court may consider "the burden that separate suits would impose," both on the defendant and "upon the court calendars.").

injured by petitioners' tortious conduct (J.A. 16), and the settlement resolves those claims in return for benefits that accrue to each class member (*e.g.*, Pet. App. 173a-176a, 241a). As the district court held in a thorough opinion that was not disturbed on appeal (J.A. 185-204), and whose findings are subject to deferential review under the "clearly erroneous" standard (see *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 74 n.19 (1978)), the specific requirements for standing are amply satisfied. See *In re UNR Indus., Inc.*, 20 F.3d 766, 770 (7th Cir. 1994) (persons exposed to asbestos satisfy Article III injury test).

1. The "injury in fact" requirement is satisfied.

To qualify as "injury in fact," the plaintiff's injury need only be "distinct and palpable as opposed to merely abstract." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990) (citation omitted). Put otherwise, it need only be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted). The *present* injuries alleged by the "exposure-only" class members — including damage to lung tissue, the need to undergo and pay for medical monitoring, and increased risk of future diseases — easily satisfy these standards.

First, the complaint alleges that class members have, as a direct result of their "inhalation of asbestos fibers and dust," suffered "cellular changes in their lungs and other organs" that can result in asbestosis and cancer. J.A. 16. While respondents disparage these claims as "mere autobiography" (Windsor Br. 19), many federal and state courts have found that inhalation of asbestos *immediately* produces these cellular changes and thereby inflicts "injury." See, *e.g.*, *Stonewall Ins. Co.* v. *Asbestos Claims Management Corp.*, 73 F.3d 1178, 1197-1199 (2d Cir. 1995) (citing evidence that asbestos inhalation "immediately" causes two kinds of "injury" to lung tissue — "inflammation and scarring" and cancerous "mutations"), modified, 85 F.3d 49 (2d Cir. 1996).[12]

[12] See also *Lloyd E. Mitchell, Inc.* v. *Maryland Cas. Co.*, 595 A.2d 469, 475-778 (Md. 1991) (collecting similar decisions by the Second, Third, Fifth, Sixth, Eleventh, and D.C. Circuits and by other state courts); *J.H. France Refractories Co.* v. *Allstate Ins. Co.*, 626 A.2d 502,

In fact, respondents' own expert testified below that, upon inhaling asbestos fibers, each class member suffered "a mechanical injury to the cells and to the adjoining tissue." J.A. 839; see also J.A. 835-837. In short, the district court correctly held that "the exposure-only plaintiffs have alleged a demonstrable physical injury which satisfies the Article III injury in fact requirement." J.A. 201; see also *Agent Orange*, 996 F.2d at 1434 (persons exposed to Agent Orange have injury in fact, given that "[s]ome types of injury to the body occur prior to the appearance of any symptoms") (citation omitted).

Second, the complaint alleges that class members have suffered "the necessity to undergo medical surveillance in order to detect the onset of any future asbestos-related conditions." J.A. 16. This claim too was supported by expert testimony. See J.A. 135; 3/8/94 Tr. 188-189. Many courts have held that the need to undergo testing itself constitutes "injury"[13] and gives rise to a cause of action (see page 20 *infra*); thus it surely is sufficient for Article III as well.

Third, the complaint alleges that each class member also suffers from an "enhanced risk of contracting" cancer and other diseases. J.A. 16. It is settled that the increased risk of diseases caused by exposure to a toxin constitutes "injury in fact." In *Duke Power*, 438 U.S. at 74, the Court held that exposure to radiation constituted Article III injury, given the "uncertain[] * * * health and genetic consequences" of such exposure.[14] Contrary to

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505-506 (Pa. 1993) ("exposure to asbestos causes immediate 'bodily injury'").

[13] See, *e.g.*, *Friends For All Children, Inc.* v. *Lockheed Aircraft Corp.*, 746 F.2d 816, 824-826 (D.C. Cir. 1984); *Hansen* v. *Mountain Fuel Supply Co.*, 858 P.2d 970, 977-978 (Utah 1993); *Ayers* v. *Township of Jackson*, 525 A.2d 287, 309-311 (N.J. 1987).

[14] See also cases cited by the district court at J.A. 197-200 & n.10; *Metropolitan Wash. Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264-65 (1991) (potential "increased noise, pollution, and danger" are sufficient for standing); *Helling* v. *McKinney*, 509 U.S. 25, 33-35 (1993) (recognizing claim based on

respondents' argument that this was "dictum," Professor Tribe has described *Duke Power* as having held that "the possible health and genetic consequences of emissions of nonnatural radiation into the environment" constitute Article III injury.[15] The plaintiffs here allege far more direct and personal toxic exposure than in *Duke Power*; and the "enhanced risk" claim in this case was factually supported by expert testimony that "anybody who's had occupational exposure to asbestos is at an increased risk for developing lung cancer." 2/4/94 Oliver Dep. 39; see also J.A. 135 (testimony of Dr. Kurt).

The Windsor respondents argue half-heartedly (at 21-22) that one of the prudential requirements for standing is not met because the "exposure-only" class representatives are not "best suited" to assert the disease-based claims that absent class members may have in the future. But it is clear that each class member *is* the "best suited" person — indeed, the *only* person with standing — to assert his or her present claims seeking relief for medical monitoring, fraudulent misrepresentation, emotional distress, and increased risk of disease.[16]

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exposure to second-hand smoke). In *Metro-North Commuter R.R. Co.* v. *Buckley*, S. Ct. No. 96-320, which presents claims under FELA by a person exposed to asbestos, the defendant has not even argued that the plaintiff lacks Article III standing.

[15] TRIBE, CONSTITUTIONAL CHOICES 107 (1985). As the district court explained (J.A. 194-197), respondents' efforts to distinguish *Duke Power* are meritless. For example, it is *easier* to establish standing to seek damages than an injunction. *Los Angeles* v. *Lyons*, 461 U.S. 95, 105 n.6 (1983); *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097, 2104 (1995).

[16] Respondents' suggestion (at Windsor Br. 22 n.17) that, to have standing, each plaintiff must show a valid cause of action under the law of every state, confuses issues of jurisdiction with those relating to the merits. As the district court discussed in detail (J.A. 187-193), standing focuses on injury, causation, and redressability, not on the merits of the plaintiff's claims. See *Hagans* v. *Lavine*, 415 U.S. 528, 542 (1974).

2. *The "redressability" requirement is satisfied.*

Respondents contend (Windsor Br. 23-26) that the "redressability" requirement for standing is not met because the settlement will not redress the "exposure-only" class members' injuries. This argument is frivolous. The district court found that the benefits of the settlement to non-impaired class members directly and fairly remedy those class members' alleged injuries. Pet. App. 173a-176a, 268a, 270a; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 642 n.10 (1975) (eligibility for benefits is "in the nature of insurance, providing present security and peace of mind"). In any event, redressability focuses on whether the injury is "likely to be redressed by the requested relief" as set forth in the complaint (*Metropolitan Wash. Airports Auth.*, 501 U.S. at 264 (citation omitted)), not on the relief that is ultimately obtained in a settlement. In this case, as the district court observed, "it is self-evident that the very conventional remedy sought by the plaintiffs [in their complaint] — money damages — would do much to redress their injuries." J.A. 203.

3. *The class representatives' testimony confirms that they have standing.*

Wrenching portions of testimony wholly out of context, the Windsor respondents argue (at 17-18) that the named plaintiffs disavowed any present injury and any present claim for relief. In fact, the named plaintiffs testified that they have *present* health and financial problems resulting from asbestos exposure and that they require *immediate* relief.

Timothy Murphy testified that he was "sure" there has been "some damage" to his body (J.A. 362), that he is concerned because "a lot of [asbestos companies] are going bankrupt" (*id.* 363), and that he wants to be "sure that those companies are still able to pay" him when he gets sick (*ibid.*). Ambrose Vogt testified that, having seen "an awful lot of members of my local get sick and die from asbestos related diseases" (*id.* at 671), he fears that it is now "a gamble of what you're really going to get" (*id.* at 672); he wants to be "certain there's going to be plenty of money left to compensate" him. *Id.* at 395. When asked whether he authorized a suit for "damages," Vogt replied: "Just this one" (*id.* at 394). Ty Annas testified that he is "concerned" that the "asbestos

that [he] inhaled * * * may be causing damage" (*id.* at 419) and that he has "concerns for [himself] and [his] children" (*id.* at 683). He is worried because, in the tort system, "[c]ases * * * are being tied up" (*id.* at 690), the money may "run out" (*id.* at 692), and there are statute of limitations problems (*id.* at 686); thus the practical need for money is "driv[ing]" his claim (*id.* at 417). Carlos Raver testified that he has "asbestos in my lungs" and is "sick now" (*id.* at 372), that he needs something to "protect [him] from the * * * statute of limitations" (*id.* at 377), and that he does not "want [his] wife to have to go without the necessities and everything that [he] could provide for her" (*id.* at 371). Robert Georgine, who affirmed that he had "fil[ed] a lawsuit for damages" in the "present case" (*id.* at 449), testified that he has "concerns" as to his future health (*id.* at 746) and as to what will happen to him if he does "contract a disease" (*id.* at 754).

The class representatives never renounced their demands for immediate relief. Instead, they testified that, in settling their claims, they had secured such relief. Pet. App. 175a. Georgine said that "I got this whole system that has been developed here. I got peace of mind. I got the knowledge that if anything does go wrong, I have a right to file a claim and that it will be honored." J.A. 746-747. Murphy testified that the settlement "will set back money so in case people like myself develop mesothelioma, there will be money set aside for me." *Id.* at 364. Raver testified that the settlement "would give me great peace of mind, if I do need money down the road, that * * * I would be taken care of." *Id.* at 374. Vogt explained that the settlement makes him "feel a little more secure in the fact that there would be money for me if I ever had a claim in the future." *Id.* at 672. And Annas testified that "[i]f there is a situation down the road five years from now with me, and my asbestos exposure develops into an impairment, certainly I can go" for compensation. *Id.* at 694.

In sum, the named plaintiffs did not testify that there is nothing wrong, that they have no present demands for relief, or that they would have abandoned their claims if unable to secure a settlement providing the economic protection they need. Instead, as the district court found, they simply testified "to the effect that they support the deferral of compensation" under that settlement. Pet. App. 93a n.2.

B. The Amount-In-Controversy Requirement Is Satisfied.

1. Each class member satisfies the requirement.

The amount-in-controversy test is met unless "from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed." *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 289 (1938). Neither events occurring subsequent to the institution of suit nor the existence of a valid defense to the claim can oust the court's jurisdiction. *Id.* at 289-290. And given the "legal certainty" standard, a claim must be counted "if it is unclear whether the local law permits recovery." 14A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3702, at 53 (1985). Given the fundamental distinction between jurisdiction and the merits, "it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction," at least where the claim is not "completely devoid of merit." *Hagans*, 415 U.S. at 542-543 (citation omitted).

The complaint here asserts seven causes of action for each class member (J.A. 15-21), seeks unliquidated compensatory and punitive damages (*id.* at 21), and alleges that "[t]he amount in controversy exceeds $100,000 * * * for each" class member (*id.* at 5). As the district court found (*id.* at 204-216), there can be no "legal certainty" that any class member's claims were for less than $50,000.

As of the date the complaint was filed, courts in many states had recognized a negligence or strict liability claim for medical monitoring on behalf of a person exposed to a toxin, and no state had foreclosed such a claim.[17] This remains true today.[18] Thus,

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[17] See, *e.g.*, *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 850-852 (3d Cir. 1990) (citing other decisions); Blumenberg, *Medical Monitoring Funds*, 43 HASTINGS L. REV. 661, 678-83 (1992); Slagel, *Medical Surveillance Damages*, 63 IND. L.J. 849, 862-865 (1988); CCR Ct. App. Br. Attachment A.

[18] The only monitoring cases cited by respondents (WLA Br. 24) involved federal courts predicting what state law might turn out to be, which hardly amounts to "legal certainty." *Ball* v. *Joy Technol., Inc.*, 958 F.2d 36 (4th Cir. 1991); *Fried* v. *Sungard Recovery Servs., Inc.*, 936 F. Supp. 310, 311 (E.D. Pa. 1996).

as the district court ruled (J.A. 211), the monitoring claim asserted in the complaint (*id.* at 19-20) is viable for all class members. And while respondents contend that monitoring claims cannot by themselves provide the requisite amount, monitoring claimants have in fact recovered large sums.[19]

The complaint also alleges the intentional tort of "willfully, knowingly, and fraudulently suppressing knowledge about the dangers of asbestos" (J.A. 20). Such claims are widely recognized under the common law, see RESTATEMENT (SECOND) OF TORTS § 557A (1981), and such claimants may seek general damages for "bodily harm" — defined as the "alteration" of the body "to any extent."[20] Plainly there is no "legal certainty" as to the amount a jury might award based on plaintiffs' claims for alleged "cellular changes," including scarring and mutation of lung tissue. And given the rapidly changing law in this area, the plaintiffs' claims for emotional distress and enhanced risk (J.A. 18-19) cannot be rejected to a "legal certainty" either.

Finally, the complaint seeks punitive damages on behalf of all class members. See *Bell* v. *Preferred Life Assur. Society*, 320 U.S. 238, 240 (1943). Claims for both medical monitoring and punitive damages are frequently made together.[21] And we are aware of no

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[19] *E.g.*, *Potter* v. *Firestone Tire & Rubber Co.*, 25 Cal. Rptr. 2d 550, 558 (Cal. 1993) (over $142,000 awarded to four monitoring claimants). Moreover, the value of monitoring claims may be aggregated for jurisdictional amount purposes. *Gibbs* v. *E.I. DuPont de Nemours & Co.*, 876 F. Supp. 475, 479 (W.D.N.Y. 1995).

[20] RESTATEMENT (SECOND) OF TORTS § 15 and cmt. (a). The amount of injury needed to support a claim for damages is less in intentional tort cases. See KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 37 (5th ed. 1984).

[21] See, *e.g.*, J.A. 212 & n.20 (citing cases); *Potter*, 25 Cal. Rptr. 2d at 558 (jury awarded both); *In re Fernald Litig.*, No. C-1-85-149, 1989 U.S. Dist. LEXIS 17764, at *4 (S.D. Ohio Sept. 29, 1989) (advisory class action verdict of $80 million for medical monitoring and $55 million

state that prohibits punitive damages for medical monitoring and fraudulent misrepresentation — particularly where the defendants' conduct is alleged to be "reckless, wanton, and willful and in conscious disregard of [the plaintiffs'] safety and health" (J.A. 20). Punitive damages are invariably sought by asbestos plaintiffs in all kinds of cases and can result in large awards.[22]

In these circumstances, it is not surprising that courts in other nationwide class actions involving "exposure-only" claimants have uniformly held the amount-in-controversy requirement satisfied. See *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 729, 734 (2d Cir. 1992), modified, 993 F.2d 7 (2d Cir. 1993); *Agent Orange*, 996 F.2d at 1433-1434; *In re A.H. Robins Co.*, 880 F.2d at 723-25 (Dalkon Shield).

2. The court also has supplemental jurisdiction over the "exposure-only" class members.

Even if an individual class member's claims were for less than the jurisdictional amount, those claims would still be properly before the district court. In *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), this Court held that each class member in a diversity case must individually satisfy the amount-in-controversy requirement. But 28 U.S.C. § 1367(a), enacted in 1990, provides in pertinent part:

> in any civil action, of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of

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in punitive damages).

[22] See, e.g., *Dunn* v. *Hovic*, 1 F.3d 1371, 1385-91 (3d Cir.) (en banc) (upholding punitive damage award of $1 million for single asbestos plaintiff and noting prior asbestos punitive damage awards totaling hundreds of millions of dollars), modified, 13 F.3d 58 (3d Cir. 1993). Claimants from states that generally do not allow punitive damages may claim special circumstances or argue that the law of a state permitting punitive damages should be applied. See *Ahearn* v. *Fibreboard Corp.*, No. 6:93CV526, 1995 U.S. Dist. LEXIS 11523, at *8-9 (E.D. Tex. July 27, 1995).

> the same case or controversy * * * . Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Thus, so long as the claims of at least one class member satisfy the amount-in-controversy requirement — such that the court has "original jurisdiction" over those claims — the court also has "supplemental jurisdiction" over the claims of all other class members. Both courts of appeals to address the issue have agreed that § 1367, by its plain terms, overrules *Zahn*. See *In re Abbott Laboratories*, 51 F.3d 524, 529 (5th Cir. 1995); *Stromberg Metal Works, Inc.* v. *Press Mechanical, Inc.*, 77 F.3d 928, 931 (7th Cir. 1996).

The WLA respondents argue (at 26 n.13) that § 1367 does not apply here because "none of the named plaintiffs have the requisite amount in controversy." But this ignores the class representatives who asserted claims for *present* injuries and the many other *presently sick* class members. See Pet. App. 103a-105a. Clearly, each of those plaintiffs has a claim for the requisite amount, and because the court has "original jurisdiction" over their claims, it has supplemental jurisdiction over the claims of the "exposure-only" class members.[23]

C. This Is Not A "Feigned," Non-Justiciable Lawsuit.

As the district court correctly held (J.A. 216-223), and as the Fifth Circuit agreed in rejecting the same contention in another settlement class action (*In re Asbestos Litig.*, 90 F.3d at 988-889), respondents' argument that this is a "feigned," non-justiciable case is meritless. To be justiciable, a case simply must "touch[] [on] the legal relations of parties having adverse legal interests" (*Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937)) and seek "a final judgment altering [their] tangible legal rights" (*ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 619 (1989)).

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[23] Respondents do not dispute that the claims in this case "form part of the same case or controversy under Article III." 28 U.S.C. § 1367(a). As the Court held in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966), claims are part of one "case" if they "derive from a common nucleus of operative fact." Here, all class members allege injuries resulting from a single conspiracy among the defendants (J.A. 20).

The present case easily satisfies those standards. As the district court found in a decision not disturbed by the Third Circuit, "it is clear that the plaintiffs and the CCR defendants are true adversaries." J.A. 222. Persons occupationally exposed to asbestos have sued petitioners more than 100,000 times. Pet. App. 144a; see also *id.* at 106a-110a. The complaint *in this case* alleges that all class members have been injured by petitioners' tortious conduct and seeks enormous compensatory and punitive damages. J.A. 16, 21. Counsel for the parties *in this case* engaged in "protracted," "vigorous," and "arms-length adversarial negotiations" over the proposed settlement. Pet. App. 118a, 271a. And, under the settlement *in this case*, petitioners will pay up to *$1.3 billion* to the plaintiffs during the first 10 years alone (*id.* at 269a) — with much of that money going to persons who today have no manifested disease (*id.* at 175a-176a). Moreover, the judgment will sharply alter the parties' tangible legal rights: among other things, petitioners waive their defenses to liability, class members settle their claims, and petitioners agree to pay a large sum of money to the class.[24]

Thus, as the district court found (J.A. 218), this case is "the opposite of the type" of case on which respondents rely, in which the parties shared the same legal interests and were not settling any genuine dispute. Indeed, in *Muskrat* v. *United States*, 219 U.S. 346, 361 (1911), this Court distinguished such a case from lawsuits that — like this one — "demand compensation for alleged wrongs because of action upon [the defendant's] part."[25]

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[24] Accord *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d at 739 (holding that asbestos defendants and a class of asbestos plaintiffs — including "exposure-only" claimants — have interests that are "profoundly adverse to each other"). Whether or not the plaintiffs and defendants also are engaged in a "Marxist * * * class struggle" (Windsor Br. 16) is beside the point.

[25] The existence of adverse interests among the parties is further shown by the presence of class members who oppose the settlement and who litigated virtually every issue in the case — which itself is sufficient to demonstrate an Article III "case or controversy." See *INS* v. *Chadha*, 462 U.S. 919, 939 (1983).

Respondents contend (WLA Br. 29-30; Windsor Br. 12-13) that because the settlement was negotiated before the complaint was filed, the requisite adversity of interests was not present when the case began. But as the district court recognized (J.A. 220-221, 223), the existence of a proposed settlement does not make a class action non-justiciable, since the settlement must be approved by the court and will thereafter become part of a prospective decree.[26] In addition, the district court correctly noted (*id.* at 218-219) that there have been many cases in which parties with adverse interests reached a tentative settlement through *pre-lawsuit* negotiations and then filed that proposed settlement at the same time as the complaint.[27] Those cases show that the timing of the settlement negotiations simply "does not change the adversarial nature of the disputes which the settlement resolves." *In re Asbestos Litig.*, 90 F.3d at 988; accord 13 FEDERAL PRACTICE AND PROCEDURE § 3530, at 320. In short, as the district court found, "this case is one involving genuinely adverse interests"; it merely "lacks a dispute as to the remedy." J.A. 222.

Respondents' argument that the case is feigned because petitioners "selected" class counsel (Windsor Br. 11; see also WLA Br. 33) is flatly refuted by the district court's findings. Numerous federal and state judges and the MDL panel had urged the parties to explore a global settlement (Pet. App. 111a, 270a). Petitioners simply "continue[d] the discussions" toward such a settlement that

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[26] See, *e.g.*, *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 371 n.10 (1982); *In re Asbestos Litig.*, 90 F.3d at 988; see also 2 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 11.21, at 11-30 (3d ed. 1992) ("lack of a controversy may not be raised as a valid objection to a class action brought on a prelitigation settlement").

[27] See *Swift & Co.* v. *United States*, 276 U.S. 311, 326 (1928), and other cases cited by the court at J.A. 219-221. The Windsor respondents try (at 16 & n.12) to distinguish these cases as involving injunctive relief. But neither *In re Asbestos Litig.*, 90 F.3d 963, nor *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, involved injunctive relief. Moreover, that distinction does not change the fact that the parties in each of those cases were not disputing the appropriate resolution when the case was filed. In any event, the settlement here will take the form of a prospective injunction. J.A. 220-221. See also *id.* at 52.

already were underway with class counsel, whom Judge Weiner had appointed to serve as co-chairs of the plaintiffs' MDL steering committee following their election by their peers (*id.* at 115a, 177a-179a). Indeed, it would have been suspicious had petitioners negotiated with anyone else. Petitioners "continue[d] the discussions" with class counsel not for any collusive reason (*id.* at 115a, 179a), but because if they "wanted to succeed in reaching a global settlement that a Court would approve, they had no choice but to hope to negotiate with such counsel" (*id.* at 258a). Class counsel and petitioners thereafter engaged in "arms-length adversarial negotiations" (*id.* at 271a) that "were difficult, lengthy, and time-consuming" (*id.* at 116a).[28]

In short, neither the identity nor the conduct of class counsel supports respondents' argument. See *In re Asbestos Litig.*, 90 F.3d at 988-989. This case simply bears no relation to the ones, relied on by respondents, in which one party was dominated by the other and had no role in shaping the outcome of the dispute.[29]

D. Notice To The Class Satisfied Rule 23 And Due Process.

Rule 23(c)(2) requires that class members be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The district court made extensive findings establishing that "the individual notice campaign and the notice by publication campaign together are designed to reach the maximum number of class members." J.A. 300. The court also found that the notice was both "extensive and expensive," involving over 700,000 individual notices, notices in union publications that were delivered to more than 6 million union members and retirees, and a multi-

[28] Although the WLA respondents persist in arguing (at 30-31) that class counsel had agreed not to litigate "exposure-only" claims against petitioners if the settlement is not approved, the Third Circuit recognized that this issue had been resolved against respondents "largely on the basis of fact findings that [respondents] have not challenged" (Pet. App. 49a).

[29] As the district court recognized, petitioners' agreement to pay class counsel's fees — in an amount to be fixed *by the court* — is "standard practice" in class actions. J.A. 222 (citing numerous cases).

million dollar television and newspaper advertising campaign that reached millions more. Pet. App. 218a-219a, 267a, 272a. Notably, respondents did *not* deny before the Third Circuit that the express requirements of Rule 23(c)(2) were satisfied.[30]

Instead, respondents argued that the notice here denied class members due process despite its compliance with Rule 23(c)(2). But Rule 23(c)(2) was specifically designed to satisfy due process. See *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974). The district court, moreover, was "confident that due process has been * * * given to the class" (Pet. App. 272a; see also J.A. 309-314), and the adequacy of notice is, in large part, a discretionary decision turning on the assessment of many facts. See 7B FEDERAL PRACTICE AND PROCEDURE § 1786, at 188. As we now show, the district court did not abuse its discretion in this case.

In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950), this Court held that due process requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties" of the action or, where such notice is not "reasonably permit[ted]," then notice in a form "not substantially less likely to bring home notice than other of the feasible and customary substitutes." Both Rule 23(c)(2) and *Mullane* make it clear that classwide notice will be valid even if not received by some class members.[31] A corollary — as shown by this Court's emphasis on the "best notice practicable" and "reasonable efforts" under "all of the circumstances" — is that the adequacy of notice is not measured by exceptional cases. Cf. *Walters* v. *National*

[30] Hence, *none* of their present complaints about the contents or dissemination of the notice (many of which are factually inaccurate) is properly before this Court.

[31] See *Eisen*, 417 U.S. at 166-67, 175 (requiring individual notice only to reasonably identifiable class members, with four million other members notified by publication only); *Mullane*, 339 U.S. at 317 ("in the case of persons missing or unknown," due process requires only "employment of an indirect and even a probably futile means of notification"). See also Kaplan, *Continuing Work of the Civil Committee*, 81 HARV. L. REV. 356, 396 (1967) ("perfect notice" to class members is "unnecessary" because of other protections in Rule 23).

Ass'n of Radiation Survivors, 473 U.S. 305, 330 (1985) (a procedure "must be judged by the generality of cases to which it applies"); *Parham* v. *J.R.*, 442 U.S. 584, 616-17 (1979).

Respondents, echoing the court of appeals, advance three arguments as to why notice was insufficient. WLA Br. 38-41; Cargile Br. 36-42; Balonis Br. 28-31; Pet. App. 55a-56a. Each attempts to substitute unsupported speculation for the district court's factual findings; none is sufficient to invalidate the notice here.

First, respondents repeat the Third Circuit's conjecture that "exposure-only plaintiffs *may* not know that they have been exposed to asbestos." Pet. App. 55a (emphasis added). But the district court *in fact* found that "after more than 20 years of extensive litigation, over 15 bankruptcies (many with extensive notice), and massive publicity about asbestos, persons who have had occupational exposure to asbestos are aware of that exposure." J.A. 311. Moreover, the notice here included "[a] list of asbestos-containing products and occupations where exposure to these products potentially occurred" (*id.* at 302-303), further helping individuals to determine their membership in the class (*id.* at 309, 311).

The court of appeals cited the testimony of two wives of mesothelioma victims and then surmised that "[m]any" class members "*may* have no knowledge of the[ir] exposure." Pet. App. 55a (emphasis added). That testimony represents a minority of even the anecdotal evidence,[32] and is plainly insufficient to refute the district court's overall factual finding. In every class action there are *some* class members who do not realize that they are part of the class, yet that does not invalidate a Rule 23 notice.

Second, respondents repeat the Third Circuit's suggestion that class members who are not sick "*may* pay little attention to class action announcements." Pet. App. 55a (emphasis added). The district court, however, found that there has been "massive publicity about asbestos" (J.A. 311), making class members aware of the

[32] Another wife of a mesothelioma victim was aware of her husband's asbestos exposure before his diagnosis (1/6/94 Baumgartner Dep. 13-14), and several Cargile respondents submitted affidavits indicating that, prior to their illnesses, each would have known that he had had occupational exposure to asbestos (J.A. 921-923).

serious health and legal consequences of their exposure. The district court also ordered that all of the notice materials prominently emphasize that individuals occupationally exposed to asbestos are class members whether or not they are currently sick. J.A. 308-309; see also *id.* at 229, 232, 268. In fact, tens of thousands of persons filed timely exclusion requests, confirming that class members did not simply treat the notice as "junk mail." The law "presume[s]" that a notice will be read and will "prompt an appropriate inquiry if it is not fully understood." *Atkins* v. *Parker*, 472 U.S. 115, 131 (1985). The Third Circuit's contrary suggestion would invalidate every Rule 23 notice.

Third, respondents repeat the Third Circuit's assumption that non-impaired class members "*may* lack adequate information to properly evaluate whether to opt out of the settlement." Pet. App. 56a (emphasis added). But the district court found that the notice materials "contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class." J.A. 307. Nor is the opt-out decision a blind gamble. Under the settlement, each class member's compensation will depend upon his or her particular disease and "all the factors" considered in the tort system (Pet. App. 137a) — thus avoiding any uncertainties that allegedly make the opt-out decision unfair.

Respondents theorize that it is unfair to require an opt-out decision before the full consequences of that decision are known. In litigation class actions, however, class members must decide whether to opt out before *anything* is known about the outcome of the case — which might be a complete defeat — and yet due process plainly is not offended. Because the notice here described the terms of the settlement in detail, class members had much *more* information concerning the consequences of their decision than class members do in such litigation cases.[33]

[33] Respondents' suggestion that due process requires that class members be given a second opportunity to opt out after developing a disease is wrong for the same reasons. Moreover, the settlement in fact allows belated opt-outs by "far" *more* class members than have rejected settlement offers and proceeded to verdict in the tort system. Pet. App. 150a.

Finally, respondents suggest that special due process rules should apply here because the settlement resolves "future" claims along with present ones. But most of the cases cited by respondents (*e.g.*, Balonis Br. 31 n.8) involved future *conduct* by the defendant. In this case, the defendants' conduct and its alleged impact on each class member had already occurred, and each class member had viable *present* causes of action — whether for medical monitoring, intentional misconduct, fear, or risk. Federal courts consistently have approved notices in cases resolving such claims. See, *e.g.*, *Agent Orange*, 996 F.2d at 1435 and 818 F.2d at 167-169; J.A. 312-313 & n.31 (citing cases).[34]

In sum, the notice here fully satisfied the requirements of Rule 23 and due process. To the extent that individual class members seek to present extraordinary circumstances justifying special relief, those arguments are properly addressed to the district court under Fed. R. Civ. P. 60(b) and cannot serve as a basis for invalidating the notice to the class as a whole.[35]

CONCLUSION

The judgment of the court of appeals should be reversed.

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[34] Respondents' analogy (*e.g.*, Balonis Br. 35) to the statute of limitations "discovery rule" adopted in *Urie* v. *Thompson*, 337 U.S. 163 (1949), is inapt. *Urie* turned on statutory construction, not due process. See *id.* at 169. Moreover, the claimant in *Urie* faced total forfeiture of all rights, whereas here all class members' interests were represented by the named plaintiffs and further protected by the district court, and the resulting settlement secures rather than forfeits their rights.

[35] See, *e.g.*, *Silber* v. *Mabon*, 18 F.3d 1449, 1454-55 (9th Cir. 1994); see also *Matsushita Elec. Indus. Co.* v. *Epstein*, 116 S. Ct. 873, 890 n.11 (1996) (Ginsburg, J., concurring in part and dissenting in part).

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96-270

(26)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., *et al.*
Petitioners,
v.
GEORGE WINDSOR, *et al.*
Respondents.

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On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

JOINT OPPOSITION TO CARGILE RESPONDENTS' MOTION FOR DIVIDED ARGUMENT

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January 27, 1997

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JOINT OPPOSITION TO CARGILE RESPONDENTS' MOTION FOR DIVIDED ARGUMENT

All of the other separately represented individual and institutional parties who object to this class action join in this opposition to divided argument, and have agreed upon a single advocate (Laurence Tribe) to advance all of the various alternative grounds for affirmance presented in their respective briefs.

ARGUMENT

The Cargile respondents acknowledge "this Court's reluctance to permit divided argument." Motion at 1. Indeed, Rule 28 provides that "[d]ivided arguments are not favored." Accordingly this Court routinely denies motions for divided argument.[1] As Justice Jackson once observed:

> When two lawyers undertake to share a single presentation, their two arguments at best will be somewhat overlapping, repetitious and incomplete and, at worst, contradictory, inconsistent and confusing. ... [A]n argument almost invariably is less helpful to us for being parceled out to several counsel.

Justice Jackson, Advocacy Before the Supreme Court, 37 A.B.A.J. 801, 802 (1951).

The Cargile respondents fail to identify any unusual circumstances that could justify divided argument in this case. The mere desire of different parties with the same interests to be

[1] See, for example, in this Court's most recent Terms, Exxon Co., U.S.A. v. Sofec, Inc., 116 S. Ct. 1038 (1996); Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 812 (1996); 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 35 (1995); North Star Steel Co. v. Thomas,115 S. Ct. 1354 (1995); Crown Cork & Seal Co. v. Steelworkers, 115 S. Ct. 1354 (1995); U. S. Term Limits, Inc. v. Thornton, 115 S. Ct. 39 (1994); Bryant v. Hill, 115 S. Ct. 39 (1994); Director, Office of Workers' Compensation Programs v. Greenwich Collieries,114 S. Ct. 1291 (1994); Dalton v. Specter, 510 U.S. 1038 (1994); Department of Defense v. FLRA, 509 U.S. 951 (1993); Lamb's Chapel v. Center Moriches Union Free School District, 506 U.S. 1032 (1992).

represented by different attorneys emphasizing slightly different lines of argument is not a sufficient reason for divided oral argument. Robert L. Stern, et al., SUPREME COURT PRACTICE § 14.5, at 478 (7th ed. 1993) (citing Illinois v. Abbott & Associates, 459 U.S. 1012, 1031 (1982)). In fact, in the ordinary case allotted an hour for oral argument, this Court "usually denies divided argument even if the parties on one side of the case have divergent interests." Id. (citing Michigan Citizens v. Thornburgh, 493 U.S. 888 (1989), and Whitmore v. Arkansas, 493 U.S. 1015 (1990)). A fortiori divided argument is unjustified where, as here, the parties do not represent divergent interests.

The Cargile respondents do not suggest that their interests are different from those of the other respondents — nor could they. By their own account, the Cargile respondents are six class members, three of whom developed mesothelioma (an invariably fatal asbestos-related disease) after the opt-out period closed (they have since died). They received no notice of this class action. The other three Cargile respondents are class members who, like everyone exposed to asbestos, are at risk of developing mesothelioma some day. Brief for Cargile Respondents at 2. The interests of the Cargile respondents are identical to those of the other respondents here. Respondents Casimir Balonis, Louis Andersen and Richard Blanchard are class members who likewise received no notice of this class action and likewise have succumbed to mesothelioma that they developed after the opt-out period closed. Respondents George, Constance, Michael and Karen Windsor are class members who have been exposed to asbestos and are therefore at risk of developing mesothelioma and the entire range of asbestos-related maladies. The other respondents include the White Lung Association of New Jersey (an asbestos victims' group with more than 10,000 members), the National Asbestos Victims Legal Action Organizing Committee

(an umbrella organization representing some 15 separate victims' rights groups), the Oil, Chemical and Atomic Workers International Union (with 300,000 present and former members, 90% of whom were occupationally exposed to asbestos), and the Skilled Trades Association. Many of the members of these respondent organizations are, like the Cargile respondents, class members residing in California, and all of them share the same interest in having this class action decertified, the class-wide injunction vacated, and the judgment below affirmed.

Since the Cargile respondents do not claim to have interests distinct from (let alone conflicting with) those of the other respondents, it should come as no surprise that the Cargile respondents do not seek a different result in this Court. The Cargile respondents, like the other three groups of respondents, contend that the judgment below should be affirmed. Brief for Cargile Respondents at 43 ("Conclusion"). The Cargile respondents, like the other respondents, likewise contend that the Third Circuit correctly concluded that this proposed class action failed to meet the certification requirements of Rule 23 and that this class action failed to provide adequate notice to absent class members. *Id.* at 43.

Thus, the only basis offered by the Cargile respondents to distinguish themselves from the other respondents is that the Cargile respondents have not pressed the full range of Fed.R.Civ.P. 23, federalism and justiciability arguments presented by the other Respondents and instead proffer only what they term a "narrower" subset of those arguments, focusing on just part of Rule 23.[2]

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[2] The other respondents, like the Cargile respondents, also press the contention that this class action fails to meet the requirements of Fed.R. Civ.P. 23(b)(3). *See* Brief for White Lung Respondents at 36-42; Brief for Windsor Respondent at 26-28, 48-50. Similarly, the other respondents place great weight on the same notice and due process arguments favored by the Cargile respondents. *See* Brief for Balonis Respondents at 28-41; Brief for White Lung

The Cargile respondents' characterization of their approach as "narrower" is mistaken. From this Court's institutional perspective, the narrowest ground for decision is a ruling on subject matter jurisdiction, particularly Article III justiciability — a question that always precedes consideration of the merits and that, indeed, will be raised by the Court sua sponte if the respondents fail in their duty to address the issue. Metro. Wash. Airports Auth. v. Citizens For Abatement of Aircraft Noise, 501 U.S. 252, 265 n.13 (1991); ASARCO v. Kadish, 490 U.S. 605, 611 (1989); Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). By asking this Court to reach out and decide major questions concerning Rule 23(b)(3) and due process in a feigned case in which the exposure-only plaintiffs have no injury in fact and have failed to meet the amount-in-controversy requirement for diversity jurisdiction, the Cargile respondents have inverted the order of this Court's prudent responsibilities as an Article III tribunal of limited jurisdiction.

Although the unwillingness of the Cargile respondents' counsel to address the full range of issues raised in the briefs of the other respondents plainly makes him unsuited to present oral argument on behalf of all the respondents in this case — an oral argument that will include the justiciability arguments that led petitioners to seek, and this Court to grant, an extension in the length of the petitioners' reply brief — it does not justify dividing the argument. The mere desire of counsel for one party to emphasize only some points of common interest is not a sufficient reason for divided argument.

All of the other individual and institutional parties who object to this class action join in this opposition to divided argument, and have agreed upon a common advocate to advance all of the various arguments presented in their respective briefs and all of the various alternative

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Respondents at 38-42; Brief for Windsor Respondents at 48-49.

grounds for affirmance (including the particular Rule 23(b)(3) grounds favored by the Cargile respondents), relating both to the threshold questions of jurisdiction and justiciability and to the merits of the proper application of Fed.R.Civ.P. 23 in a diversity class action. There is no warrant for dividing the argument so that a few respondents, who concede that they have no interests distinct from the rest and that they seek the identical result, can repeat the particular subset of arguments for affirmance that they personally find most appealing.

CONCLUSION

The motion for divided argument should be denied.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*
AND
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No. 96-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

AMCHEM PRODUCTS, INC., ET AL.,
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.3 of the Rules of this Court, the Chamber of Commerce of the United States of America moves for leave to file the accompanying brief as *amicus curiae*.

The Chamber of Commerce of the United States of America (the "Chamber") is the largest federation of business, trade and professional organizations in the United States. The Chamber represents more than 215,000 companies, as well as several thousand trade and pro-

fessional organizations, and state and local chambers of commerce. The Chamber regularly participates as *amicus curiae* in civil cases raising issues of national concern to the business community.

Chamber member businesses often have been, and in numerous cases presently are, defendants in cases initiated by class action complaints. Those cases have asserted allegations on a wide array of matters, such as products liability, securities, tort, and antitrust claims. In some of these putative class actions, the parties may be able to reach a settlement before the district court has decided whether the class should be certified for the purpose of litigating the claims set forth in the complaint. The present case raises the question of how the standards for class certification set forth in Federal Rule of Civil Procedure 23 should be applied in such circumstances.

As set forth in the accompanying brief, there is a long history of courts' taking the parties' voluntarily negotiated settlement into account in deciding whether to certify a class. Given the frequency with which Chamber member businesses are made targets of federal class action complaints, the Chamber has a strong interest in informing the Court of the extent to which the settlement class device is used to resolve class action litigation, and the extent to which any ruling that changes long-standing settlement class procedures might affect the public interest.

Consent was granted by many of the parties, but was refused by Prudential Reinsurance Co. *et al.* and American

Reinsurance Co. *et al.* Accordingly, the Chamber moves for leave to file the accompanying brief as *amicus curiae*.

December 16, 1996

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Supreme Court of the United States

OCTOBER TERM, 1995

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners,

v.

GEORGE WINDSOR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the largest federation of business, trade and professional organizations in the United States. The Chamber represents more than 215,000 companies, as well as several thousand trade and professional organizations, and state and local chambers of commerce. The Chamber regularly participates as *amicus curiae* in civil cases raising issues of national concern to the business community.

Chamber member businesses often have been, and in numerous cases presently are, defendants in cases initiated by class action complaints. Those cases have asserted allegations on a wide array of matters, such as products liability, securities, tort, and antitrust claims. In some of these putative class actions, the parties may be able to reach a settlement before the district court has decided whether the class should be certified for the purpose of litigating the claims set forth in the complaint. The present case raises the question of how the standards for class certification set forth in Federal Rule of Civil Procedure 23 should be applied in such circumstances.

The Third Circuit's rule that the parties' settlement cannot be considered in applying Rule 23's class certification prerequisites is markedly at odds with almost thirty years of judicial tradition in reviewing and approving consensual resolutions of class action settlements without determining, hypothetically, whether the actions could be tried on a class basis. If the Third Circuit's interpretation of Rule 23 is affirmed by the Supreme Court, class actions raising claims embodying some individualized issues would be much less likely to settle in the future, a significant number of pending class action settlements could be disrupted, and attempts could be made to challenge ostensibly final class action settlements. In addition, by eliminating consensual settlement as a practical option in many class actions, an affirmance would put pressure on district courts to disregard, or give short shrift to, the rigorous requirements that Rule 23 imposes on class actions proposed for trial. Accordingly, *amicus* has a strong interest in the outcome of the decision below.

SUMMARY OF ARGUMENT

Given the broad diversity of the Chamber's member businesses, it is not surprising that members do not all share a uniform view of ultimate merits of the settlement class device. On the one hand, businesses well recognize that the existence of the settlement class device may encourage wholly untriable class actions brought for the sole purpose of obtaining large settlements. On the other hand, many businesses have long accepted the practical reality that classwide settlement is often the most efficient and fair way of resolving complex claims brought by numerous persons.

The fact is, however, that the Third Circuit's interpretation of Rule 23 -- in particular, its holding that Rule 23 precludes consideration of the fact and terms of the parties' settlement in determining whether the requirements of subdivisions (a) and (b) of the Rule are met -- flies in the face of the consistent practice of the federal courts since Rule 23 was last amended in 1966. The Third Circuit's recognition that Rule 23(a)'s requirements of "commonality," "typicality" and "adequacy of representation," and Rule 23(b)(3)'s requirements that common questions "predominate" over individual questions and that classwide handling be "superior" to individual adjudication, must be applied rigorously before sanctioning a classwide trial is consistent with the developing views of its sister courts,[1] and is to be applauded. But its rigid view that these

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[1] *See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1080-86 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

requirements must be applied to a consensual settlement class as if the case will be tried ignores the fact that Rule 23's prerequisites are designed to safeguard the class action *defendant's* due process rights as much as the rights of absent class members. Where the defendant, as part of a class settlement, proposes to surrender its due process rights to full-fledged litigation, the due process inquiry underlying Rule 23 necessarily is simplified. The Third Circuit failed to appreciate this important respect in which the purposes of Rule 23 scrutiny differ in the case of settlement classes.

Acceptance of the Third Circuit's conclusion that the parties' settlement must be ignored in conducting the certification inquiry would have serious consequences for class litigants and the federal courts. Settlement of "mass tort" and like class claims prior to certification would occur, if at all, only in the unusual situation in which the defendant were willing to concede the certifiability of the action for trial. Many class settlements under judicial review could be disrupted as well. And an affirmance of the Third Circuit's ruling might prompt collateral attacks even to finalized settlements. These considerations strongly counsel in favor of deference to the interpretations of Rule 23 made over the last thirty years by members of the Judicial Conference who created the Rule, rather than allowing the Third Circuit to use judicial fiat to advance its minority position with respect to the viability of settlement classes.[2]

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[2] The Third Circuit's decision arose in the context of objections to the district court's preliminary injunction preventing class members from pursuing their claims in any other court pending the issuance of a final order. The objectors challenged the district court's jurisdiction over the underlying class action, the justiciability of the case, the adequacy of class notice, and the propriety of class certification. *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617 (3d Cir.), *cert. granted*, 116 S. Ct. 379 (1996). This brief addresses only the question on which this Court granted *certiorari*.

ARGUMENT

I. THE THIRD CIRCUIT'S NEW INTERPRETATION OF RULE 23 IS AT ODDS WITH THE LONG-STANDING PRACTICE OF OTHER FEDERAL COURTS.

The question whether a district court presented with a pre-certification settlement must ignore that settlement in applying the standards for class certification is one that has often arisen, and will continue frequently to arise, in a wide variety of cases, the vast majority of which have nothing to do with asbestos litigation. For the past 30 years, parties have negotiated, and courts often have approved, pre-certification class action settlements resolving a wide array of such cases.

Shortly after adoption of the 1966 amendments to Rule 23, district courts began taking pre-certification settlements into account in applying the standards for class certification and certifying classes solely for purposes of settlement. *See, e.g., West Va. v. Charles Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971) (antitrust); *Dorey Corp. v. E.I. duPont de Nemours and Co.*, 1975-2 Trade Cas. (CCH) ¶ 60,576 (S.D.N.Y. 1975) (antitrust); *Badgett v. IBEW*, 21 Fed. R. Serv. 2d 173 (N.D. Ohio 1975) (employment discrimination); *Picower v. Lord*, 1976-77 Fed. Sec. L. Rep. ¶ 95,882 (S.D.N.Y. Feb. 22,

1977) (securities); *Kusner v. First Penn. Corp.*, 74 F.R.D. 606, 607 (E.D. Pa. 1977) (securities), *aff'd mem.*, 577 F.2d 726 (3d Cir. 1978); *Alexander v. NFL*, 1977-2 Trade Cas. (CCH) ¶ 61,730 (D. Minn. 1977) (antitrust); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626 (N.D. Cal. 1978) (antitrust and securities; citing 1973 order), *aff'd*, 645 F.2d 699 (9th Cir. 1981). In a number of cases, the courts did so while expressly noting that the class likely could not be certified absent the settlement. *See, e.g., In re Anthracite Coal Antitrust Litig.*, 79 F.R.D. 707, 711 (M.D. Pa. 1978) (antitrust); *Arenson v. Board of Trade*, 372 F. Supp. 1349, 1353-54 (N.D. III. 1974) (antitrust); *City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1390 (S.D.N.Y. 1972) (antitrust), *aff'd in part, rev'd in part on other grounds*, 495 F.2d 448 (2d Cir. 1974).

Subsequently, various courts of appeals examined the validity of such certifications. In an early landmark decision, Judge Wisdom, writing for the Fifth Circuit, held that certifying a class based on (and for purposes of) the parties' settlement (1) is consistent with the language of Rule 23, (2) accords with the flexibility that is the "hallmark" of that rule, (3) constitutes "an important segment of court flexibility in administering and managing" class actions, and (4) provides advantages to class members that outweigh any perceived risks. *See In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 173-78 (5th Cir. 1979) (citation omitted). Several years later, Judge Friendly, writing for the Second Circuit, concurred with "Judge Wisdom's thorough opinion," rejecting the argument that "a firm prophylactic rule" prohibiting the certification of settlement classes is necessary to address potential collusion. *See Weinberger v. Kendrick*,

698 F.2d 61, 72-73 (2d Cir. 1982).[3] Similar conclusions were reached by the Ninth Circuit, *see Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 632-35 (9th Cir. 1982), and by the Fourth Circuit, *see In re A.H. Robins Co., Inc.*, 880 F.2d 709, 725-48 (4th Cir. 1989).

To be sure, courts and commentators have occasionally raised concerns about possible abuses of settlement classes. As Judge Wisdom recognized, courts must be mindful of the possibility of "collusion, individual settlements, 'buy-offs' where the class action is used to benefit some individual at the expense of absent members, and other abuses." *In re Beef Indus.*, 607 F.2d at 174. In light of such concerns, some courts, while persuaded of the benefits of settlements classes, have urged careful scrutiny of settlement terms and conditions (as well as the procedural history leading up to the settlement). *See, e.g., Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33-34 (3d Cir. 1971) (court must be doubly careful where negotiation occurs before certification and designation of class); *In re Baldwin United*, 105 F.R.D. 475, 481 (S.D.N.Y. 1984) ("[T]he trial courts 'are bound to scrutinize the fairness of the settlement agreement with even more than the usual care . . . in order

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[3] In *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 464 (2d Cir. 1974), another Second Circuit panel rejected the argument that the district court had erred by certifying the class "for the purposes of settlement and refus[ing] to make the same legal finding for all other purposes." The court both "reject[ed] the initial premise" of this argument -- that such certification was not authorized by Rule 23 -- and held that the value of requiring a certification for hypothetical litigation was "somewhat remote." *Id.* at 465.

to meet the concerns noted in the Manual'") (quoting *Weinberger*, 698 F.2d at 73); *Simer v. Rios*, 661 F.2d 655, 664-66 (7th Cir. 1981) (requiring a higher showing of fairness where settlement negotiated prior to certification).

But while courts all along have been mindful of the potential abuses of settlement classes, the prevailing view from the beginning has been to avoid an "inflexible" construction of Rule 23 that would preclude the practical benefits of settlement. *See* 3 Herbert B. Newberg, CLASS ACTIONS § 5570(c) at 475-76 (1977). Thus, over the past two decades, numerous district courts certified classes for settlement purposes while expressly indicating that the class either certainly, or at least possibly, could not have been certified for purposes of litigation. *See, e.g., In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. MDL 926, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994) (medical products liability); *In re Marine Midland Motor Vehicle Leasing Litig.*, 155 F.R.D. 416, 420 (W.D.N.Y. 1994) (RICO); *In re First Investors Corp. Sec. Litig.*, No. 90 Civ. 7225(MJL), 1993 U.S. Dist. LEXIS 18044, *14 (S.D.N.Y. Dec. 22, 1993) (securities); *Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) (securities); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 157-58 (S.D. Ohio 1992) (medical products liability); *Smith v. Vista Org. Partnership*, No. 89 Civ. 0048(MJL), 1991 U.S. Dist. LEXIS 10484, *24 (S.D.N.Y. July 29, 1992) (securities); *In re Dun & Bradstreet Credit Serv. Customer Litig.*, 130 F.R.D. 366, 369, 371 (S.D. Ohio 1990) (credit information fraud); *South Carolina Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1426 (D.S.C. 1990) (securities); *Sanders v. Robinson Humphrey/American Express, Inc.*, 1990 Fed. Sec. L. Rep. ¶ 95,315 at 96,492 (N.D. Ga. 1990) (securities); *In re First*

Commodity Corp. Customer Accounts Litig., 119 F.R.D. 301, 314 (D. Mass. 1987) (commodities fraud); *Fisher Bros. v. Phelps Dodge Indus., Inc.*, 604 F. Supp. 446, 450 (E.D. Pa. 1985) (antitrust); *In re Petro-Lewis Sec. Litig.*, 1984-85 Fed. Sec. L. Rep. ¶ 91,899 at 90470 (D. Colo. 1984) (securities); *In re Bendectin Prods. Liab. Litig.*, 102 F.R.D. 239, 240 n.4 (S.D. Ohio) (medical products liability), *mandamus granted*, 749 F.2d 300 (6th Cir. 1984); *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1390-91 (D. Md. 1983) (antitrust); *In re Cuisinart Food Processor Antitrust Litig.*, 38 Fed. R. Serv. 2d 446, 453 (D. Conn. 1983) (antitrust); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957,960-61 (N.D. Ga. 1980) (antitrust); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357, 1371-73 (N.D. Ga. 1979) (antitrust), *modified in part on other grounds*, 645 F.2d 488 (5th Cir. Unit B 1981); *Desimone v. Industrial Bio-Test Labs, Inc.*, 83 F.R.D. 615, 620 (S.D.N.Y. 1979) (securities).[4]

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[4] Numerous other courts have certified classes solely for purposes of settlement without suggesting whether the classes also could have been certified for purposes of trial. Recent examples include *Woodward v. NOR-AM Chem. Co.*, No. 94-0780-CB-C, 1996 U.S. Dist. LEXIS 7372, *41 (S.D. Ala. May 23, 1996) (chemical products liability); *Ruiz v. Stewart Assoc., Inc.*, 167 F.R.D. 402, 404 n.4 (N.D. Ill. 1996) (RICO); *In re Kendall Square Research Corp. Sec. Litig.*, 869 F. Supp. 53, 54 (D. Mass. 1994) (securities); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 62 (S.D.N.Y. 1993) (securities); *Breslow v. Prudential-Bache Properties, Inc.*, 1993 Fed. Sec. L. Rep. ¶ 97,693 (N.D. Ill. 1993) (securities); *Wells v. Dartmouth Bancorp., Inc.*, 813 F. Supp. 126, 130 (D.N.H. 1993) (securities); *Whitford v. First Nationwide Bank*, 147 F.R.D. 135, 142-43 (W.D. Ky. 1992) (Magistrate) (lending violations); *Cagan v.*

In perhaps the most recent example of a settlement class, a nationwide class was preliminarily certified for settlement purposes in light of an agreement that would settle claims against a number of chemical manufacturers by hemophiliacs alleging injury from exposure to the HIV virus. *See In re "Factor VIII or IX Concentrate Blood Products" Prods. Liab. Litig.*, Nos. MDL-986; 93-C-7452, Pretrial Order No. 32 (N.D. Ill. Aug. 14, 1996). Notably, a year earlier, the Seventh Circuit reversed an order that had certified essentially the same class for purposes of litigation. *See In re Rhone-Poulenc Rorer*, 51 F.3d 1293.[5]

There is no justification for the Third Circuit's rejection of the federal courts' historical application of Rule 23 at this late stage. Certainly, the due process concerns that apparently influenced the Third Circuit do not justify so rigid an approach. It is true, as the Third Circuit observed, that the requirements of Rule 23(a) and (b) are aimed in significant part at ensuring that classwide litigation is a procedurally fair substitute for individualized adjudication. But the object of Rule 23's concern goes beyond the due process interests of absentee *plaintiffs*; Rule 23(a)'s specifications of "commonality" and "typicality," and Rule

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Anchor Savings Bank FSB, 1990 Fed. Sec. L. Rep. ¶ 95,324 at 96,557 (E.D.N.Y. 1990) (securities); *In re Jiffy Lube Sec. Litig.*, 1989-90 Fed. Sec. L. Rep. ¶ 94,859 at 94,657 (D. Md. 1990) (securities); *In re Electric Weld Steel Tubing Antitrust Litig.*, 1982-2 Trade Cas. ¶ 64,872 (E.D. Pa. 1982) (antitrust).

[5] In another recent example, the Fifth Circuit upheld a nationwide settlement class of persons asserting asbestos personal injury claims against Fibreboard Corporation. *See In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996).

23(b)'s predominance and superiority requirements, are designed to safeguard the due process rights of class *defendants* as well. *See, e.g., In re American Med. Sys.*, 75 F.3d at 1086 (defendant's due process rights violated where district court failed "to conduct a 'rigorous analysis' into whether [Rule 23] criteria were met" by certifying class without allowing defendant opportunity to submit evidence to respond to the class action complaint); *Chateau de Ville Prods., Inc. v. Tams-Witmark Music Library*, 586 F.2d 962, 966 (2d Cir. 1978) (same). For instance, the important Rule 23(b)(3) requirement that plaintiffs advance some "classwide proof" of the essential elements of their claims, *see Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1012 (D.C. Cir.), *cert. denied*, 482 U.S. 915 (1986), is aimed primarily at protecting the *defendant* from being subjected to classwide liability on proof that is without classwide dimension, *see id.* at 1017-18.

In reaching its conclusion below, the Third Circuit voiced concern exclusively over the due process interests of absentee class members[6] without assigning any importance to the *defendants'* agreement to surrender their due process interests in individualized litigation. A defendant's conditional surrender of its due process interests in

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[6] *See Georgine v. Amchem Prods., Inc.*, 83 F.3d at 631 ("The [typicality] inquiry assesses whether the named plaintiffs have incentives that align with those of absent class members so that absentees' interests will be fairly represented."); *id.* at 632 ("We think that typicality is more akin to adequacy of representation: both look to the potential for conflicts in the class"); *id.* at 633 ("This class action also suffers from serious problems in the fairness it accords to the plaintiffs.").

individualized factfinding wholly eliminates defendant-focused due process concerns from the class certification equation. And while the due process interests of the absent class members must be examined in any event, the availability of settlement terms and conditions to test the fairness of the proposed relief to all concerned parties significantly alters the complexion of this inquiry.

At bottom, the tradition from which the Third Circuit's decision departs makes clear that settlement class actions are not a novelty spawned by the pressure to do something about mass torts in general or asbestos litigation in particular. To the contrary, settlement classes have been used for decades consensually to resolve all sorts of multi-plaintiff claims. Wholesale rejection of the current practice of taking the fact and terms of the parties' proposed settlement into account in applying Rule 23's requirements is simply not justified by the due process concerns enumerated by the Third Circuit. Indeed, as more fully discussed below, acceptance of the Third Circuit's interpretation of Rule 23 at this late stage would have potentially serious consequences for the management of class litigation in the federal courts.

II. AN AFFIRMANCE OF THE THIRD CIRCUIT'S APPROACH COULD THREATEN EXISTING CLASS RESOLUTIONS AND RENDER THE MANAGEMENT OF COMPLEX CLASS LITIGATION MORE DIFFICULT.

An affirmance of the Third Circuit's ruling that the parties' settlement must be ignored in applying Rule 23(a) and (b) would have far-reaching consequences not only for class actions that are currently proposed for settlement, but also for the federal courts' management of complex class

litigation in the future. These consequences counsel extreme caution in rejecting the judicial tradition that has developed around settlement classes since the present version of Rule 23 was put in place, and suggest that so fundamental a change in practice as the Third Circuit's approach ordains should be addressed in the rulemaking process rather than through judicial decision.

To begin with, it should almost go without saying that, were the Third Circuit's approach erected as the law of the land, many class settlements currently undergoing district court review, or review on appeal to the circuit courts, could well be challenged anew.[7] An affirmance of the Third Circuit's ruling in this case would arguably be applicable to class actions -- and all class settlements -- pending at the time of decision. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."); *see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 538-44 (1991). At the very least, such pending settlements

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[7] The presence of objectors dissatisfied with some or all of a class settlement's terms is the usual case. "Because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, . . . some or many class members," including named plaintiffs, may object to the terms of the settlement. *Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182, 195, 199 (N.D. Ill. 1981) (citation omitted), *rev'd on other grounds*, 742 F.2d 1007 (7th Cir. 1984) (en banc).

could be subject to a fresh review under Rule 23(a) and (b) with an eye toward whether the plaintiffs' claims could fairly and efficiently be *tried* on a class basis. Doubtless, of course, some of the pending settlement classes might, on close scrutiny, be found to satisfy Third Circuit-style requirements for certification under Rule 23. But the defendants in many such actions would likely be unwilling to concede the propriety of a trial-like certification for fear of a possible rejection of the settlement's substantive terms -- from which a classwide trial would then follow. As a result, any pending settlements formed in actions in which the class defendant has nonfrivolous grounds on which to question the permissibility of class certification for trial could potentially be restored to the adversary calendar.

Even seemingly final settlements could be subject to fresh challenges from disgruntled class members. Absent class members unhappy with the disposition of their claims in recently concluded settlements -- even those that have survived final review -- might try to draw strength for new collateral challenges to those settlements from an affirmance of the Third Circuit's approach. Since this Court's decision over fifty years ago in *Hansberry v. Lee*, 311 U.S. 32 (1940), the permissibility of collateral challenges to class action dispositions on due process grounds has been clear. *Id.* at 40-42. Were this Court to accept the rule pronounced by the Third Circuit in this case, disaffected class members in many "final" class settlements -- not otherwise precluded from raising their own claims[8] -- might try to initiate

[8] Statutes of limitations might pose obstacles for claimants seeking to question settlements concluded long ago. However, claimants who bring their individual litigation within a few years

from raising their own claims[8] -- might try to initiate individual litigation questioning the adequacy with which their litigation interests were represented in the class settlement process. *See generally Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (Due Process Clause "requires that the named plaintiff at all times adequately represent the interests of the absent class members" (citing *Hansberry*, 311 U.S. at 42-43, 45)); *see also Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992) (collateral attack premised on counsel's inadequate representation of class requires inquiry into counsel's performance in prior action), *cert. dismissed*, 511 U.S. 117 (1994).

In addition to threatening to undermine both pending and final class settlements, the Third Circuit's rule would inordinately (and unnecessarily) complicate the management of mass tort, securities, and other pattern litigation in the federal courts. Under the Third Circuit's interpretation, the parties and court in a purported class action would not be permitted finally to proceed with a proposed settlement unless and until the trial court made a formal finding that the class would be suitable for trial on behalf of the putative class. This would be an unlikely prospect in most pattern litigation. As this Court has noted, "[c]ertification of a large class" can enormously "increase the defendant's potential

[8] Statutes of limitations might pose obstacles for claimants seeking to question settlements concluded long ago. However, claimants who bring their individual litigation within a few years of approval of the class settlement they desire to challenge might try to claim the benefit of tolling for the period in which the prior class action was pending. *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

v. Livesay, 437 U.S. 463, 476 (1978).[9] For that reason, defendants faced with putative class actions under the Third Circuit's regime generally would be unwilling to stipulate or consent to a finding that any class could be certified for purposes of litigation. In the event that a given settlement were ultimately disapproved and the action returned to a trial track, any such settlement stipulation might be cited by plaintiffs as precluding any resistance to a certification order for trial purposes. And even if the settlement were given final approval, a settlement-induced finding by the trial court that class treatment was appropriate could arguably serve as a valuable precedent for future plaintiffs seeking to obtain class certification outside the settlement context. Thus, even where class action defendants believed they could negotiate a reasonable settlement, they would still be obliged to fight class certification exhaustively.

Although, in the long run, the reluctance of class action defendants to settle might discourage the filing of frivolous class action complaints by persons hoping for a quick settlement, in the short term lower courts would need to manage the class actions already filed as if they were heading for trial. And for many such cases, individualized adjudication (or individualized settlements) would be the sole means of resolution under the Third Circuit's rule, given the plaintiff-focused questions of fact and varying state law rules

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[9] Lower courts too have recognized that class actions can present defendants with intolerable financial risks and often deprive defendants of any meaningful opportunity to litigate their defenses to individual claims. *See, e.g.*, *Castano*, 84 F.3d at 746; *In re Rhone-Poulenc Rorer*, 51 F.3d at 1298.

that the typical multi-plaintiff litigation presents.[10] The crisis posed by the filing of unjustified class action complaints would quickly assume calamitous dimensions.

The ultimate consequences of such a shift in the means of resolving multi-plaintiff actions might well be long delays in achieving final resolutions, but an equally probable result would be the distortion of Rule 23's requirements for trial-suitable classes as trial courts attempt to grapple with increasingly insoluble caseloads. Put otherwise, under the Third Circuit's rule, courts might well be pressured to distort the principles for deciding whether cases should be certified for litigation in the cause of alleviating docket congestion.[11] For instance, a court seeking to alleviate the docket crush created by an inability to consider settlement classes might seek to promote settlement of a mass tort

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[10] *See, e.g.*, *Georgine*, 83 F.3d at 624-35; *Castano*, 84 F.3d 734 (decertifying class for litigation of alleged nicotine claims); *In re Rhone-Poulenc Rorer*, 51 F.3d 1293 (decertifying class of hemophiliacs for litigation of HIV exposure claims); *In re American Med. Sys.*, 75 F.3d 1069 (decertifying class for litigation of penile implant claims); *In re Telectronics Pacing Sys., Accufix Atrial "J" Leads Prods. Liab. Litig.*, 168 F.R.D. 203 (S.D. Ohio 1996) (decertifying litigation class); *In re Norplant Contraceptive Prods. Liab. Litig.*, 168 F.R.D. 577 (E.D. Tex. 1996) (denying certification of litigation class).

[11] The staggering number and complexity of mass tort class actions brings extraordinary pressure to bear on the courts, all but forcing judges to push settlement options in order to clear these cases from their dockets. *See Recent Case*, 109 HARV. L. REV. 870 (1996) ("[C]ourts faced with the delay and docket-crowding conditions of [mass tort class actions] tend to encourage settlement.")

action by certifying the class and allowing the case to proceed pell-mell to trial, even though the class does not meet all of Rule 23's requirements. Unfounded and abusive class action filings would likely continue to proliferate in such an environment.

In sum, by potentially undermining existing settlements and making the consensual resolution of class action litigation more problematic, an affirmance of the Third Circuit's decision would exacerbate the inexorable pressures of mass tort litigation on the federal courts.

III. THE DECISION BELOW INAPPROPRIATELY PREEMPTS THE RULEMAKING PROCESS OF THE JUDICIAL CONFERENCE.

Although admittedly a matter of speculation, the Chamber respectfully submits that the Third Circuit's decision to part company with the hundreds of cases over thirty years interpreting Rule 23 to allow settlement classes could have been spawned by concern over class actions that assert frivolous claims, raise issues not worthy of litigation, or otherwise invoke the class action device for purposes never intended. As the Seventh Circuit has recently noted, the sheer magnitude of the theoretical exposure and burdens that any class action creates for a defendant often leaves the defendant with little choice but to pursue settlement. *See In re Rhone-Poulenc Rorer*, 51 F.3d at 1298 ("settlements induced by a small probability of an immense judgment in a class action [are] 'blackmail settlements'") (quoting Henry J. Friendly, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)). Without question, such cases often yield settlements that accomplish little but the enrichment of the attorneys who filed the complaints.

To the extent that the Third Circuit's decision was motivated by these concerns, the Chamber applauds the intent. Something must be done to curtail attempts to invoke the class action device for purposes never intended by its creators. But the Third Circuit's bid to legislate its preferred changes to Rule 23 by judicial fiat is a disruptive and unauthorized means to that end. The current version of Rule 23 was the mid-1960s handiwork of the Judicial Conference of the United States,[12] and the members of that Judicial Conference have on hundreds of occasions interpreted the rule they wrote as authorizing the settlement class device. Particularly in light of this thirty-year history, a minority of the members of that conference should not be permitted effectively to amend the rule by announcing a radically different interpretation thereof.

If there is any need to reexamine the course that lower courts have charted in interpreting Rule 23 in the settlement context, neither the Third Circuit nor any other court should be allowed to circumvent the rulemaking procedure. At

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[12] 28 U.S.C. § 331, which establishes the Judicial Conference of the United States, provides that "[t]he Conference shall . . . carry on a continuous study of the operation and effect of the general rules of practice and procedure . . . prescribed by the Supreme Court for the other courts of the United States pursuant to law." The statute further provides that "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law." The current version of Rule 23 was a product of that process.

present, the Advisory Committee on Civil Rules ("Advisory Committee")[13] has launched efforts to amend Rule 23 to address possible abuses of the class action device. *See Proposed Amendments to the Federal Rules of Civil Procedure*, 167 F.R.D. 559 (1996).[14] Through the Judicial Conference, the Third Circuit (as well as any other court or member of the Bar) is welcome to participate in the Advisory Committee's examination of Rule 23 and any proposed amendments thereto.

Deference to the rulemaking process would offer several important advantages over the adjudicatory change to Rule 23 reflected in the Third Circuit's decision. First, the rulemaking process would allow careful weighing of the substantial policy considerations attendant to taking settlement into

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[13] The Judicial Conference has resolved that a standing Committee on Rules of Practice and Procedure be appointed by the Chief Justice and that five advisory committees be established to recommend to the Judicial Conference changes in the rules of practice and procedure for the federal courts. *See* ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6-7 (1958). The Advisory Committee on Civil Rules is one of those advisory committees.

[14] The Advisory Committee's proposed amendments include a new Rule 23(b)(4) that effectively would overrule the Third Circuit's position and amend Rule 23 to leave no doubt that settlement classes are authorized. *See id.* at 560, 563. This amendment was proposed in the immediate aftermath of the Third Circuit's decision in *In re General Motors Corp. Pick-Up Tuck Fuel Tank Products Liability Litigation*, 35 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995), holding that the requirements of Rule 23(a) must be applied without regard to whether the parties have proposed a settlement class.

account in class certification decisions. Importantly, these policy tradeoffs could be weighed in the first instance by "the Judicial Conference and its committees, . . . '[who] are in a far better position to make a practical judgment on [the Rules'] utility or inutility than [the Court].'" Statement of White, J., 61 U.S.L.W. 4390, 4391 (U.S. Apr. 27, 1993) (quoting Statement of Douglas, J., 383 U.S. 1089, 1090 (1966) (Douglas, J., dissenting)). Second, if class action practice is to be changed, an amendment to Rule 23, unlike a judicial pronouncement, would indicate a future date upon which the change would become effective. This would prevent disruption of pending class settlements; the parties would be able to continue negotiations with full understanding of the scope and timing of any changes in existing law. Finally, use of the rulemaking process would avoid the inevitable threat of challenges to the finality of already concluded settlements that would be created by a judicial change in the treatment of settlement classes under Rule 23.

For more than three decades, parties have relied on the federal courts to thoughtfully and carefully consider settlement classes in resolving sometimes extraordinarily complex litigation. The Third Circuit's sudden pronouncement that Rule 23 does not countenance a role for settlement considerations in testing the prerequisites for class certification is less an interpretation of the Rule than a quasi-legislative change in the Rule's imperatives; clearly, concerns such as those expressed by the Third Circuit are best mediated by the rulemaking machinery for the Federal Rules. If members of the Judicial Conference determine that Rule 23 needs to be clarified or changed, an amendment can be pursued to effect the required clarification or change with

minimal disruption to the judicial system and to the expectations of parties in existing class settlements.

CONCLUSION

For the foregoing reasons, the Chamber urges the Court to reverse the judgment of the U.S. Court of Appeals for the Third Circuit.

December 16, 1996

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No. 96-270

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., *et al.*,
Petitioners,

v.

GEORGE WINDSOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Supreme Court Rules, the Washington Legal Foundation ("WLF") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the petitioners. WLF has requested consent to file this brief from all parties to the proceedings in the Third Circuit. As of the time this motion was printed, one party, Protective National Insurance Co. represented by Lawrence M. Silverman, Esq., has refused to consent to the filing of this brief. Furthermore, although WLF has received written consent from the petitioners and ten of the respondents, it has yet to receive responses from the remaining respondents.

WLF is a non-profit public interest law and policy center with thousands of supporters nationwide. WLF seeks to promote and protect the free enterprise system and the economic and civil liberties of individuals and businesses.

In particular, WLF has devoted substantial resources to curbing abusive litigation practices, excessive punitive damage awards, excessive attorneys' fees, and unwarranted expansion of tort liability by publishing monographs and similar educational materials on these subjects, and by filing *amicus curiae* briefs in appropriate cases. *See, e.g., Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Burlington Northern R.R. Co. v. Ford*, 504 U.S. 648 (1992).

WLF believes that the decision below is a radical departure from the established construction of Rule 23 of the Federal Rules of Civil Procedure in the context of class action settlements. The Third Circuit has enunciated a sweeping rule that would largely eliminate the use of Rule 23 to settle a wide variety of complex cases. If left intact, the decision will impose significant costs on businesses and citizens, lead to significant new controversies, and further burden the judicial system with litigation that otherwise could have been amicably resolved by the parties. Given this framework, WLF brings a broader perspective to the issues in this case and their potential effects on society than that presented by the parties in this action.

For the foregoing reasons, movant WLF respectfully requests that it be allowed to participate in this case and file the accompanying *amicus curiae* brief in support of petitioners.

Respectfully submitted,

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December 16, 1996

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BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

The decision below incorrectly holds that Rule 23 of the Federal Rules of Civil Procedure forbids certification of a settlement class unless the district court ignores the settlement itself and instead determines that the class can be certified for the trial of the matter. In thus extending its earlier decision in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) (hereafter "*GM Trucks*"), the Third Circuit has overturned a

settlement that would have provided more than $1 billion in compensation to asbestos claimants and would have spared litigants and the court system the debilitating effects of litigating hundreds of thousands of asbestos claims. The nullification of this settlement is troublesome in its own right, but the more pressing concern to the Washington Legal Foundation ("WLF") is the extraordinary scope and reach of the Third Circuit's holding. Using an improper approach that interprets the Federal Rules as presuming that cases are meant to be tried rather than settled, the Third Circuit has enunciated a sweeping rule that would largely eliminate the use of Rule 23 to achieve class settlements of both mass tort litigations and other complex cases of immense magnitude.

The Third Circuit's approach contravenes Rule 23's language and structure. By emphasizing the absence of language expressly stating that the district court may consider the settlement when certifying a settlement class, the Third Circuit ignored both that the rule contains no language *forbidding* consideration of the settlement and that Rule 23(e) vests authority in the district courts to determine the circumstances in which class settlements should be approved. The Third Circuit (along with all other courts) interprets Rule 23 to permit the certification of "settlement-only" classes, and the logical corollary is that the district court may consider the settlement when addressing that certification issue. The Third Circuit's contrary construction not only ignores Rule 23's text and structure, but also contravenes the deeply rooted public policy favoring settlement. If a necessary premise of a class settlement is that the action would be maintainable in class form for litigation purposes, and if the settlement class is then certified but the settlement is disapproved or not consummated, the defendants would be left with a certified class action for all purposes. Such a potential outcome will dissuade most defendants from pursuing class settlements at all.

The Third Circuit's approach also is illogical, unworkable, and unnecessary in light of the purpose of Rule 23. Requiring district courts to ignore the settlement when certifying a class solely for settlement purposes would mean ignoring information that is highly pertinent to the application of the Rule 23(a) and (b) certification criteria. Moreover, the court of appeals' approach would require the district courts to address purely hypothetical issues concerning how the case would have been tried if it had not settled, leading to disapproval of settlements on grounds unrelated to whether the settlement treats the class members fairly. Properly construed, Rule 23 requires the district courts to address the certification of a settlement class by reference to the settlement itself, and thus to focus on those criteria which concern whether the settlement was reached through adequate representation of class members' interests and is otherwise fair.

The court of appeals proclaimed that by destroying the asbestos settlement, it was avoiding a "serious rend in the garment of the federal judiciary" and leaving "legislative solutions to legislative channels." Pet. App. 20a. This language of judicial restraint is wholly misplaced here, for the Third Circuit itself rested its decision on the policy judgment that if district courts are permitted to certify settlement classes by reference to the settlement, the "hydraulic pressures" of having to deal with mass litigation will lead them to approve inappropriate class settlements. Pet. App. 36a-37a (quoting *GM Trucks*, 55 F.3d at 799). Such a judgment is dubious on its face, but in any event is not for the courts to make in light of Rule 23(e)'s express grant of judicial authority to oversee class settlements. The Third Circuit's approach—which disregarded the decisions of virtually all other courts that have addressed the settlement class issue, overturned nearly three decades of established practice, and adopted an illogical rule of construction that encourages trial over settlement and demands hypothetical decision-

making over deciding the case actually at hand—does not preserve the institutional values of the judiciary but rather destroys them.

Once this Court rejects the Third Circuit's construction of Rule 23, the remaining issue will be whether the district court erred in certifying the settlement class in light of the settlement itself. This issue, which was not reached by the Third Circuit, should be reviewed under an abuse of discretion standard. Although WLF does not address here the specifics of the settlement class certification in this case, the district court's extensive factual findings on the key certification criteria and fairness issues should not be overturned unless clearly erroneous. This Court should reject the Third Circuit's sweeping suggestion that settlement class certification may be inherently precluded by certain "intra-class conflicts"—specifically, the potential conflict between claimants who are presently injured and those who may suffer injury in the future. Pet. App. 49a-51a. The identification of such *potential* conflicts within a class merely highlights an area for inquiry, and does not mean that *actual* conflicts exist. Consistent with the fact-specific nature of class action issues in general, the district courts should analyze the particular settlement and the processes by which it was brought about, as the district court did here.

The practical effects of failing to overturn the Third Circuit's decision would be monumental. Some of the largest, most intractable mass tort litigations in the country have been resolved through the use of settlement classes certified under Rule 23—not by reference to whether the class could be certified for litigation purposes, but rather by reference to the settlement itself. The same is true of settlements in numerous other class action contexts, such as antitrust, securities, consumer, and civil rights cases. Elimination of the settlement class option for resolving such vexing litigation crises would result in massive additional burdens and expense on both the court system and litigants. At the same time, claimants would be disadvantaged, for class settlements often resolve claims more fairly, quickly, and efficiently than other available processes. Finally, affirming the court of appeals' decision could spawn extensive new litigation as litigants in class actions that have already been resolved attempt to raise collateral attacks on those settlements. For all of these reasons, the Court should reverse the decision of the Third Circuit.

ARGUMENT

I. THE THIRD CIRCUIT ERRED IN HOLDING THAT RULE 23 FORBIDS CERTIFICATION OF A SETTLEMENT CLASS UNLESS THE SETTLEMENT IS IGNORED AND THE CLASS IS CERTIFIED FOR LITIGATION PURPOSES

The key holding below was that in determining whether to approve a proposed class settlement under Rule 23, a district court cannot certify the class "unless the case would have been 'triable in class form.'" Pet. App. 37a (quoting *GM Trucks*, 55 F.3d at 799). This approach precludes the district court from considering the settlement in addressing the class certification issue, *i.e.*, the court must pretend that the settlement does not exist and address the Rule 23(a) and (b)(3) class certification criteria "as if the case were going to be litigated." Pet. App. 36a, 39a. In reaching this conclusion, the court of appeals portrayed itself as the champion of judicial restraint: "Every decade presents a few great cases that force the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other. This is such a case." Pet. App. 17a. Believing that it was avoiding "a serious rend in the garment of the federal judiciary," the court overturned the asbestos class settlement so as to "leave legislative solutions to legislative channels." Pet. App.

20a. Though appealing in general, these propositions are misplaced here. It is the Third Circuit that has exceeded proper judicial bounds by adopting an unnatural and strained construction of the text of Rule 23, ignoring longstanding precedent and practice, and fashioning a novel policy designed to reflect not the structure and purpose of the rule but rather the court's own hostility toward comprehensive class settlements in the mass litigation context.

A. The Third Circuit's Interpretation Contravenes The Language And Structure Of Rule 23

The decision below rests on a simplistic and fundamentally erroneous approach to the construction of Rule 23. The reason that a district court may not consider the proposed settlement when certifying a settlement class, the Third Circuit declared, is that the rule does not affirmatively say that the court may do so: "There is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes."[1] Pet. App. 38a (quoting *GM Trucks*, 55 F.3d at 799). But the court equally failed to identify language in Rule 23 providing that the settlement may *not* be considered in certifying a settlement class. That Rule 23 contains no explicit provision one way or the other does not mean that it must be presumed to withhold the power to take the settlement into account. No principle of interpretation requires each rule to itemize how it shall apply to the myriad situations which may confront the district courts. Far from prescribing guidelines for every conceivable situation, the Federal Rules necessarily are applied flexibly, taking into account the overarching command that they "shall be construed to secure the just, speedy, and

[1] The court of appeals also erred in asserting that considering the settlement means applying "liberalized" criteria. The same Rule 23(a) and (b) criteria are applied, but with different effect depending on the particular circumstances of each case (including whether a settlement has been reached). *See* pp. 14-15 *infra*.

inexpensive determination of every action." FED. R. CIV. P. 1.

Instead of searching for an express provision authorizing the consideration of the settlement when none was required, the Third Circuit should have assessed the plain meaning of the language in the context of Rule 23 as a whole, *see Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989), and adopted the most natural reading of the language, taking account of the rule's structure and purpose, *see Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 528-29, 533-34 (1984). Such an approach reveals that, far from prohibiting consideration of the settlement in the context of settlement class certification, Rule 23 can only sensibly be read to require it.[2] The rule mentions settlement only briefly and generally: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED. R. CIV. P. 23(e). The rule's silence on how this approval power should be exercised necessarily implies a grant of broad discretion to the district courts. For this reason, Rule 23(e) readily has been construed (including by the Third Circuit) to authorize courts to define the circumstances under which class settlements are proper, consistent with Rule 23's overall purpose and the Federal Rules in general.[3]

The absence of a provision explicitly authorizing consideration of the settlement when certifying a settlement

[2] Indeed, as set forth in the brief of Petitioners, the text of Rule 23 specifies that certification decisions should be made based on the actual posture of the case. *See, e.g.*, FED. R. CIV. P. 23(c)(1) (certification decision may be conditional and may be altered before decision on the merits).

[3] The Third Circuit has adopted a nine-part test for determining whether a class settlement should be approved. *See, e.g., GM Trucks*, 55 F.3d at 768-85, 806.

class is therefore irrelevant. The certification criteria in Rules 23(a) and (b) must be read in conjunction with Rule 23(e)'s settlement authority to permit the district courts to determine the settlement class certification in the context of the settlement itself. The Third Circuit itself acknowledged that the district courts' Rule 23(e) settlement approval power is not limited to cases in which a class has already been certified for litigation purposes under Rules 23(a) and (b). *See GM Trucks*, 55 F.3d at 794. The court agreed that Rule 23 permits certification of a "settlement class," *i.e.*, a procedure under which "[b]y conditionally certifying the class for settlement purposes only, the court allows the defendant to challenge class certification in the event that the settlement falls apart." Pet. App. 37a n.9. Because no provision explicitly authorizes the creation of settlement-only classes, that interpretation necessarily arises from a reading of Rule 23(e)'s settlement authority in conjunction with the remainder of the rule. Given this "practical construction" which "affords considerable economies to both the litigants and the judiciary and is also fully consistent with the flexibility integral to Rule 23," *GM Trucks*, 55 F.3d at 794, there is no reason for rejecting the natural corollary: if Rule 23 permits certification of a class for the specific and limited purpose of settlement, the certification criteria should be addressed in light of that specific and limited posture of the case. Nothing in the text or structure of Rule 23 provides a basis for construing the rule to permit the former, but not the latter. Not surprisingly, this is the interpretation adopted by virtually every court of appeals and district court to address this issue,[4] as well as by the MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.45 at 243 (Federal Judicial Center 1995). The Third Circuit's contrary interpretation—which paradoxically finds that settlement-only classes are permissible, yet asserts that "a class is a class is a class,"

[4] *See, e.g.*, cases cited at pp. 23-24 *infra*.

Pet. App. 38a (quoting *GM Trucks*, 55 F.3d at 799)—fails to give logical meaning to the text of Rule 23 as a whole and therefore should be rejected.

B. Consistent With Its Language And Purpose, Rule 23 Should Be Construed In Light Of The Deeply Rooted Public Policy Favoring Settlement

Petitioners' construction not only is the most natural reading of Rule 23's language, but also is powerfully supported by the public policy favoring the compromise of civil litigation. *See, e.g., McDermott, Inc. v. Amclyde & River Don Castings Ltd.*, 511 U.S. 202, 114 S. Ct. 1461, 1469 n.22 (1995) ("public policy wisely encourages settlements"); *Williams v. First National Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts (*Hennessy v. Bacon*, 137 U.S. 78); and, presumptively, the parties to the compromise in question possessed the right to thus adjust their differences."). This Court has often directed that any ambiguity in the language of statutes and rules must be construed in light of presumptions derived from long-standing policies and practices. *See, e.g., United States v. Mezzanatto*, 513 U.S. 196, 115 S. Ct. 797, 803 (1995) (absent clear statement to the contrary, Federal Rules of Criminal Procedure will not be construed to preclude waiver of legal rights in view of the "background presumption that legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement of the parties"); *Landgraf v. USI Film Products*, 511 U.S. 244, 255-57 (1994) (declining to construe ambiguous statute to impose liability for conduct prior to the effective date in light of the strong presumption against retroactivity). In the same vein, the language of Rule 23 should be construed in light of a presumption that federal procedures should be applied in ways that facilitate settlement or allow parties to narrow issues by agreement. Because Rule 23's language does not clearly mandate a different result, it should be construed to

permit a district court to refer to the settlement itself when deciding whether to certify a settlement class.[5]

The Third Circuit has impermissibly reversed this presumption. By forbidding settlements unless the case could have been fully litigated as a class action, the Third Circuit has treated settlement as a disfavored mechanism.[6] Under this construction of Rule 23, most defendants will refuse even to consider a class settlement. Every class settlement submitted to a district court for approval will presuppose a stipulation *by the defendants* that the class can be certified for litigation under Rules 23(a) and (b). If the class is then certified but the settlement

[5] The Third Circuit's concern about transforming the courts into a "mediation forum," *GM Trucks*, 55 F.3d at 799, ignores the reality that settlement is the predominant mechanism for resolving civil litigation. *See McDermott*, 114 S. Ct. at 1469 n.22 (less than five percent of federal cases end in trial, and settlement is the primary means of resolution). Settlement is equally critical for the resolution of class actions as well. *See* Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Changes*, 71 N.Y.U. L. REV. 74, 112 (1996) (recent study found that 84% of cases in which a class was certified ended in settlement, with about half of those settlements and 39% of all certified class actions involving a class certified for settlement purposes only).

[6] In doing so, the Third Circuit also contradicted its own doctrine that one consideration in determining the fairness of a settlement under Rule 23 is the risk of maintaining class action status. *See GM Trucks*, 55 F.3d at 785, 817. This consideration makes sense only if Rule 23 permits a class to settle with the defendants in circumstances in which there is uncertainty whether a class action can be maintained. If, on the other hand, the class itself cannot be certified for settlement purposes absent an affirmative finding that the case *is* triable in class form, the "risk of maintaining class status" factor can never arise. If the settlement class is certified as proper for litigation purposes, the risk of non-certification becomes moot; if the settlement class is rejected because the class could not be certified for litigation purposes, this risk factor again is moot and indeed the court will never reach the fairness of the settlement. This is one of many logical inconsistencies inherent in the Third Circuit's ruling. *See* pp. 12-15 *infra*.

for any reason is not approved by the court or otherwise is not consummated, the court will have found that the class action is maintainable under Rules 23(a) and (b) without regard to the settlement. The defendant will be locked into a class action that it otherwise adamantly would have opposed.[7] The mere possibility of such an outcome will discourage defendants from considering a class settlement at all, thus destroying the very purpose of recognizing "settlement classes."[8] These anti-settlement results are wholly inconsistent with public policy and the purposes of the Federal Rules and Rule 23 in particular.[9]

[7] It is no answer that a "settlement class" is only a conditional certification and that the defendant reserves the right to contest class certification if the settlement is not consummated. If the district court makes the requisite affirmative findings that the class can be certified as if the case were going to be litigated, *see* Pet. App. 36a, the district court hardly can cavalierly ignore or overturn those findings if the settlement falls apart and the matter proceeds in litigation. Nor is it practical for a defendant to advocate the factual and legal basis for certifying a class for litigation purposes when the context is settlement, and then to switch sides and attack the certification unequivocally in the litigation context.

[8] *GM Trucks* reasoned that "a defendant considering a settlement may resist agreeing to class certification because, if the settlement negotiations should fail, it would be left exposed to major litigation," and that "settlement classes may reduce litigation costs by allowing defendants to stipulate to class certification without forfeiting any of their legal arguments against certification should the negotiations fail." 55 F.3d at 790. The court of appeals did not acknowledge that its decision below negated this central purpose of the settlement class mechanism.

[9] Even where settlements are approved under the Third Circuit's approach, defendants in general will be disadvantaged because each settlement approval will create a new precedent in support of maintaining a class action for litigation purposes. If settlements occurred with regularity under this approach, the inevitable effect would be a shift in doctrine toward much more liberal class certification.

C. The Third Circuit's Construction Of Rule 23 Is Internally Inconsistent And Creates An Unnatural And Unworkable Scheme That Is Not Compatible With The Structure Or Purpose Of The Rule

For the reasons explained above, the position advanced by Petitioners harmonizes Rule 23(e) with Rules 23(a) and 23(b) and respects the strong public policy favoring settlement. In contrast, the Third Circuit's strained reading of Rule 23 contains so many logical inconsistencies and creates so many practical difficulties that it should be rejected as implausible. To require a district court to pretend that a settlement does not exist, when the very inquiry at hand is whether to certify a class solely for settlement purposes, "would require a court to ignore important and relevant information that sits squarely in front of it when deciding whether to certify a settlement class." *In re Asbestos Litig.*, 90 F.3d 963, 975 (5th Cir. 1996). For example, even the Third Circuit acknowledged that, "[c]ertainly, evaluating the settlement can yield some information relevant to the adequacy of representation determination under 23(a)(4)." *GM Trucks*, 55 F.3d at 795. Indeed, the adequacy of representation inquiry can be made more concretely in the context of a settlement, where the *actual* results obtained by the putative class counsel can be assessed, than in the context of litigation, where the inquiry is inherently predictive in nature.

By requiring the district courts to ignore the settlement and instead to render findings on the hypothetical question of how the case would proceed if it were litigated, the Third Circuit has ignored the admonition that, in construing Rule 23, courts should disregard "interests that may be theoretic rather than practical." *Amendments to Rules of Civil Procedure, Rules Advisory Committee Notes to Amended Rule 23*, 39 F.R.D. 69, 104 (1966); *cf. Landgraf*, 511 U.S. at 258 n.29 ("Our orders approving amendments to federal procedural rules reflect the common-sense notion that the applicability of such provisions ordinarily depends on the posture of the particular case."). For example, the Third Circuit argued that the existence of important state law questions prevented a finding of "commonality" under Rule 23(a)(2) or of "predominance" under Rule 23(b)(3) because of the difficulties of determining such questions in a nationwide class litigation. *See* Pet. App. 43a, 48a. But if class certification is addressed specifically in the context of a settlement, it does not matter whether it would be practical to try the case as a national class action. The settlement eliminates the need to resolve those state law questions. The complexity, uncertainty, and expense of resolving this type of difficult litigation issue are compelling reasons for the parties to compromise their rights, and should not be used (as under the Third Circuit's anomalous approach) as reasons for disallowing a class settlement.

As another example, the Third Circuit insisted that a settlement class satisfy Rule 23(b)(3) as if the case were to be litigated. *See* Pet. App. 36a, 39a. But criteria such as the difficulties likely to be encountered in the management of a class action, *see* FED. R. CIV. P. 23(b)(3)(D), have little relevance when the decision is solely whether to resolve the case rather than to litigate it. Moreover, such case management issues will not even be presented to the district court in a proper adversarial form. If the context is settlement, no one will have proposed a plan for managing the action as class form, addressed the discovery and trial issues expected to arise along the way, or otherwise fully briefed the considerations that would inform the litigation class inquiry as opposed to the settlement class inquiry. By mandating that the district courts address such hypothetical and unripe litigation inquiries when the limited context at hand is settlement, the Third Circuit's construction of Rule 23 produces results that are contrary to common sense.[10]

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[10] Many other logical inconsistencies or absurd outcomes are created by the Third Circuit's approach:

A more sensible and consistent interpretation is that when a court exercises its settlement approval authority under Rule 23(e), it should address the class certification issue specifically with respect to the settlement at hand. The Rule 23(a) and (b) criteria are intended to address two basic concerns: judicial economy and fairness. *See General Telephone Co. v. Falcon*, 457 U.S. 147, 157-58

• For example, even if there were no objections to a proposed settlement that the district court agreed was fair, the court nonetheless would be *required* to disapprove the settlement if it could not find that the class would have been maintainable for litigation purposes. Such an anomalous result is contrary to the well-established principle that litigants are free, and indeed encouraged, to resolve their disputes.

• The Third Circuit's test—is the case "triable in class form"?—is presented as an all-or-nothing conclusion that is divorced from the realities of a class action. In the litigation context, the district court may certify a class conditionally, and await the progress of the case before finally deciding the class certification issues. *See* FED. R. CIV. P. 23(c)(1) (certification order may be conditional and may be altered or amended before judgment). Or the district court may conclude that the propriety of a class certification for trial purposes is uncertain, and authorize discovery to address that issue. Under the Third Circuit's approach, any uncertainty concerning whether the case is "triable in class form" presumably must lead to a refusal to certify the settlement class. Settlements therefore will be disapproved in cases in which a class ultimately might have been certified.

• In still other cases, the district court may conclude that the class action is maintainable for certain issues, but not for others. *See* FED. R. CIV. P. 23(c)(4); Pet. App. 47a (citing many cases in which courts have only partially certified common issues). Although the court of appeals did not address this question, its opinion suggests that if the class action could not be maintained for all purposes, a settlement purporting to resolve all claims between the class and the defendants could not be approved because the class representatives could not purport to represent the class for purposes of those issues (such as individual damages) not suited for class treatment The result would be to eliminate class settlements in virtually any case involving individual damage issues.

n.13 (1982). Those considerations which are addressed to practical issues such as the efficiency and manageability of the class for purposes of litigation need not stand in the way of certifying a settlement-only class, for such concerns generally are eliminated by the settlement itself.[11] In contrast, the core fairness concerns of the Third Circuit—that "Rule 23 is designed to assure that courts will identify the common interests of class members and evaluate the named plaintiffs' and counsel's ability to fairly and adequately protect class interests," *GM Trucks*, 55 F.3d at 799, and that "collusion, inadequate prosecution, and attorney inexperience are the paramount concerns in pre-certification settlements," *id.* at 795—will be addressed directly by the district court both in examining the adequacy of putative class counsel's representation of the settlement class and in evaluating the fairness of the settlement itself. Construed in this common sense fashion, Rule 23 amply protects the class members' interests in fairness and adequate representation, without requiring the district courts to pretend that the settlement does not exist.

D. The Court Of Appeals Has Abdicated Judicial Responsibility In The Name Of Judicial Restraint And Has Substituted Its Own Policy Judgments For Those Already Embodied In Rule 23

The court of appeals ultimately seems to have concluded that the district courts simply cannot be trusted to carry

[11] There is no reason why the presumption that parties may voluntarily compromise their legal rights and settle their disputes, *see, e.g., Mezzanatto*, 115 S. Ct. at 802, *Williams*, 216 U.S. at 585, should not apply to those issues that relate to the efficiency and manageability of a class action (as opposed to fairness and adequacy of representation issues). The court's independent concern about burdens on the judicial system can be addressed by examining any burdens associated with administering the settlement; the burdens that would have resulted in the absence of a settlement are eliminated because the settlement ensures that litigation will not go forward.

out their Rule 23 responsibilities: "To allow lower standards for the requisites of the rule in the face of the hydraulic pressures confronted by courts adjudicating very large and complex actions would erode the protection afforded by the rule almost entirely." *GM Trucks*, 55 F.3d at 799. The Third Circuit thus presumed that if district courts are allowed to consider the settlement when certifying a settlement class, their desire to clear crowded dockets will prove overwhelming and thus impel them to approve unfair or improper class settlements. This proposition is not supported by any evidence, but in any event is irreconcilable with Rule 23(e), which vests in the district courts the power to approve or disapprove settlements. The Third Circuit's concern about "hydraulic pressures," whether or not plausible, cannot provide a basis for a judicial rewriting of Rule 23.

It is ironic that the Third Circuit, while cloaking itself in the mantle of judicial restraint, decided to rest its decision on an essential policy judgment about judicial competence. The very structure and content of the Third Circuit's opinions reflect a determination to get to the bottom of the *policy* implications of the class settlement issue. Having engaged in this policy debate with itself, the court of appeals became so convinced of the need to avoid these presumed "hydraulic pressures" that it disregarded the holdings of virtually every other federal court that has addressed the settlement class issue; overturned nearly three decades of established practice; and adopted an illogical rule of construction that encourages trial over settlement and demands hypothetical decisionmaking over deciding a case based on the circumstances at hand. Far from preserving the institutional values of the judiciary, such an approach contravenes them. The court of appeals should have limited its focus to the rule itself, which grants ample authority to the district courts to address the pertinent considerations that affect a proposed class settlement.

This Court also should dismiss the Third Circuit's suggestion that the district court's certification of the settlement class and approval of the settlement somehow constituted an improper judicial exercise of legislative powers. *See* Pet. App. 58a. Although Congress might choose to act, it hardly is the usual forum for deciding the outcome of civil disputes, however complex. These asbestos claims are pending in the courts. Resolutions of one kind or another must be reached, whether in a class action or individual adjudications. The oversight of negotiated settlements between litigants is a long-accepted part of the judicial function, and here is based on an express delegation in Rule 23(e). The complexity of the claims and the sheer number of the claimants may affect the exercise of that function, but they do not transform it into impermissible social legislation. The Third Circuit's "hope" that its opinion will galvanize Congress into action, *see* Pet. App. 59a, is likely to be in vain, but in any event is not a proper basis for abdicating judicial power. The use of Rule 23 to achieve massive class settlements merely reflects the need for the courts to apply their rules to novel situations created by the inundation of the judicial system with lawsuits of a constantly expanding number, type, and scope. Construing the Federal Rules in the context of complex new litigations, and particularly interpreting them to promote opportunities for settlement, is well within the judiciary's delegated power and indeed is an integral part of the courts' responsibility.

II. IF THIS COURT ADDRESSES WHETHER THE DISTRICT COURT PROPERLY CERTIFIED THE CLASS IN LIGHT OF THE PARTICULAR SETTLEMENT IN THIS CASE, IT SHOULD EMPLOY AN ABUSE OF DISCRETION STANDARD TO ANALYZE THE DISTRICT COURT'S FACTUAL FINDINGS AND SHOULD REJECT THE THIRD CIRCUIT'S SWEEPING SUGGESTION THAT CERTAIN TYPES OF "INTRA-CLASS CONFLICTS" MAY INHERENTLY PRECLUDE SETTLEMENT CLASS CERTIFICATION

Based on its erroneous premise that "a class is a class is a class," the court of appeals decided only that the class in this case could not be certified for litigation purposes, and therefore that it could not be certified for any purpose. If this Court reverses on that issue, the remaining question will be whether the district court correctly certified the class in light of the settlement itself. The Third Circuit did not reach this question. Because the question depends on an analysis of the district court's factual findings relating to a variety of factors, the proper standard of review is abuse of discretion. "The certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court." *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). In this case, the district court conducted extensive proceedings directed toward a host of issues, including numerous attacks on class certification and on the fairness of the settlement. *See* Pet. App. 23a-30a (summarizing proceedings in the district court); Pet. App. 269a. These proceedings included discovery and a five-week evidentiary hearing. *See* Pet. App. 29a (18 days, 29 witnesses). In certifying the class and approving the settlement, the district court made more than 300 findings of fact. *See* Pet. App. 103a-223a. Thus, although WLF does not address here the specific issues concerning the certification of the settlement class (issues addressed in Petitioners' brief), the thoroughness of the district

court's examination of both the class certification criteria and the fairness considerations certainly provides a strong foundation for upholding that decision.

If this Court addresses whether the certification decision was proper in light of the settlement itself, it should reject the indiscriminate statements in the Third Circuit's opinion which might be read to suggest that supposed "intra-class conflicts" would preclude settlement class certification, not only here but in many other cases as well, even if the settlement is taken into account. In particular, this Court should reject the Third Circuit's far-reaching discussion concerning the "adequacy of representation" criterion under Rule 23(a). The Third Circuit stated that "serious intra-class conflicts preclude this class from meeting the adequacy of representation requirement." Pet. App. 49a. Briefly addressing the settlement, the court reasoned that the settlement "makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others. . . . In short, the settlement makes numerous decisions on which the interests of different types of class members are at odds." Pet. App. 49a. The Third Circuit was especially concerned with a perceived conflict between the interests of the presently injured plaintiffs and those who may become ill in the future: "[T]he interests of the exposure only plaintiffs are at odds with those of the presently injured: the former have an interest in preserving as large a fund as possible while the latter seek to maximize front-end benefits." Pet. App. 20a. As a result, "presently injured class representatives cannot adequately represent the futures plaintiffs' interests and vice versa." Pet. App. 50a-51a.

To the extent the court intended to suggest that a settlement class containing both types of plaintiffs can never be certified, that suggestion must be rejected. There is no

inherent, irresolvable conflict within such a class.[12] The Third Circuit's observation that different class members might prefer different remedies hardly is surprising, for a certain degree of conflict among class members may always be present, if for no other reason than that persons tend to prefer the maximization of their own benefits without regard to others similarly situated. Every class settlement is a compromise, not only between plaintiffs and defendants, but also within the plaintiff class itself. For that very reason, Rule 23 imposes requirements concerning matters such as notice and opt-out rights. *See* FED. R. CIV. P. 23(c)(2). In addition, the district court is required to examine the circumstances of the individual settlement in view of possible conflicts, and then to decide whether the settlement was arrived at through representatives who adequately protected the interests of class members and whether it otherwise is fair.[13]

[12] In the proceedings below, certain objectors asserted that some members of the class lacked standing to assert claims because they had not suffered any actual injuries, and therefore should not have been included within the class. The Third Circuit did not reach that issue, *see* Pet. App. 19a, it is not before this Court, and WLF takes no position on it here. *See* Brief *Amicus Curiae* of the Washington Legal Foundation in Support of Petitioner, *Metro-North Commuter R.R. Co. v. Buckley*, No. 96-320 (arguing that plaintiff manifesting no physical effect from exposure to asbestos and alleging only a general anxiety concerning his future health should not be permitted to assert a claim under the Federal Employer's Liability Act).

[13] The Third Circuit stopped short of suggesting that such a settlement class could never be certified, appearing to recognize the possibility of "structural protections to assure that differently situated plaintiffs negotiate for their own unique interests." Pet. App. 51a. Even that qualification was too limited, however, for nothing in Rule 23 specifies that any particular "structural protection" (such as sub-classes) is required to vindicate the class members' interests. In overseeing the settlement negotiations, or at least in approving the compromise reached therefrom, the district court should be concerned with the actual adequacy of representation of the class members' interests, not with the formality of whether any particular procedural device was employed.

The most striking thing about the Third Circuit's "conflict" analysis is that it was entirely divorced from the specifics of the settlement in *this* case. Having identified *potential* conflicts between presently injured plaintiffs and those whose exposure to asbestos may give rise to future injury, the court of appeals reached its decision without determining whether such conflicts actually exist. In this case, the district court heard extensive testimony and argument and then made detailed findings that rebutted these concerns identified by the Third Circuit. *See, e.g.*, Pet. App. 175a, 179a-204a. In other major class action cases, district courts similarly have certified a settlement class including different types of plaintiffs after analyzing the particular facts and circumstances involved. *See, e.g., In re Agent Orange*, 996 F.2d 1425, 1428-29 (2d Cir. 1993); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. 1994). Such findings should be upheld unless they constitute an abuse of discretion.

For similar reasons, this Court should decline to accept the Third Circuit's intimations that the supposed intra-class conflict between these different types of plaintiffs may prevent a finding of typicality, predominance, and superiority. When these factors are considered in light of the settlement itself, they either are readily satisfied (to the extent that they relate to practical issues such as the manageability of the class litigation) or tend to merge into the fairness issue that is central to the adequacy of representation factor. *See General Telephone Co.*, 457 U.S. at 157-58 n.13. The district courts should avoid bright-line presumptions that potential intra-class conflicts have improperly infected the settlement.[14] Instead, they should

[14] The Third Circuit similarly went much too far in its brief analysis of the "superiority" prong of the Rule 23(b)(3) inquiry. The court stated:

> [I]t is obvious that if this class action settlement were approved, some plaintiffs would be bound despite a complete

analyze the particular settlement and the processes by which that settlement was brought about, just as the district court did in this case.

III. THE THIRD CIRCUIT'S HOLDING THREATENS TO PRECLUDE FUTURE CLASS ACTION SETTLEMENTS IN BOTH PERSONAL INJURY CASES AND MANY OTHER CONTEXTS, THUS ELIMINATING THE PRINCIPAL MECHANISM FOR THE FAIR AND EFFICIENT RESOLUTION OF MASS LITIGATION THAT HAS BEEN USED SUCCESSFULLY FOR NEARLY THREE DECADES

The practical effects of the Third Circuit's decision are staggering. If "a class is a class is a class," then *no* settlement can be reached where any impediment exists to certifying the class for litigation purposes. The Third Circuit would preclude use of the settlement class device precisely where such classes are "most useful": those "cases presenting the most unwieldy substantive and procedural issues, i.e., those diversity cases in which plaintiffs from many states are confronted with different defenses, differing statutes of limitations, etc." *GM Trucks*, 55 F.3d at 799. If applied across the nation, this approach would radically alter judicial practice over the past three decades, flooding the courts with additional cases and stalling indefinitely the resolution of plaintiffs' claims. This Court should not permit the elimination of this critical safety valve in the judicial system.

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lack of knowledge of the existence or terms of the class action. It is equally obvious that this situation raises serious fairness concerns. Thus, a class action would need significant advantages over alternative means of adjudication before it could become a 'superior' way to resolve the case. . . . These advantages are lacking here. Although individual trials for all claimants may be wholly inefficient, that is not the only alternative. A series of statewide or more narrowly defined adjudications, either through consolidation under Rule 42(a) or as class actions under Rule 23, would seem preferable.

Pet. App. 57a. This analysis not only ignores contrary district court findings in this very case, *see* Pet. App. 227a-228a, but also undercuts Rule 23 entirely by suggesting that if claimants without actual notice may be bound (something inherent in large class actions), then any alternative form of adjudication may be presumed to be "superior." Moreover, the Third Circuit's reasoning is nonsensical on its own terms. If the concern is that individual claimants must be given an opportunity to control their own claims and to avoid any risk of being bound to a settlement without actual notice, then it hardly would be "superior" to relegate claimants to a series of statewide class actions that would suffer from the same alleged defects.

The "settlement class" device has been used to settle some of the most complex mass tort litigations that have inundated the judicial system. For example:

- A class settlement was reached covering all persons exposed to Agent Orange, including those who had not yet manifested injury. As of 1992, the settlement had disbursed more than $146 million and processed some 60,000 claims. *See In re Agent Orange*, 996 F.2d at 1428-29 (reprinting terms of settlement and recounting procedural history).

- In 1989, the Fourth Circuit affirmed the certification of a settlement class in the Dalkon Shield cases, resolving the claims of "literally hundreds of thousands of claimants," including both present and future claims. *See In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989).

- In *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 158-60 (S.D. Ohio 1992), the court approved the certification of a class for the settlement of approximately 100,000 claims, present and future, related to defective heart valves.

- The Northern District of Alabama approved a settlement resolving the claims of hundreds of thousands of recipients of silicone gel breast implants, including women who allege illnesses as well as women who may become ill in the future. *See In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. 1994).

As these cases illustrate, Rule 23 "settlement classes" have been used to resolve some of the largest and most intractable mass tort problems in the country by comprehensively settling all claims of an enormous number of claimants. The Third Circuit's approach likely would have prevented such settlements, for the courts in those cases focused on the settlement itself in certifying the class, rather than on the hypothetical question whether the action could be maintained in class form for litigation purposes. The destructive impact of the Third Circuit's opinion, moreover, would not be limited to mass tort cases. Class settlements have been reached in a wide variety of contexts, including antitrust, securities, consumer, and civil rights cases, in which settlement-only classes were certified in situations in which a litigation class might not have been certified. *See, e.g., In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 960-61 (N.D. Ga. 1980) (antitrust case affecting rights of over 200,000 persons), *aff'd*, 669 F.2d 228 (5th Cir. 1982); *Malcham v. Davis*, 761 F.2d 893 (2d Cir. 1985) (securities), *cert. denied*, 475 U.S. 1143 (1986); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615 (9th Cir. 1982) (racial and sexual bias action on behalf of San Francisco police department), *cert. denied*, 459 U.S. 1217 (1983); *In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301 (D. Mass 1987) (fraud case addressing claims of 50,000 customers); *In re Marine Midland Motor Vehicle Leasing Litig.*, 155 F.R.D. 416 (W.D.N.Y. 1994) (claims of 50,000 persons based on RICO violations in leasing practices).

Overturning the widespread and longstanding judicial construction of Rule 23 that enabled these and many other class settlements to occur would have a devastating effect on the court system, claimants, and defendant businesses. Without the settlement class option, federal judges would lose one of the few available mechanisms for forging solutions to these exceptional litigations. When one compares the alternatives, settlement class actions resolve claims

more fairly, quickly, and efficiently, and with greater protections for claimants, than do the alternative procedures which—until this settlement—have grossly failed to resolve asbestos claims. For example, the Judicial Conference Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist found grave problems with the tort system's handling of asbestos claims: "[D]ockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether." *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* (March 1991), p. 3.[15]

Even beyond these problems of extraordinary expense for litigants and extraordinary burdens on the judicial system, the Third Circuit has ignored reality in believing that alternatives to class settlements will provide greater fairness to claimants. *See* Pet. App. 57a. Settlement classes are subject to substantial protections, in the form of judicial supervision of the settlements and other pro-

[15] The district court made similar findings in this very case: "[T]he proposed settlement will provide class members with fair compensation for their claims while reducing the delays and transaction costs endemic to the asbestos litigation process as it occurs presently in the tort system. . . . This Court has also made findings concerning how asbestos victims presently fare in the tort system. New filings continue unchecked, there is much uncertainty as to liability and verdict results, claims are often resolved only after long delays, transaction costs are high, and victims receive only a fraction of the funds expended. . . . The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease." Pet. App. 227a-228a, 240a, 270a (citations omitted).

cedural protections in Rule 23, as compared to the complete absence of structural protections in other tort system settlements. For example, most asbestos cases in the tort system are resolved not through individual trials or settlements, but instead as part of group settlements of hundreds or thousands of cases filed by the same plaintiffs' attorney.[16] Having reached such multi-claim settlements, the plaintiffs' lawyer often then unilaterally allocates the settlement sum among his many clients.[17] There is no judicial supervision of the group settlement amount.[18] There is no supervision of counsel's allocation of the settlement among the numerous claimants.[19] And there is no review of the reasonableness of the fees kept by the plaintiffs' attorney.[20] In short, because settlement class actions provide claimants with far greater safeguards than other available forms of adjudication in the tort system, both for asbestos cases and other types of claims,[21] the Court

[16] *See, e.g.*, JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 74-75 (1995).

[17] *See, e.g.*, WEINSTEIN, at 74-75; Deborah R. Hensler, *Resolving Mass Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 102 ("In asbestos litigation . . . [b]atch settlement sessions settle hundreds of cases in a single week, often using only crude categorization schemes and rules of thumb to determine levels of compensation.").

[18] Moreover, individual claimants are "rarely, if ever, included in the settlement discussions" with the defendant. Hensler, *supra* note 17, at 97.

[19] Nor is it realistic to think that individual clients can refuse to accept the amount allocated by their counsel. *See* WEINSTEIN *supra* note 16, at 75 ("I have yet to see plaintiffs successfully ignore their attorney's advice to settle an asbestos or DES case.").

[20] For example, Judge Weinstein observed that "[a]n audit of the Baltimore asbestos cases," which were settled on a group basis, "might show a net fee on the order of thousands of dollars per hour." WEINSTEIN, *supra* note 16, at 74 (citation omitted).

[21] The lack of structural protections and the individual claimants' lack of involvement are so severe that, in one recent situation, a plaintiffs' asbestos attorney simply misappropriated a group settlement payment of over $1 million; his 900-odd clients never realized that they should have received those funds; and the misappropriation only came to light when another attorney later informed a disciplinary board. *See In re Asbestos Prods. Liab. Litig.* MDL 875 (E.D. Pa. Oct. 31, 1994) (order voiding agreement to substitute counsel).

should be especially wary of [illegible]arding this critical tool of case management and resolution.

Moreover, adopting the Third Circuit's rule could prove enormously detrimental to American businesses. The vast number of claims, coupled with great uncertainty regarding potential liability, poses a significant threat to the viability of many companies facing mass tort litigation. The district court recognized this problem in the context of the asbestos cases: "[F]acing enormous liabilities and overwhelming costs to defend thousands of asbestos-related claims, many asbestos producers were on the road to bankruptcy, including a number of companies previously considered to be immune from financial difficulty." Pet. App. 107a. Similar problems have been recognized in other mass tort cases. *See, e.g., In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989) (explaining how the burden of litigation arising out of the Dalkon Shield cases forced A.H. Robins into Chapter 11 bankruptcy). Class action settlements, such as the one rejected by the Third Circuit, provide businesses with a critical option for resolving claims without having to resort to bankruptcy. Even for companies that may not be on the brink of bankruptcy, settlements that comprehensively resolve broad classes of claims enable the companies to establish the boundaries of their liabilities and structure their finances accordingly. As the district court noted below, "the Stipulation itself will, if approved, significantly enhance the financial condition and prospects of[] CCR defendants . . . because it will remove 'uncertainty which adversely affects these companies' ability to access the capital markets, to raise debt and equity, or to attract people, or to compete in the

marketplace . . . .'" Pet. App. 172a (quoting expert testimony).

Finally, affirmance of the Third Circuit decision not only would thwart future class settlements, but might also cause litigants to try to dismantle many of the class settlements that already have been reached. The damage of such a result on businesses, claimants, and the judiciary would be almost incalculable. Accordingly, this Court should reject the Third Circuit's decision in order to avoid articulating a sweeping rule that not only would preclude future class settlements in the most vexing mass litigation scenarios, but also would threaten to generate collateral litigation concerning the settlements that already have resolved enormous controversies such as the cases involving Agent Orange, Dalkon Shields, and breast implants.[22]

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[22] In this regard, WLF disagrees with the statement in the Petition for Certiorari that "[i]f the Third Circuit is right and its approach ultimately prevails nationwide, parties that choose to enter into settlements in reliance on the decisions of those other courts of appeals eventually will see those settlements overturned." Pet. at 2. Even if those prior courts adopted erroneous interpretations of Rule 23, that type of legal error does not provide a basis to upset a class settlement on collateral attack. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."). At a minimum, therefore, the Court should leave no room for a suggestion that previously approved settlements could be undone through collateral attack or otherwise.

CONCLUSION

For the foregoing reasons, WLF respectfully requests that this Court reverse the decision of the Third Circuit.

Respectfully submitted,

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AMCHEM PRODUCTS, INC., *et al.*,
Petitioners,
v.
GEORGE WINDSOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RHONE-POULENC RORER INC., ARMOUR PHARMACEUTICAL COMPANY, BAYER CORPORATION, BAXTER HEALTHCARE CORPORATION AND ALPHA THERAPEUTIC CORPORATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici curiae will address the following issue: Should the fact that a case cannot be litigated as a nationwide class action preclude the parties from entering into a nationwide class settlement, even if absent class members are given adequate notice of their rights and the district court concludes that the settlement is fair to all parties?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

No. 96-270

AMCHEM PRODUCTS, INC., *et al.*,
Petitioners,
v.
GEORGE WINDSOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RHONE-POULENC RORER INC., ARMOUR PHARMACEUTICAL COMPANY, BAYER CORPORATION, BAXTER HEALTHCARE CORPORATION AND ALPHA THERAPEUTIC CORPORATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

Amici curiae Rhône-Poulenc Rorer Inc., Armour Pharmaceutical Company, Bayer Corporation, Baxter Healthcare Corporation, and Alpha Therapeutic Corporation respectfully submit this brief in support of petitioners and urge the Court to reject the radical reinterpretation of Rule 23 adopted by the United States Court of Appeals for the Third Circuit.

Amici are pharmaceutical companies that process plasma to isolate the components used to treat hemophilia. *Amici* have been sued by more than 1,300 persons

who claim that they or a family member were exposed to the human immunideficiency retrovirus ("HIV") through those therapies.

After nearly a decade of hard-fought litigation, *amici* reached a settlement with a nationwide class of hemophiliacs, their relatives, and other representatives. *Amici* App. 1-17a. The settlement, which has received the preliminary but not the final approval of the district court, would pay 100 thousand dollars to each eligible member of the class.

Under the reasoning of the Third Circuit, this 600 million dollar cash settlement could not be given final approval—even if the court concludes that the settlement is fair to class members—because the court could not certify the settlement class. Certification would be barred because the hemophiliacs' claims cannot be litigated through a class action. *See Wadleigh v. Rhône-Poulenc Rorer Inc.*, 157 F.R.D. 410 (N.D. Ill. 1994) (refusing to certify a nationwide class pursuant to Fed. R. Civ. P. 23(b)(3), but certifying an issue class pursuant to Fed. R. Civ. P. 23(c)(4)(A)), *rev'd in part sub nom. In re Rhône-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir.) (directing district court to vacate the issue class certification), *cert. denied sub nom. Grady v. Rhône-Poulenc Rorer Inc.*, 116 S. Ct. 184 (1995). If, as the Third Circuit states, "a class is a class is a class," there can be no classwide settlement because classwide litigation is impossible. *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 625 (3d Cir. 1996).

Neither the language of Rule 23 nor considerations of fairness to absent class members requires such a result. Therefore, *amici* urge this Court to reject the Third Circuit's rewriting of class action law, and to hold that settlement classes may be approved when absent class members have adequate notice and the opportunity to opt out of the settlement, and when the district court concludes that the settlement is fair.

BACKGROUND

1. Hemophilia is an incurable, hereditary disorder characterized by deficiencies of certain clotting factors in the blood. In the late 1960s and early 1970s, freeze-dried and concentrated forms of the missing clotting factors were developed and largely replaced the cumbersome and less effective therapies that had previously been used. These new therapies greatly increased the life expectancy and quality of life for persons with hemophilia.

The disease now known as Acquired Immune Deficiency Syndrome (AIDS) was diagnosed in three hemophiliacs in 1982. By 1984, the medical community had reached a consensus that AIDS was transmissible by blood, blood components and other bodily fluids. *In re Rhône-Poulenc Rorer Inc.*, 51 F.3d 1293, 1296 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995). The HIV retrovirus was identified as the cause of AIDS in the spring of 1984.[1] In March of 1985 the FDA licensed a test to detect antibodies to HIV in blood. All plasma donations collected after the test became available were tested and HIV positive donors were excluded. *Id.*

2. Approximately 500 lawsuits involving some 1,300 named plaintiffs have been filed by persons with hemophilia who claim to have been infected with HIV through the plasma-based therapies used to control their hemophilia. Approximately 60 percent of the cases are pending in various state courts. The federal cases have been consolidated for pretrial purposes in the Northern District of Illinois. *In re "Factor VIII or IX Concentrate Blood Products" Prod. Liab. Litig. (MDL No. 986)*, 853 F. Supp. 454 (J.P.M.L. 1993). *See generally* 28 U.S.C. § 1407. The parties have conducted substantial discovery, including the production of over one million documents

[1] Later that year, experiments by the Centers for Disease Control demonstrated that HIV could be inactivated by heat-treatment processes that had recently been approved for certain factor concentrates.

and the depositions of factual, medical and scientific witnesses.

On September 30, 1993, a consortium of plaintiffs' counsel filed *Wadleigh v. Rhône-Poulenc Rorer*, No. 93 C 5969 (N.D. Ill.)—a purported nationwide class action against *amici* and the National Hemophilia Foundation. The district court denied plaintiffs' motion to certify a nationwide class pursuant to Federal Rule of Civil Procedure 23(b)(3). The court concluded, *inter alia*, that plaintiffs' negligence claims could not be certified because common issues of fact and law did not predominate "[o]n the proximate cause issue." However, the district court certified an issue class pursuant to Rule 23(c)(4)(A) for the purpose of determining whether the defendants were "guilty of ordinary negligence." *Wadleigh v. Rhône-Poulenc Rorer Inc.*, 157 F.R.D. 410, 424 (N.D. Ill. 1994). The court planned to try this issue using a uniform national negligence instruction and then remand individual cases to the districts from which they originated for adjudication of individual causation and damage issues.

3. The Seventh Circuit issued a writ of mandamus directing the district court to vacate its class certification order. *In re Rhône-Poulenc Rorer*, 51 F.3d at 1293. The court of appeals concluded that the proposed class action "far exceed[ed] the proper bounds of judicial discretion" in three ways. *Id.* at 1299. First, the district court violated *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), by proposing "to have a jury determine the negligence of the defendants" pursuant to "a kind of Esperanto instruction, merging the negligence standards of the 50 states and the District of Columbia." *In re Rhône-Poulenc Rorer*, 51 F.3d at 1300. Second, the district court's plan violated the Seventh Amendment because the court intended to try, on a classwide basis, "negligence" issues that were inextricably interwoven with proximate cause, comparative negligence and other issues

that would be addressed in the individual local trials. *Id.* at 1302-03. Third, the district court violated Rule 23 by certifying a class when class litigation was a manifestly inferior means for fair and efficient adjudication of these claims. *Id.* at 1299-1300.

4. Plaintiffs' application for *certiorari* was denied. *Grady v. Rhône-Poulenc Rorer, Inc.*, 116 S. Ct. 184 (1995). On January 16, 1996, the district court decertified the class.

5. Plaintiffs and *amici* then entered settlement negotiations. In August of 1996, the parties agreed on the terms of a nationwide settlement that would pay 100 thousand dollars (exclusive of fees and costs) to each HIV-positive hemophiliac who used factor concentrates processed or distributed by *amici* during the period 1978 through 1985.[2] The settlement would be implemented through conditional certification of a class for settlement purposes in *Walker, et al. v. Bayer Corp., et al.*, 96 C 5024 (N.D. Ill.).

On August 14, 1996, the district court made a preliminary finding that the settlement was sufficiently fair, reasonable and adequate to issue class notice. Approximately 6,200 claims[3] were subsequently filed by persons who wanted to participate in the settlement. Approximately 540 persons opted out of the settlement class.

On November 25, 1996, the district court commenced a hearing to determine whether the settlement was fair to the settlement class. The court reserved final approval of the settlement pending resolution of certain subrogation and government benefits issues. *Amici* App. 18a.

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[2] The settlement class would also include family members and other representatives of deceased hemophiliacs and persons who contracted HIV through sexual relations with a spouse or eligible partner. The precise terms of the settlement appear in the Notice of Settlement appended to this brief. *See Amici* App. 4-17a.

[3] This number is an estimate based upon the settlement administrator's preliminary analysis of claim forms submitted.

ARGUMENT

The Third Circuit has engaged in a judicial revision of Rule 23 that is unsupported by the language of the Rule and inconsistent with the Rules Enabling Act, 28 U.S.C. § 2072(b). If this Court adopts the Third Circuit's reasoning, numerous fair and reasonable settlements—including this 600 million dollar settlement with thousands of HIV-positive hemophiliacs—will be outlawed. *Amici* do not dispute that settlement classes can be abused. However, they believe that any such abuses can be prevented through vigorous judicial enforcement of the procedures for approval of a class settlement. The Court need not and should not engraft new requirements onto Rule 23.

I. THE THIRD CIRCUIT'S INTERPRETATION OF RULE 23 BLOCKS PARTIES FROM MAKING INFORMED DECISIONS TO SETTLE LITIGATION, IN VIOLATION OF THE RULES ENABLING ACT.

Rule 23 does not outlaw settlement classes. Rather, it describes the "prerequisites to a class action" that must be "satisfied" for a class action to be "maintainable." The district court's decision to certify a class is a discretionary one, based on the *specific circumstances of a case*. *General Tel. Co. v. Falon*, 457 U.S. 147, 160 (1982). As those circumstances change, the certification decision is subject to reconsideration. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

The Third Circuit has loosed Rule 23 from its pragmatic moorings. Instead of applying Rule 23(a) and 23(b) based on the facts—including the fact that the parties have negotiated a settlement—the Third Circuit requires a district court to apply Rule 23 based on a false hypothesis. The court must disregard the parties' stated intention to compromise their claims and apply Rule 23 as if the parties intend to take their dispute to trial. Only if a class trial would be fair and manageable may the court certify the class and allow parties to enter a global settlement.

Such an interpretation violates the Rules Enabling Act, which provides that rules of procedure cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The only distinction between settlement in Rule 23 and other cases is that, "[u]nlike the settlement of most private civil actions, class actions may be settled only with the approval of the district court." *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 623 (9th Cir. 1982). *See* Rule 23(e). The Third Circuit's interpretation of Rule 23 deprives litigants in putative class actions of an opportunity available to everyone else who comes to court: the right to settle their claims.

The very essence of a settlement is compromise—on both legal and factual differences. "The parties waive their right to litigate the issues involved in the case and save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise . . ." *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) (discussing consent decrees). *See also Mars Steel Corp. v. Continental Illinois Nat. Bank and Trust Co. of Chicago*, 834 F.2d 677, 681 (7th Cir. 1987) (analogizing settlement to a contract, where "normally the test for the fairness of a contract is strictly procedural: were the parties competent adults duly apprised of the basic facts relating to their transaction").

In the context of the Seventh Circuit's decision in *In re Rhône-Poulenc Rorer*, 51 F.3d 1294, the Third Circuit rule would prevent sophisticated defendant corporations from settling claims that they want to settle. The Seventh Circuit identified three significant obstacles to class certification in the AIDS/hemophilia litigation: 1) "forcing defendants to stake their companies on the outcome of a single jury trial" or forcing them to settle even if they have no legal liability, *id.* at 1299; 2) subjecting defendants to a uniform standard of negligence where differences in various states' law "could make a big difference in the liability of these manufacturers," *id.* at 1301-02; and

3) risking a violation of defendants' Seventh Amendment right to trial by jury if there were inconsistent verdicts. *Id.* at 1303-04.

The Seventh Circuit instructed the district court to vacate its certification order because a class trial would be unfair to *amici*. Under the Third Circuit's interpretation of Rule 23, however, *amici*—who are certainly sophisticated litigants—would be denied the opportunity to compromise on these issues in furtherance of a global settlement. For example, when *amici* present the district court with what they—and the plaintiffs—believe to be a fair negotiated settlement, the Seventh Circuit's concern that the companies could be "forced" into a settlement by improper class certification disappears. To blindly apply the Third Circuit's "litigation rule" would be absurd unless *amici* were unable to adequately protect their own interests in these settlement negotiations. *See In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301, 308 (D. Mass. 1987) ("the issue of whether class treatment is appropriate is one that the parties can settle or compromise").

If *amici* want to settle, they should be allowed to overlook choice of law objections that they would have made in the litigation context. Negotiated choice-of-law provisions are not unusual. *See Milanovich v. Costa Crociere, S.P.A.*, 954 F.2d 763, 767 (D.C. Cir. 1992) ("contractual choice of law provisions are usually honored"). Nor is it uncommon for courts to allow parties to waive objections to "choice-of-law issues" by failing to raise them at an early stage in the proceedings. *See Whirlpool Financial Corp. v. Sevaux*, 96 F.3d 216, 221 (7th Cir. 1996); *Neely v. Club Med Management Services, Inc.*, 63 F.3d 166, 180 (3d Cir. 1995) ("choice of law issues may be waived"). There is nothing in Rule 23 that should abridge or modify a party's right to waive or negotiate around any applicable choice-of-law questions that could arise in the context of a negotiated settlement.

Similarly, if *amici* want to settle, they should be allowed to give up their Seventh Amendment right to a jury trial. This Court has expressly stated that the right to jury trial may be limited or "dispensed with" by "the assent of the parties entitled to it." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959) (citing *Scott v. Neely*, 140 U.S. 106, 109-10 (1891)). The fact that the district court's class trial plan violated the Seventh Amendment should not preclude *amici* from making an intelligent decision to settle thousands of claims on a classwide basis.

II. RULE 23(e) AND THE DUE PROCESS REQUIREMENTS FOR CLASS CERTIFICATION AND SETTLEMENT ADEQUATELY PROTECT THE RIGHTS OF ABSENT CLASS MEMBERS.

The Third Circuit's reinterpretation of Rule 23 is unnecessary to shield absent class members from collusive settlements. The procedures and safeguards provided by the Due Process Clause and Rule 23 ensure that the interests of absent class members are protected and that "a class action plaintiff is not required to fend for himself." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

In *Shutts*, the Court reviewed the procedures required, as a matter of due process, to protect absent class members. The judge, with the aid of named plaintiffs and the defendant, "conducts an inquiry into the common nature of the named plaintiff's and absent plaintiffs' claims, the adequacy of representation, the jurisdiction possessed over the class, and any other matters that will bear upon the proper representation of the absent plaintiffs' interest." *Id.* at 809. This ensures that the named plaintiffs and their counsel share the absent plaintiffs' interests and those interests can and will be vigorously pursued.

Absent plaintiffs must also receive "the best practicable" notice plus an opportunity to be heard and participate—or not participate—in the litigation. *Id.* at 811-12. The notice "describes the action and the plaintiffs' rights in it" for all interested parties so that they can present objections to the court or make an informed decision to opt-out and remove themselves from the litigation. *Id.* at 812. The Court has maintained that these procedures—embodied in the requirements of Rule 23(e)—not only satisfy the Due Process Clause, but protect the interests of absent plaintiffs. *Id.* at 814.

In the factor concentrate litigation, more than 65,000 printed notices were mailed to individuals and organizations in the hemophilia community. In addition to a detailed description of the prior litigation and the settlement terms, these mailed notices and nationally published "summary notices" included a toll-free number to call for further information or legal assistance. The sizable number of filed claim forms—and opt-outs—demonstrates that absent plaintiffs were apprised of the details of the class before deciding to participate in the settlement and waive the right to litigate their claims. Moreover, the district court held an open hearing where it listened to "all persons who indicated a desire to speak" in favor of or in opposition to the settlement. *Amici* App. 18a. When the court does rule on the ultimate question of the settlement's fairness, it can hardly be considered the "rubber stamp" suggested by the Third Circuit.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL-986
93-C-7452

IN RE: FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION

This document relates to: No. 96-C-5024

IMPORTANT LEGAL NOTICE

TO: ALL PERSONS WITH HEMOPHILIA WHO USED BLOOD CLOTTING FACTOR CONCENTRATES PROCESSED OR DISTRIBUTED FROM 1978 THROUGH 1985, AND WHO ARE (OR WERE) INFECTED WITH HIV AND THEIR ESTATES.

PLEASE READ THIS ENTIRE NOTICE CAREFULLY
YOUR LEGAL RIGHTS MAY BE AFFECTED

YOU MAY BE ENTITLED TO RECEIVE $100,000

NOTICE CONCERNING SETTLEMENT

A proposed settlement in a class action lawsuit involving blood clotting factor concentrates is now pending in federal court in Chicago, Illinois and may affect your rights. Please read this Notice carefully.

If you or your family member is a person with hemophilia who used Factor VIII or Factor IX (Factor Concentrates) processed or distributed by any of the Defendants during 1978 through 1985 and are (or were) infected with HIV, you may be eligible to receive $100,000 as a result of the proposed settlement. This settlement may be available to you if you or your family member have a lawsuit pending in federal or state court, *or even if you have not filed a lawsuit*. This Notice describes your rights.

DESCRIPTION OF THE LITIGATION

The Honorable John F. Grady, a Judge of the United States District Court for the Northern District of Illinois, has pending before him numerous cases filed by persons with hemophilia, their HIV infected spouses and children, and their estates. These lawsuits claim injury from the use of HIV-contaminated plasma-derived factor concentrates, specifically Factors VIII and IX.

The principal defendants in these suits are: ALPHA THERAPEUTIC CORPORATION, GREEN CROSS OF AMERICA CORPORATION and THE GREEN CROSS CORPORATION (collectively. "Alpha"), ARMOUR PHARMACEUTICAL COMPANY, RHÔNE-POULENC RORER INC. (collectively, "Armour"), BAXTER HEALTHCARE CORPORATION and BAXTER INTERNATIONAL, INC. (collectively, "Baxter"; which also refers to Travenol Laboratories, Inc., and Hyland Therapeutics, a division of Baxter Healthcare Corporation), and BAYER CORPORATION and BAYER A.G. (collectively, "Bayer"; which also refers to Cutter Laboratories, Inc., Cutter Laboratories, a division of Miles, Inc., Miles Laboratories, Inc., Miles, Inc. and Miles Inc.). These Defendants are referred to in this Notice as the "Fractionators."

These lawsuits allege that the Fractionators are legally responsible for HIV infections caused by factor concentrates. The Fractionators have vigorously defended these lawsuits and deny any liability.

The Judicial Panel on Multidistrict Litigation consolidated all federal cases before Judge Grady in 1993. Thereafter, Judge Grady appointed a Plaintiffs' Steering Committee to conduct that litigation, including discovery of common issues, on behalf of all of those plaintiffs. Judge Grady has also attempted carefully to coordinate this consolidated federal litigation with the pretrial preparation of similar cases pending in various state courts.

On November 3, 1994, the District Court certified a litigation class action to resolve certain issues which it believed were common to all cases. However, on March 16, 1995, in response to a petition filed by the Fractionators, the United States Court of Appeals for the Seventh Circuit held that these issues were not properly certified as a litigation class action and directed that the class be decertified. On January 16, 1996, the District Court issued an Order decertifying the litigation class.

There has been substantial litigation before Judge Grady concerning the merits of the lawsuits which have been filed against the Fractionators including: examining, analyzing, and classifying over a million pages of the Fractionators' documents; briefing and arguing dozens of discovery and other pretrial motions; obtaining, analyzing and conducting hundreds of depositions, including depositions of the Fractionators' employees, and former employees; conducting extensive investigation, including medical and scientific research, into those common issues in this litigation impacting on any legal responsibility of the Fractionators; and retaining and presenting for deposition testimony medical and scientific experts.

On April 19, 1996, the Fractionators, without admitting liability, and to limit the time, expense and risks of continued litigation, proposed a nationwide settlement of all claims of all members of the Settlement Class (which is described below). In August, 1996, following extensive

negotiations among the Parties, a comprehensive settlement agreement was reached.

Judge Grady has certified a Settlement Class for purposes of considering whether to approve that settlement, which is described in this Notice. If you are a member of the Settlement Class defined below, your rights are affected by this Proposed Settlement. You are eligible to file a claim to participate in this Settlement even if the Fractionators have defenses to your claim, such as the statute of limitations, that might otherwise defeat your claim if you have filed or later file your own separate lawsuit. If you meet the definition of a Settlement Class member as described in the next section of this Notice ("Description of the Settlement Class"), no defenses that a Fractionator may have will play any role in determining whether or not you are eligible for this Settlement.

DESCRIPTION OF THE SETTLEMENT CLASS

The Settlement Class consists of all living persons who, as of August 13, 1996, are, and all deceased persons who at the time of their deaths were, citizens or permanent residents of the United States, including all of its possessions and territories, and persons who are not, and deceased persons who were not, citizens or permanent residents of the United States but who are, or whose personal representatives are plaintiffs in lawsuits against one or more of the Fractionators that, as of January 1, 1996, were pending in any Court of the United States, and who are or were:

(a) persons with hemophilia who used Factor Concentrates, processed or distributed by any of the Fractionators during the period from 1978 through 1985, and who are or were HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(b) all persons who, as a result of their relationship as spouses or as monogamous and cohabitating partners of at least two consecutive years duration of persons in paragraph (a), are or were also HIV infected (including those HIV infected persons who are or were also infected with hepatitis or any other infectious agents allegedly transmitted by such Factor Concentrates),

(c) all children of persons in sections (a) or (b) who as a result of their relationship with persons in sections (a) or (b) are or were HIV infected (including those HIV infected children who are or were also infected with hepatitis or any other infectious agent allegedly transmitted by such Factor Concentrates),

(d) all persons who are not or were not HIV infected but who nevertheless have or allegedly have derivative claims resulting from a family relationship (such as uninfected spouses, parents or children) with a person in sections (a), (b), or (c), based upon the use of such Factor Concentrates by a person with hemophilia, including, but not limited to, such claims as loss of consortium, love and support, fear of AIDS, hepatitis or any other infectious agents, emotional distress, or claims for wrongful death under an applicable wrongful death statute,

(e) parents or guardians, on behalf of any minor or otherwise legally incompetent class members in sections (a), (b), (c) or (d), and

(f) the estates and all persons who are now, or are eligible to become, executors, executrixes, administrators, administratrices or personal representatives of any deceased class members in sections (a), (b), (c), (d) or (e).

Expressly not a part of the Settlement Class are the following:

(a) any person who has previously made a claim, or who is a member of a Claimant Group which includes another person who has previously made a claim, against one or more of the Fractionators (including claims against one or more of the Fractionators and one or more non-Fractionators), as a result of which a payment or payments totaling $100,000 or more have already been made by one or more of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled for $100,000 or more;

(b) any person who has previously settled in any amount with all four of the Fractionators, or who is a member of Claimant Group which includes another person who has previously settled in any amount with all four of the Fractionators, unless such person has his or her own Direct Claim that has not previously been settled with all four of the Fractionators;

(c) any person who, since April 19, 1996, has settled in any amount with one or more of the Fractionators or who is a member of a Claimant Group which includes another person who since April 19, 1996, has settled in any amount with one or more of the Fractionators;

(d) any person who is or was a plaintiff in a lawsuit, or who is a member of a Claimant Group which includes another person who is or was a plaintiff in a lawsuit, against one or more of the Fractionators that has gone to final judgment in a trial court, unless such person has his or her own Direct Claim that has not gone to judgment, *provided, however*, that a person against whom judgment has been entered for lack of prosecution of a claims shall not be excluded for the Settlement Class;

(e) any person who submits a timely written request to be excluded from the Settlement Class; and

(f) any person who is a plaintiff in a case in which trial begins between the date of a conditional certification and the date of final certification of the Settlement Class, or whose claim relates to or derives from the plaintiff in such a case.

GENERAL ELIGIBILITY GUIDELINES

The following are merely general guidelines for eligibility and should not be read or understood to contradict the formal class definition outlined above which determines eligibility. To simplify matters, the basic guideline for eligibility is that each HIV infected person is generally eligible to receive $100,000 from the Settlement if he or she used Factor Concentrates processed or distributed by any of the Fractionators during the period 1978 through 1985. Also potentially eligible are persons who contracted HIV through birth, or sexual relations with a spouse or eligible partner who took Factor Concentrates. However, as stated in the class definition, family members of such persons (those who have what the law calls derivative claims) are not separately eligible to receive $100,000, unless they themselves are infected with the HIV virus.

To illustrate, an HIV infected person with hemophilia who used Factor Concentrates processed by any of the Fractionators at any time during the period 1978 through 1985 is eligible to file a claim and, if approved, to receive $100,000 under the Settlement. If his wife is HIV infected as a result of sexual relations with him, she may also file a claim, and if approved, receive a separate $100,000. If they had a child who was also HIV positive through birth, this child would also be eligible to file a claim and, if approved, receive a separate $100,000. However, if the spouse or child is *not* HIV positive, they are part of the "Claimant Group" of the infected father or husband, and cannot file a separate claim for $100,000.

A claim may be also filed on behalf of a person who is deceased. In the illustration above, if the father had

died, the executor of his estate, or his personal representative, can assert his claim. The same $100,000 payment will be made, just as though the father or husband were alive and had filed his own claim form. The same is true for a deceased spouse, or deceased child, who was HIV positive.

It is not necessary that the deceased person have died of AIDS. Death can be from any cause, so long as the deceased person met the definition of an HIV-infected Settlement Class member (paragraphs A, B, or C above).

You are a member of the Settlement Class if you meet the definition on page 2, regardless of whether your already have a lawsuit pending in federal or state court or have never filed any lawsuit. However, if you have filed a lawsuit against one or more of the Fractionators that has gone to judgment in a trial Court, you are probably not a member of the Settlement Class. In addition, this settlement offer is not available to people who choose to continue their lawsuits after the present Notice. *These individuals must choose either to participate in the present Settlement or to opt out and continue with their present lawsuits.*

The Fractionators have agreed that plaintiffs who previously settled claims with one, two or three (but not all four) of the Fractionators on or before April 19, 1996 for a total amount less than $100,000 are eligible to participate in the present Settlement up to a total of $100,000 (in other words, these individuals can receive the difference, if any, between the total of the previous settlement and $100,000) except that these claimants must be able to show that they used Factor Concentrate processed or distributed in the period 1978 through 1985 by at least one of the Fractionators with which they did not previously settle. For example, a Claimant who previously settled with Bayer and Armour for a total of $45,000 would be entitled to receive another $55,000, assuming proof of use of Factor Concentrate processed or distributed

by either Baxter or Alpha in the period 1978 through 1985.

PROPOSED SETTLEMENT AND PLAN OF DISTRIBUTION OF THE SETTLEMENT FUND

If you want to participate in this Settlement, you must file a Confidential Claim Form. This Form is included in the documents you received with this Notice. It says: "Confidential Claim Form and Exclusion Form" at the top. You must complete and return the form, postmarked on or before October 15, 1996 to the address indicated. All information you supply will be kept strictly confidential, by Order of the Court, and will not be published or disseminated in any way. It will only be used, under strict and confidential supervision, to determine your eligibility to participate in the Settlement.

The Claim Form is designed so that you can complete it yourself. You do not need a lawyer.

Class Counsel have conducted discovery and investigation into the facts of the pending Lawsuits, have studied the general legal principles applicable to the claims in these Lawsuits, as well as the general legal principles applicable to claims that might be made by members of the Settlement Class who are not plaintiffs in the Lawsuits, and have concluded that a class settlement with the Fractionators in the amount and on the terms set forth in this Notice is fair and reasonable, and is in the best overall interest of the Settlement Class. However, it is also recognized that in those instances where individual lawsuits can be successfully litigated and you are willing, preferably with the advice of an attorney, to assume the risks, the uncertainties, and the delay involved in the outcome of those lawsuits, you might obtain a larger net amount of compensation from an individual lawsuit than the $100,000 that you could receive from the present Settlement. On the other hand, if you pursue your own individual lawsuits, you might recover a lesser net amount

or nothing. This is an individual decision which you must make based on your own circumstances.

Under the Settlement terms, the Fractionators will pay $100,000 for each approved claim, in full and final settlement of the class members' claim. The Claimant (and members of that Claimant Group) will thereafter be barred from any further legal action against the Fractionators and all of their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the Fractionators and distributors for the Fractionators, as well as all directors, officers, employees, agents, insurers, and counsel of the foregoing, as well as their predecessors and successors concerning Factor Concentrate processed or distributed during the period 1978 through 1985.

If you accept this settlement, the $100,000 payment will *not* have any attorneys fees or costs deducted from it. Any attorney who has represented you will have to make application to Judge Grady for any counsel fee and reimbursement of costs, and any such payments will come from a separate fund which Judge Grady may approve, not from the $100,000 paid to you.

Acceptance of the Settlement will end all claims related to the use of Factor Concentrate that you have, or may have, against the Fractionators. You cannot accept the Settlement, and also file or continue your own lawsuit against Fractionators in either federal or state court. However, acceptance of the Settlement does not affect your right to pursue any claims you have against any person or organization other than the Fractionators (and all of their present and former corporate parents, subsidiaries, affiliates, partners and joint venturers, as well as suppliers to the Fractionators and distributors for the Fractionators, as well as all directors, officers, employees, agents, insurers, and counsel of the foregoing, as well as their predecesors and succesors). For example, if you have filed a lawsuit against some party other than the

Fractionators, acceptance of this Settlement will not bar you from continuing with that lawsuit, but it could, depending upon the state law applicable to your claim, reduce your total recovery in that lawsuit, especially if the Fractionators were found to be partially responsible for your injuries.

The Fractionators have made the settlement proposal with a desire to achieve substantially complete participation by affected members of the community. Therefore, under the Settlement Agreement, if too many persons decide not to participate, the Fractionators have the right (but are not obligated to) withdraw the Settlement offer. The Confidential Claim Form which has been sent to you includes, at the end, an "Exclusion Form." The "Exclusion Form" must be completed and postmarked on or before October 15, 1996 if you do *not* desire to participate in the Settlement.

The Settlement is conditioned on resolving issues relating to reimbursement and subrogation claims that might possibly be asserted—in which part or all of the $100,000 payment could be claimed by various public or private sector healthcare reimbursers or insurers, including Medicare and Medicaid—and issues relating to Class members' continuing eligibility for government programs such as Medicaid or Medicare payments. If these issues are not satisfactorily resolved, this Settlement will not go forward.

The Settlement is also subject to a decision by Judge Grady as to whether or not to approve the settlement as fair and reasonable to members of the Settlement Class. Judge Grady will make this decision after he conducts a final fairness hearing on the Settlement at the Chicago Federal Courthouse at 9:30 a.m. on November 25, 1996. This hearing, and your rights in connection with that hearing, are described below in the section titled "Final Fairness Hearing."

YOUR RIGHTS AND OPTIONS

If you are a member of the Settlement Class, you have the following rights and options.

A. *Your Right to Participate in the Settlement.*

You exercise this right by completing the enclosed Confidential Claim Form. You do not need a lawyer to file the enclosed Claim Form. The completed form, and all information contained in the form, will be treated as Confidential. *Your Confidential Claim Form must be postmarked on or before October 15, 1996.*

If you choose to participate, and you submit a timely Claim Form and your claim is approved, and if the overall settlement is approved by Judge Grady after the Fairness Hearing (and his Order is upheld and becomes final, in the event an appeal is taken), you will then be eligible to receive a $100,000 payment. Remember, only a single payment can be made to an HIV-infected person. That will end all of your claims against the Fractionators concerning any alleged contamination of Factor Concentrate, and you will not have the right to pursue separate law suits against the Fractionators on such claims.

B. *Your Right To "Opt Out" of the Settlement:*

If you are a member of the Settlement Class, you have the right to exclude yourself ("opt out") from the Settlement Class. If you exclude yourself, you cannot participate in the Settlement described in this Notice, and you cannot receive any of the Settlement Funds. You can, however, pursue your own lawsuit with your own attorney.

To exclude yourself from the settlement class, you must complete the "Exclusion Form" which is enclosed. (It is part of the "Confidential Claim Form and Exclusion Form" package on p. 5.) Print and sign your name, stating that you want to be excluded from the Settlement,

and return the Exclusion postmarked on or before October 15, 1996.

The decision whether to exclude yourself from the settlement class is one that should be made with care, and after considering such factors as: (1) the strengths, merits, and damages potentially recoverable in an individual case, and the risks of losing the lawsuit; (2) your desire to pursue or not pursue individual litigation against the Fractionators, and (3) the value to you of receiving from the Settlement Fund a definite, fixed amount at an earlier time, as opposed to your possible recovery in an individual lawsuit of a different amount in the future (which could be higher, lower or none at all). Each individual may have a greater or lesser chance to succeed in an individual lawsuit depending upon the specific facts of each case, the applicable state law, including the applicable the statute of limitations, and other defenses available to the Fractionators.

If you decide to opt out of the settlement class to pursue your own individual litigation, you (and your individual attorney, if you have one) *MUST* sign a completed Exclusion Form and return it postmarked on or before October 15, 1996, *even if you already have a lawsuit now pending in federal or state court against these Fractionators over the same subject matter.*

C. *Your Right to Support or Oppose the Settlement*

If you remain a member of the Settlement Class (in other words, you do not request to be excluded) you also have the right to support or oppose the Settlement at the Court Fairness Hearing. This right is described in more detail in the section of this Notice concerning the Court Fairness Hearing.

D. *Failure to File the Confidential Claim and Exclusion Form:* If you are a member of the Settlement Class described in this Notice, and you "do nothing"—in other

words, do not choose either to participate in the Settlement or exclude yourself ("opt out") from the Settlement Class—you will be barred from any further right to recover from the Fractionators for a claim concerning contamination of Factor Concentrates, even if you already have a lawsuit pending. You will not receive any money from the Settlement Fund, and you will also lose the right to pursue an individual lawsuit against these Fractionators.

FINAL FAIRNESS HEARING

Judge Grady will conduct a Fairness Hearing to determine whether the proposed settlement and plan of distribution is fair and reasonable for members of the Settlement Class. This hearing will be held on November 25, 1996 at the United States District Court, Northern District of Illinois, Eastern Division, Courtroom 2525, 219 South Dearborn Street, 9:30 a.m., Chicago local time. The Hearing may be adjourned without additional notice.

If you exclude yourself from the Settlement Class, this hearing does not concern you and you do not have the right to participate in the Hearing. If you remain a member of the Settlement Class, you have the right, if you choose, to file papers supporting or objecting to the Settlement, and to appear personally or through your attorney at this Hearing to speak in favor of, or in opposition to, the fairness and reasonableness of the proposed Settlement. If you approve of the Settlement, you do not need to attend the hearing and do not need to send papers stating your approval.

If you remain a member of the Settlement Class, you do not need to be represented by an attorney to support or oppose the Settlement. If you desire to write in favor of or in opposition to the Settlement, you should state each reason you support or oppose the Settlement. Your statement must be postmarked on or before October 15, 1996. You must send copies of your statement to each of the following: (1) Clerk of Court of the United

States District Court for the Northern District of Illinois, Eastern Division, MDL 986, 219 South Dearborn Street, Chicago, Illinois 60604; (2) David S. Sharger, Two Commerce Square, 2001 Market St., Philadelphia, Pa. 19103; (3) Dianne M. Nast, 36 E. King St., Suite 301, Lancaster, Pa., 17602; and (4) Sara J. Gourley, Sidley & Austin, One First National Plaza, Chicago, Illinois 60603. If you desire to appear and speak at the Fairness Hearing, so indicate in your statement. You do not have to appear at the hearing to write in favor of or to oppose the Settlement.

ATTORNEYS FEES AND COSTS

Attorneys fees and costs will not be deducted from the $100,000 Settlement amount sent to each eligible claimant who participates in the Settlement, except that if you consult an attorney solely to seek advice on the question of whether to participate in the Settlement, you will be personally responsible for paying that attorney's reasonable charges, if any, for such advice. All other payments will be made from the Cost and Fee Fund established by the Fractionators. The maximum amount of this Fund will be $40 million, plus accrued interest.

If the Settlement is approved by Judge Grady, all requests for attorneys fees and reimbursement of costs—both for members of the Plaintiffs' Steering Committee, and for individual lawyers representing members of the Settlement Class—will require approval by Judge Grady before any such payments of fees will be made.

No fee payments approved by Judge Grady will reduce the settlement payment to Settlement Class members. Applications for costs and fees must be filed of record on September 23, 1996 with the Clerk of Court, United States District Court, Northern District of Illinois Eastern Division, MDL 986, 219 South Dearborn Street, Chicago, Illinois, 60604, and will be available for your inspection

there. If you object to any fee request you must file your objection with the Clerk of Court at the above address and send a copy to the individuals listed in the "Additional Information" Section below. Any such objections must be postmarked on or before October 15, 1996.

The Court will also be requested to authorize payment from the Cost and Fee Fund for claims administration and for the costs of notice and similar costs. None of those costs will affect the Settlement amount to be paid to eligible claimants.

EXAMINATION OF PAPERS AND INQUIRIES

The Settlement Agreement has been filed and is available for inspection by any person during normal business hours at the office of the Clerk of the United States District Court, Northern District of Illinois, Eastern Division, 219 South Dearborn Street, Chicago, Illinois 60604. The Clerk's Office also has the pleadings, previous orders entered by the Court, and other papers.

Briefs and other papers of the settling parties in support of the Settlement will be filed with the Clerk of Court on or before September 16, 1996. Plaintiffs' Counsel's request for attorney fees and reimbursement of costs and expenses will be filed with the Clerk of Court on or before September 23, 1996. All such documents will be available at the office of the Clerk of Court for your inspection.

ADDITIONAL INFORMATION

ALL QUESTIONS RELATING TO THIS NOTICE MAY BE DIRECTED TO THE FOLLOWING PLAINTIFFS' COUNSEL

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You may call 1-800-836-9376, if you have questions.

If you know of someone who wants to receive this Notice, please send his or her name to one of the attorneys listed above.

PLEASE DO NOT WRITE OR CALL THE COURT OR THE CLERK'S OFFICE FOR INFORMATION

Dated: August 20, 1996

By: /s/ _____
Clerk of the Court
United States District Court
Northern District of Illinois
Eastern Division
219 South Dearborn Street
Chicago, Illinois 60604

November 25, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MDL 986
No. 93 C 7452

IN RE FACTOR VIII OR IX CONCENTRATE
BLOOD PRODUCTS LITIGATION
This Document Relates to: Walker v. Bayer,
96 C 5024

PRETRIAL ORDER NO. 38

On November 25, 1996, a fairness hearing was held on the proposed settlement between the plaintiff class and the fractionator defendants. Various members of the class and other non-attorneys spoke against the settlement and in favor of it, making numerous thoughtful arguments and comments. A number of attorneys also spoke in regard to various aspects of the proposed settlement. All persons who indicated a desire to speak were heard.

As the court explained during the hearing, it is not ready to rule on the question of fairness until it has been determined that by accepting the settlement each eligible class member will in fact receive $100,000.00 net of medical reimbursement claims by insurers and governmental agencies and, further, that they will not jeopardize their entitlement to future medical and disability benefits from Social Security and other sources. Counsel for the defendants and the class will use their best efforts to resolve these questions at the earliest possible time. Toward that end, class members will be sent a letter by December 6, 1996, inquiring as to their eligibility for

governmental programs. This information will be useful in determining what agencies need to be contacted in regard to the protection of future benefits. A copy of the letter should be sent to the court for its information.

There is disagreement as to whether two sets of claimants are included in the class and are eligible for participation in the settlement. One is a group of claimants whose cases were dismissed in Minnesota state court on August 13, 1996. Defendants take the position that since judgment was entered against these plaintiffs, they are, by definition, excluded from the class. These plaintiffs, on the other hand, contend that because they are appealing from the dismissal of their cases, and the judgments are therefore not "final" under Minnesota law, they are eligible members of the class.

The court believes that the appropriate way to determine the rights of these nine claimants is by recourse to the dispute resolution procedures provided for in the settlement agreement, with the court making the final determination if necessary. If the settlement is not approved, then, of course, the question will be moot.

The other eligibility question concerns persons with Von Willebrand's Disease, who claim they are hemophiliacs within the class definition. Defendants dispute this, contending that Von Willebrand's Disease is a separate malady for which defendants' products are neither sold nor recommended. This is another matter which will be moot if the settlement is not approved, and the court believes the way to handle it, if and when the time comes, is by recourse to the dispute resolution procedure under the settlement agreement. As the court indicated at the fairness hearing, it may be necessary for the court to hear expert medical testimony on the issue. Nothing that has been submitted in writing thus far would enable the court to make a determination at this time.

As was emphasized by many of the speakers at the fairness hearing, time is of the essence of this proposed

settlement. The court is sensitive to that fact and is prepared to rule upon the fairness question immediately upon resolution of the reimbursement and entitlement questions noted above.

DATED: November 25, 1996

ENTER: /s/ John F. Grady
JOHN F. GRADY
United States District Judge

...ION FILED
EC 2 4 1996

(14)

No. 96-270

In The

Supreme Court of the United States

October Term, 1996

AMCHEM PRODUCTS, INC., et al.,

Petitioners,

vs.

GEORGE WINDSOR, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

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December 24, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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3 pp

The National Association of Securities and Commercial Law Attorneys (NASCAT), by its Counsel of Record and pursuant to Rule 21, hereby files its Motion for Leave to File Brief of Amicus Curiae. In support of this Motion, NASCAT hereby shows the following:

1. On December 16, 1996, NASCAT sought to file the accompanying Brief as *Amicus Curiae* in support of Petitioners. Pursuant to Rule 37, NASCAT's brief was accompanied by consent letters signed by Counsel of Record for Petitioners and Respondents. Due to a miscommunication, the brief was sent to this Court by NASCAT's contract printer via U.S. overnight mail delivery service on December 16, 1996. As a result, NASCAT's brief was not on file with this Court on or before 3:00 p.m. on December 16, 1996, per this Court's Orders dated November 1 and 4, 1996.

2. NASCAT respectfully requests this Court to accept and file its accompanying Brief as *Amicus Curiae* in this case. NASCAT believes that the arguments set forth in its brief will materially assist this Court in deciding this case. No party has been prejudiced by the above-referenced slight delay in the submission of NASCAT's brief to this Court.

WHEREFORE, NASCAT respectfully submits that its accompanying Brief as *Amicus Curiae* should be accepted by this Court and filed in this case.

DATED: December 24, 1996

Respectfully submitted,

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No. 96-270

In The

Supreme Court of the United States

October Term, 1996

AMCHEM PRODUCTS, INC., et al.,

Petitioners,

vs.

GEORGE WINDSOR, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAWYERS (NASCAT) IN SUPPORT OF PETITIONERS

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38 pp

QUESTION PRESENTED

When the parties to a putative class action enter into a settlement, must the district court nevertheless pretend that every legal and factual issue will be contested, and ignore the existence of the settlement, in determining whether class certification is appropriate under Rule 23 of the Federal Rules of Civil Procedure.

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAWYERS (NASCAT) IN SUPPORT OF PETITIONERS

The National Association of Securities and Commercial Law Attorneys (NASCAT), by its Counsel of Record and pursuant to Supreme Court Rule 37.3, hereby files its *amicus curiae* brief in support of Petitioners.[1] For the reasons stated herein, the decision of the court below should be reversed.[2]

I. INTEREST OF AMICUS CURIAE

NASCAT is an association of law firms and attorneys who litigate class action cases involving antitrust, commercial, consumer, employee (and retiree) benefit, environmental and securities fraud claims in federal and state courts. NASCAT's members frequently represent victims of corporate abuse, schemes to defraud and so-called "white collar" criminal activity. In class actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve the access of victims to justice. As part of these efforts, NASCAT advocates the enactment and enforcement of effective state and federal laws to prevent wrongful,

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[1] Pursuant to Rule 37.3(a), NASCAT has lodged with this *amicus curiae* briefs consent letters signed by Counsel of Record for Petitioners and Respondents.

[2] The Third Circuit's decision is reported as *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir.), *cert. granted*, 117 S. Ct. 379 (1996).

fraudulent, deceptive and manipulative business practices. NASCAT and its members also support the practical and utilitarian construction and application of Rule 23 of the Federal Rules of Civil Procedure (and its state law equivalents) in class action litigation.[3]

Over the past thirty years, NASCAT's members have litigated and settled literally hundreds of class action lawsuits[4] filed in federal and state courts under Rule 23 (or its

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[3] NASCAT has previously filed *amicus curiae* briefs in this Court in a variety of contexts. *See, e.g., Grimmett v. Brown*, No. 95-1722 (RICO); *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996) (ERISA); *BMW of N. Am. v. Gore*, 116 S. Ct. 1589 (1996) (punitive damages); *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995) (ERISA); *Plaut v. Spendthrift Farm*, 115 S. Ct. 1447 (1994) (securities fraud); *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061 (1995) (securities fraud); *Boca Grande Club v. Florida Power & Light*, 114 S. Ct. 2703 (1994) (settlement – contribution); *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) (securities fraud); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286 (1993) (securities fraud); *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (RICO); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) (RICO).

[4] "The class action was an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs." *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948). Class actions long have been part of American jurisprudence and for more than a century this Court has held that they were authorized by the equity rules in suits involving members of a class so numerous that it was impracticable to join them all as parties. *See, e.g., Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921). In *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1854), this Court allowed a representative suit to be brought on

state court equivalents)[5] in virtually every substantive area of the law. NASCAT's members frequently bring securities fraud class actions under the Securities Act of 1933 and/or the Securities Exchange Act of 1934 and our collective experience has demonstrated that the class action "is the primary vehicle through which shareholders seek to vindicate their rights against allegedly fraudulent corporate conduct."[6] Courts and commentators have uniformly

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behalf of all the preachers in the Methodist Episcopal Church South seeking a declaration of the respective rights of each sectional group of the Methodist Episcopal Church of the United States to funds originally belonging to the entire church. This Court found that both groups of litigants had a "common interest" or "common right" to the assets in question, and equated that common interest, and the adequacy of representation signified by it, with the binding effect of the decree. *Id.* at 303. Despite the lack of notice and opportunity to be heard for many class members, this Court found the basic procedural conditions to bringing a class action to have been satisfied, thereby placing its imprimatur on the binding class action. *Id.* at 302-03.

[5] As originally adopted in 1938, Rule 23 represented "a bold and well-intentioned attempt to encourage more frequent use of class actions." 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1752, at 15 (1986). Its provisions were completely rewritten and augmented in 1966. *Id.*, § 1753 at 41.

[6] Stephen E. Morrissey, Note, *State Settlement Class Actions That Release Exclusive Federal Claims: Developing a Framework for Multijurisdictional Management of Shareholder Litigation*, 95 Colum. L. Rev. 1765, 1765 (1995) ("Morrissey, *State Settlement Class Actions*"). In the securities fraud context, the class action mechanism is seen as particularly appropriate for two reasons: "first, the alleged misconduct on the part of the defendant company's officers and directors is often the same from the standpoint of each individual shareholder; second, with small

lauded the class action as an important and effective tool in enforcing the federal securities laws.[7]

In order to resolve complex securities fraud (and other types of) class actions involving multi-million dollar claims being litigated on behalf of thousands of geographically diverse class members, NASCAT's members have filed so-called "settlement class actions" (similar to the litigation and settlement at issue in this case) or, to effectuate a settlement agreement with defendants, have agreed to seek certification of a "settlement class."[8] As a

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losses spread among large numbers of shareholders, the class mechanism is perhaps the only means through which shareholder litigation is economically viable." *Id.* at 1765 n.1 (citing Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1 (1991)).

[7] *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 764-68 (1975) (Blackmun, J., dissenting); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 678-83 (1986) (noting "obvious" advantages of the class action mechanism); 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1781, at 28 (1986) ("Because most securities cases involve hundreds or thousands of class members who typically possess only small individual claims, the class action provides a useful mechanism for enforcing the policies underlying the securities laws and should be liberally allowed.") (footnote omitted).

[8] *See, e.g., In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig.*, 55 F.3d 768 (3d Cir.) ("*GM Trucks*") (holding that settlement class actions are cognizable under Rule 23 but setting aside settlement in question due to the district court's failure to make requisite Rule 23 findings), *cert. denied*,

result of their collective experience, NASCAT's members believe that (1) settlement classes may be properly used to facilitate settlement of complex litigation; (2) Rule 23 permits settlement class actions to be brought by claimants and permits settlement classes to be certified by the district courts; (3) the district courts may properly use the fact of settlement to determine that the requirements of Rule 23 have been met in a particular case; and (4) settlement classes are properly used to resolve complex cases where they are subject to the district court's review of the fairness and adequacy of the settlement. *See* Part III.A-D, *infra*.

In this case, which involves the settlement of a nationwide class action encompassing hundreds of thousands of individual asbestos claims and settlement payments worth more than $1 billion, the Third Circuit invalidated the settlement agreement, holding that where the parties to a putative class action enter into a settlement, the district court must act as if the settlement does not exist and apply Rule 23's class certification criteria

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116 S. Ct. 88 (1995); *In re Drexel Burnham Lambert Group*, 960 F.2d 285 (2d Cir. 1992) (affirming district court's certification of settlement class and subclasses and approving settlement agreement), *cert. dismissed*, 506 U.S. 1088 (1993); *In re Prudential Sec., Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200 (S.D.N.Y. 1995) (certifying settlement class and approving settlement providing $100 million recovery in RICO class action involving 700 limited partnerships and 100,000 investors); *Klein v. McDonnell Douglas Corp.*, Case No. 4:95-CV-02225 TCM (E.D. Mo. Feb. 9, 1996) (certifying settlement class and approving settlement providing lifetime supplemental pension benefits worth $450+ million in ERISA health care benefits class action involving 24,000 retirees).

"as if the case were going to be litigated." *Georgine*, 83 F.3d at 624 (citing *GM Trucks*, 55 F.3d at 799-800).[9] In its opinion, the court below acknowledged that "the better policy may be to alter the class certification inquiry to take settlement into account," but asserted that "the current Rule 23 does not permit such an exception." 83 F.3d at 618.[10] In so holding, the court below refused to follow reported decisions from the Second, Fifth, Eighth, Ninth and Eleventh Circuits, all of which have relied on the fact of settlement in applying Rule 23's requirements and certifying settlement classes in numerous cases.

NASCAT and its members respectfully submit that the decision of the court below ignores the letter and well-recognized practical construction of Rule 23, the collective experience of the federal courts in reviewing proposed settlements under Rule 23(e), as well as the " 'strong judicial policy that favors settlements.' " *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)

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[9] *See also Georgine*, 83 F.3d at 626 (holding that "the rule in this circuit is that settlement class certification is not permissible *unless the case would have been 'triable in class form'* " and that "the Rule 23(a) requirements of commonality, typicality, and adequacy of representation, and the Rule 23(b)(3) requirements of predominance and superiority . . . must be satisfied *without taking into account the settlement, and as if the action were going to be litigated*") (emphasis added) (quoting and citing *GM Trucks*, 55 F.3d at 799).

[10] In *GM Trucks*, 55 F.3d at 798, the Third Circuit acknowledged that other courts of appeals uniformly take the existence of settlement into account in finding that Rule 23's requirements had been satisfied and upholding class certification, but it stated that it "disagree[d] with this approach." *Id.* at 799. *See also* Part III.C, *infra*.

(citatio[illegible]mitted). As a practical matter, the Third Circuit's decision in this case means that complex class action cases arising in that circuit cannot be easily settled but, rather, must be litigated for years at a cost of millions of dollars, to the collective detriment of claimants, defendants and the courts.

Given the frequency of its use in a wide variety of class actions, this case presents an appropriate occasion for this Court to hold that "settlement classes" and "settlement class actions" are authorized by Rule 23. This Court should endorse the approach utilized by a majority of the courts of appeals (and the greater number of district courts) and hold that the fact of settlement should be taken into account by trial and appellate courts in applying Rule 23's requirements. Because the Third Circuit refused to do so in this case, NASCAT and its members agree with Petitioners that the decision of the court below should be reversed.

II. ARGUMENT

A. Settlement Class Actions And Settlement Classes Are Properly Used To Facilitate Settlement Of Complex Litigation

As this Court has recognized, settlement is the principal means of resolving civil litigation in the federal courts. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 114 S. Ct. 1461, 1469 n.22 (1994) (observing that "[l]ess than five percent of cases filed in federal court end in trial" and that "the bulk of nontrial terminations reflect settlements"). Given this reality, the federal courts have

adhered to "the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir.), *cert. denied*, 506 U.S. 953 (1992).[11] In the words of the court below, a "settlement class" is a procedural device

> whereby the court postpones formal class certification until the parties have successfully concluded a settlement. If settlement negotiations succeed, the court certifies the class for settlement purposes only and sends a combined notice of the commencement of the class action and the settlement to the class members. By conditionally certifying the class for settlement purposes only, the court allows the defendant to challenge class certification in the event that the settlement falls apart.

Georgine, 83 F.3d at 625 n.9.[12] The "settlement class" (or "settlement class action"), which has been successfully employed by class action claimants and defendants for more than two decades,[13] "now has become commonplace in the federal courts" as a means of resolving complex cases.[14] As a result, the *Manual for Complex Litigation*

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[11] *Accord GM Trucks*, 55 F.3d at 805 (noting "the growing frequency of the settlement of increasingly large claims through the class action device" and the fact that "[c]ourts undertaking the special role of supervising class action settlements are apparently heeding the public policy in favor of settlement, and acknowledging the urgency of this policy in complex actions that consume substantial judicial resources and present unusually large risks for the litigants"); *Pacific Enters.*, 47 F.3d at 378 ("When reviewing complex class action settlements, we have a 'strong judicial policy that favors settlements.' ") (quoting *Class Plaintiffs*, 955 F.2d at 1276); *In re School Asbestos Litig.*, 921 F.2d 1330, 1333 (3d Cir. 1990) (referring to "our policy of encouraging settlement of complex litigation that otherwise could linger for years") (citations omitted); *Air Line Stewards & Stewardesses Ass'n v. Trans World Airlines*, 630 F.2d 1164, 1166-67 (7th Cir. 1980) ("Federal courts look with great favor upon voluntary resolution of litigation through settlement. . . . This rule has particular force regarding class action lawsuits."), *aff'd*, 455 U.S. 385 (1982); *Prudential*, 163 F.R.D. at 209 ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.") (citing, *inter alia*, *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993)).

[12] *See also GM Trucks*, 55 F.3d at 786; *In re Del-Val Fin. Corp. Sec. Litig.*, 162 F.R.D. 271, 273 n.3 (S.D.N.Y. 1995); Roger C. Cramton, *Symposium: Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 823 (1995) ("settlement class action" refers to a class action "that is designed to be settled rather than litigated, with the defendant not objecting to certification of the class providing the settlement is approved"); Morrissey, *State Settlement Class Actions*, 95 Colum. L. Rev. at 1766 (in settlement class actions, "a class is certified 'for settlement purposes only' at the instance of the litigants' counsel, who often have prearranged the terms of settlement"); William W. Schwarzer, *Symposium: Settlement of Mass Tort Class Actions: Order out of Chaos*, 80 Cornell L. Rev. 837, 840-41 (1995) (same).

[13] *See* Comment, Developments in the Law – Class Actions, 89 Harv. L. Rev. 1318, 1555 n.105 (1976) ("*Developments*") (listing settlement class cases from as early as 1971).

[14] Note, *Back to the Drawing Board: The Settlement Class Action and the Limits of Rule* 23, 109 Harv. L. Rev. 828, 831 n.27 (1996) ("Note, *Back to the Drawing Board*") (citing John C. Coffee, Jr., *Class Action Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1378 n.123 (1995) ("Settlement class actions are not only common, but in some district courts appear to constitute the majority of certified class actions.")). For additional commentary on settlement class actions, *see* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L.

§ 30.45 (3d ed. 1995) ("*MCL 3d*") recognizes that "courts permit the use of settlement classes" involving the certification of the class "for settlement purposes only," and "permit defendants to settle while preserving the right to contest the propriety and scope of the class allegations if the settlement is not approved." *Id.* at 243. "The costs of litigating class certification are saved and litigation expense is generally reduced by an early settlement." *Id.*[15]

Rev. 469, 472 (1994), and Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 961-62 (1995).

[15] There are numerous reported cases in which district courts have certified settlement classes in securities fraud class actions. *See, e.g., Harden v. Raffensperger, Hughes & Co.*, 933 F. Supp. 763, 768 (S.D. Ind. 1996) (approving settlement of securities fraud class action and certifying settlement class); *Del-Val*, 162 F.R.D. at 273 n.3 (numerous courts have used their discretion to issue orders conditionally certifying classes for purposes of facilitating settlements). *See also In re Kendall Square Research Corp. Sec. Litig.*, 869 F. Supp. 53, 54 (D. Mass. 1994); *Wells v. Dartmouth Bancorp, Inc.*, 813 F. Supp. 126, 130 (D.N.H. 1993); *Balsam v. Eastchester Fin. Corp.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,900 (E.D.N.Y. 1992); *In re Farmers Group Stock Options Litig.*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,522 (E.D. Pa. 1991); *In re Businessland Sec. Litig.*, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96,059 (N.D. Cal. 1991); *Cagan v. Anchor Sav. Bank FSB*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) 95,324 (E.D.N.Y. 1990); *Sanders v. Robinson Humphrey/American Express, Inc.*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) 95,315 (N.D. Ga. 1990); *Moorhead v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) 94,448 (D. Minn. 1989); *Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 545-46 (D. Colo. 1989); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 537 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990); *Mashburn v. National*

As the Third Circuit acknowledged in *GM Trucks*, 55 F.3d at 793, "resistance to more flexible applications of Rule 23 has diminished over time," *id.*, as the federal courts (and many commentators) have recognized the benefits of settlement classes and settlement class actions. As the court elaborated in that case:

> The evolution of the reception accorded settlement classes has manifested itself in the successive versions of the Manual for Complex Litigation. The first edition of the Manual criticized the initiation of settlement negotiations before certification, and discouraged all such negotiations. *See* MCL 1st § 1.46. The second edition recognizes the potential benefits of settlement classes but still cautioned that "the court should be wary of presenting the settlement to the class." MCL 2d § 30.45 at 243. The (draft) third version acknowledges that "settlement classes offer a commonly used vehicle for the settlement of complex litigation" and aims only to supervise rather than discourage their use.

Id. at 793-94.

In complex cases – whether the action involves a mass tort or an alleged scheme to violate the federal securities laws – the settlement class action permits litigants to use the courts to overcome collective action

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Healthcare, Inc., 684 F. Supp. 660, 665 & n.4, 675 (M.D. Ala. 1988); *In re Wicat Sec. Litig.*, 671 F. Supp. 726, 730 (D. Utah 1987); *In re First Commodity Corp. Customer Accounts Litig.*, 119 F.R.D. 301, 308 (D. Mass. 1987); *Bush v. Rewald*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) 92,999 (D. Haw. 1986).

problems that often preclude settlement.[16] In *GM Trucks*, the Third Circuit expressly recognized the utility of the settlement class action in complex cases:

> The use of settlement classes can thus enable both parties to realize substantial savings in litigation expenses by compromising the action before formal certification. Through settlement class certification, courts have fostered settlement of some very large, complex cases that might otherwise never have yielded deserving plaintiffs any substantial remuneration.

55 F.3d at 790 (citing 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11.09, at 11-13 (3d ed. 1992)). Thus, as the Third Circuit made clear in that opinion, the federal courts' recognition and utilization of settlement classes have dramatically increased the number of actions that are amenable to settlement by increasing the rewards of a negotiated settlement by (1) increasing a defendant's incentive to settle because the settlement would bind the members of the class and prevent further lawsuits against the defendant; (2) reducing litigation costs by permitting

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[16] *See* Roger H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 Cornell L. Rev. 779, 835 (1985) ("Transgrud, *Joinder Alternatives*") (in complex cases, use of a settlement class can help overcome certain elements of these actions that otherwise can considerably complicate efforts to settle, including "the large number of individual plaintiffs and lawyers; . . . the existence of unfiled claims by putative plaintiffs; and . . . the inability of any single plaintiff to offer the settling defendant reliable indemnity protection"); Bruce H. Neilson, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 Harv. J. Legis. 461, 480 (1988) (same).

defendants to stipulate to class certification without forfeiting any legal arguments against certification if settlement negotiations fail; (3) reducing differences among class members, thereby making class certification more likely and increasing the value of the settlement to the defendant; and (4) reducing the likelihood of a successful challenge to the class-wide settlement. *GM Trucks*, 55 F.3d at 790-91.

"In sum, settlement classes clearly offer substantial benefits." *Id.* at 792. As set forth below, their long-standing use in the federal courts represents a well-justified practical construction and application of Rule 23 and their validity should be recognized by this Court.

B. Rule 23 Permits Settlement Class Actions To Be Brought By Claimants And Permits Settlement Classes To Be Certified By The Trial Courts

Although settlement classes are not specifically authorized by Rule 23, they are not specifically precluded by it either. *See* 2 *Newberg on Class Actions* § 11.27, at 11-44; *Del-Val*, 162 F.R.D. at 273 n.3. After surveying numerous lower court decisions and commentary, in *General Motors* the Third Circuit expressly held that settlement classes are cognizable under Rule 23. 55 F.3d at 792-94. As that court recognized, the judicial authority to establish settlement classes springs, at least in part, from Rule 23(d), which provides that the trial court may make "appropriate orders" determining the course of proceedings. *See In re Baldwin-United Corp.*, 105 F.R.D. 475, 478-79

(S.D.N.Y. 1984) (Rule 23(d) authorizes the creation of "tentative," "provisional," or "conditional" classes).[17]

Alternatively, Rule 23(c)(1), which authorizes the trial courts to enter "conditional" orders, provides additional authority for the settlement class. *See GM Trucks*, 55 F.3d at 792-93.[18] As the Third Circuit has observed, "no court of appeals that has had the opportunity to comment on the propriety of settlement classes has held that they constitute a per se violation of Rule 23." *Id.* at 794 (citing

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[17] *See also GM Trucks*, 55 F.3d at 792 (discussing Rule 23(d) and concluding that "[w]e believe that the 'provisional' or 'conditional' conception of the settlement class device finds at least a colorable textual basis in the Rule") (footnotes omitted); *South Carolina Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1428 (D.S.C. 1990) ("It is clear that the Court may provisionally certify the Class for settlement purposes."); 7B Charles A. Wright, *et al.*, § 1791, at 286-88 (analyzing Rule 23(d)); Note, *Back to the Drawing Board*, 109 Harv. L. Rev. at 834-36 (same).

[18] *See also In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 177 (5th Cir. 1979) ("Rule 23 does not deal specifically with a tentative settlement class. 'However, a tentative class would appear to be a form of conditional certification, sanctioned by Rule 23(c)(1).' ") (quoting *Developments*, 89 Harv. L. Rev. at 1357 n.111); *Del-Val*, 162 F.R.D. at 273 n.3 ("Although Rule 23 does not expressly authorize the 'settlement class' device, a number of courts have used their discretion to issue an order conditionally certifying a class for purposes of facilitating settlement."); 2 *Newberg on Class Actions* § 11.27, at 11-55 (Rule 23(c)(1) "authorizes a class ruling to be altered or amended by the court at any time before a judgment on the merits" and such "procedure has been used in the context of a class redefinition for settlement purposes"); Transgrud, *Joinder Alternatives*, 70 Cornell L. Rev. at 835 ("[I]f conditional certification of the case as a common question class action for settlement purposes would enhance the prospects for a group settlement, then Rule 23 authorizes certification.").

Second, Third, Fifth, Seventh and Ninth Circuit decisions).[19]

Therefore, in accordance with the unanimous weight of authority, this Court should recognize that settlement classes are authorized by Rule 23 because "[s]uch construction affords considerable economies to both the litigants and the judiciary and is also fully consistent with the flexibility integral to Rule 23." *Id.*; *see also In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 832-33 (W.D. Pa. 1995).[20]

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[19] In addition, numerous district courts have certified settlement classes in securities fraud class actions. *See, e.g., Prudential*, 163 F.R.D. at 205 (certifying settlement class and approving $100 million settlement in RICO class action involving 700 limited partnerships and 100,000 investors; "The settlement class device has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants."); *Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) (certifying settlement class); *In re Drexel Burnham Lambert Group*, 130 B.R. 910, 912, 918-24 (S.D.N.Y. 1991) (court "certified temporarily, and for settlement purposes only, a mandatory non-opt-out class of all securities litigation claimants . . . and two mandatory, non-opt-out subclasses" and subsequently certified the classes in conjunction with approval of the settlement, analyzing the pertinent requirements of Rule 23), *aff'd*, 960 F.2d 285, 290-92 (2d Cir. 1992), *cert. dismissed*, 506 U.S. 1088 (1993).

[20] The Advisory Committee is in the process of considering modifications to Rule 23 and has proposed authorizing certification of settlement classes that need not meet the requirements of Rule 23(b)(3). *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996); Fed. R. Civ. P. 23(b)(4) (Draft Aug. 15, 1996); Lorna G. Schofield, *Proposed Amendments Offer an Efficient Next Step in Class Action Management* 22 Litigation News

C. The Trial Courts May Properly Use The Fact Of Settlement To Determine That The Requirements Of Rule 23 Have Been Met

This case presents an unreconcilable conflict between the court below and every other circuit court to address the Question Presented: Whether the trial court must ignore the existence of the settlement in determining whether Rule 23's requirements have been satisfied. As noted above, the Third Circuit held in this case that the requirements of Rule 23(a)(1)-(4) and (b)(3) "must be satisfied *without taking into account the settlement*, and as if the action were going to be litigated." *Georgine*, 83 F.3d at 626 (emphasis added) (citing *GM Trucks*, 55 F.3d at 799). This holding is in stark contrast to the rule followed in every other circuit court to consider this question.

Thus, in *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), which affirmed approval of a "global settlement"

1, 5 (ABA Section of Litigation Nov. 1996) (proposed Rule 23(b)(4) provides that a class action may be maintained if the requirements of Rule 23(a) are met and the parties to a settlement request certification under Rule 23(b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial); Samuel Estreicher, *Foreword, Federal Class Actions After 30 Years*, 71 N.Y.U. L. Rev. 1, 6 & n.26 (1996) (same); Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. Rev. 13 (1996) (discussing proposed changes to Rule 23); William W. Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revised?*, 94 Mich. L. Rev. 1250 (1996) (same); Note, *Back to the Drawing Board*, 109 Harv. L. Rev. at 842, 844-45 (observing that "either the Supreme Court must address the issue directly, or the advisory committee must alter Rule 23," and offering proposed Rule 23(f)).

of asbestos-related personal injury and death claims worth $1.535 billion, intervenors who were opposed to the settlement argued in the appellate court that the trial court had erred by "considering the circumstances surrounding the settlement and the evidence adduced at the fairness hearing in making findings under Rule 23(a)." *Id.* at 975. Stating that "[t]his argument is contrary to Fifth Circuit precedent *and would require a court to ignore important and relevant information that sits squarely in front of it when deciding whether to certify a settlement class*," *id.* (emphasis added),[21] and observing that "[m]ost circuits to decide the issue have held that courts should consider the settlement in determining whether Rule 23 prerequisites are satisfied," *id.*,[22] the Fifth Circuit flatly

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[21] In *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195 (5th Cir.), *aff'd*, 659 F.2d 1322 (5th Cir. 1981), *cert. denied*, 456 U.S. 998, and *cert. denied*, 456 U.S. 1012 (1982) (*"Container I"*), the Fifth Circuit held that the district court should consider the settlement in deciding whether the settlement class satisfied the prerequisites of Rule 23. 643 F.2d at 211. The court rejected a challenge to the district court's finding that the class was adequately represented (as required by Rule 23(a)(4)) and found that the terms of the settlement were virtually important to the determination that certification was appropriate. *Id.* The Fifth Circuit followed this precedent in *Asbestos Litig.*, 90 F.3d at 975.

[22] In its opinion, *see Asbestos Litig.*, 90 F.3d at 975, the Fifth Circuit cited cases from the Second, Fourth, Eighth and Eleventh Circuits. *See Malchman v. Davis*, 761 F.2d 893, 900 (2d Cir. 1985) (certification appropriate in settlement of class action antitrust suit because "the interest of the members of the broadened class *in the settlement* agreement were commonly held, and there is therefore no basis for disturbing the district court's finding on adequacy of representation") (emphasis added); *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 740 (4th Cir. 1989) (affirming settlement approval and class certification in

rejected the approach followed by the Third Circuit in this case:

> Only the Third Circuit has refused to look at settlements before it when deciding class certification issues and even that court admits that taking the settlement into account may be "the better policy." *Georgine v. Amchem Products, Inc.*, [83 F.3d 610, 617-18 (3d Cir. 1996)]. *The rule that a court should consider a proposed settlement, if one is before it, when deciding certification issues makes good sense. Settlements and the events leading up to them add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint. See* Herbert Newberg & Alba Conte, 2 *Newberg on Class Actions* § 11.28 at 11-58 (3d ed. 1992) (in settlement class context, common issues arise from the settlement itself).
>
> We are bound to follow *Container I*'s holding that the district court *can and should look at the terms of a settlement in front of it as part of its certification inquiry. We would adopt this rule even if we were not bound by precedent because it*

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products liability class action; "If not a ground for certification *per se*, certainly settlement should be a factor, and an important factor, to be considered when determining certification. That is all the District Court did in this case. Its action in considering the circumstance would appear to have been appropriate."); *White v. National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) ("The adequacy of class representation . . . is ultimately determined by the settlement itself.") (citing *Container I*, 643 F.2d at 212), *cert. denied*, 115 S. Ct. 2569 (1995); *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1543 (11th Cir. 1987) ("[I]n assessing the propriety of class certification, the courts evaluate the negotiation process and the settlement itself.").

> *enhances the ability of district courts to make informed certification decisions.*

Asbestos Litig., 90 F.3d at 975 (emphasis added; citation omitted). As noted above (*see* note 22, *supra*), the Fifth Circuit's approach has been followed in every other circuit to consider the issue, save the Third Circuit. *See, e.g., Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *Beef Indus.*, 607 F.2d at 173-78; *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174-75 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1544 (1996); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 633 (9th Cir. 1982).

D. Settlement Classes Are Properly Used To Resolve Complex Cases Where They Are Subject To The Trial Courts' Review Of The Fairness, Adequacy And Reasonableness Of The Settlement

As noted above, in *GM Trucks* the Third Circuit expressly held that settlement classes are valid under Rule 23. 55 F.3d at 792-94. In that specific case, however, the appellate court determined that the settlement was not fair and adequate. The Third Circuit's opinion stated that the district court abused its discretion when it relied upon class counsel's representation as to the value of the settlement, overestimated the risk of bringing a class action and establishing the liabilities, and misinterpreted the reaction of the class. *Id.* at 800-01, 804-19. *See Weiss v. Mercedes-Benz of N. Am.*, 899 F. Supp. 1297, 1303 (D.N.J.) (discussing *GM Trucks* decision), *aff'd without opinion*, 66 F.3d 314 (3d Cir. 1995).

It is well-settled that the approval of a proposed class action settlement is committed to the sound discretion of the district court. *See, e.g., Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 965 (3d Cir. 1983); 7B Charles A. Wright, *et al.*, § 1797.1, at 393-94. Under Rule 23(e), the district court determines whether a proposed settlement is "fundamentally fair, adequate, and reasonable." *Pacific Enters.*, 47 F.3d at 377 (quoting *Class Plaintiffs*, 955 F.2d at 1276).[23] In the words of Senior Judge Pollack, "[t]he ultimate test for the exercise of the Court's discretion in approving a settlement of a class action pursuant to Rule 23 is whether the settlement, taken as a whole, is fair, adequate, and reasonable." *Michael Milken*, 150 F.R.D. at 53 (citing, *inter alia, Protective Committee for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424-25 (1968)).[24]

Where (as here) the district court *simultaneously* certifies a class and approves a settlement of the action, "we will *more rigorously* scrutinize the district court's analysis

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[23] *See* 7B Charles A. Wright, *et al.*, § 1797.1, at 378 ("In general, the standard used by the courts in evaluating a compromise is that the proposal must be fair and reasonable and in the best interests of all those who will be affected by it."); Marc S. Galanter, *The Federal Rules and the Quality of Settlements*, 137 U. Pa. L. Rev. 2231 (1989).

[24] *See also* Jack B. Weinstein & Karin S. Schwartz, *Notes from the Cave: Some Problems of Judges in Dealing with Class Action Settlements*, 163 F.R.D. 369, 375 (1996) (discussing role of "fairness hearings" in determining whether proposed settlement is fair, reasonable and adequate); Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U.L. Rev. 1257, 1260 (1995) (explicating Rule 23(e) standards for approving settlements).

of the fairness, reasonableness and adequacy of both the negotiation process and the proposed settlement." *Drexel Burnham*, 960 F.2d at 292 (emphasis added). *Accord GM Trucks*, 55 F.3d at 805 ("[M]any courts have required the parties to make a *higher showing of fairness* to sustain these settlements.") (emphasis added); *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 681-82 (7th Cir. 1987) ("[W]hen class certification is deferred, a *more careful scrutiny* of the fairness of the settlement is required . . . [T]he district judge [must] conduct a *careful inquiry* into the fairness of the settlement to the class members. . . . ") (emphasis added).[25]

Reference to reported cases indicates that the circuit courts of appeals and the district courts have unstintingly carried out their duties to carefully review class action settlements, and have applied the heightened scrutiny required for evaluating the propriety of certifying a class that has been preliminarily approved as a settlement class. *See, e.g., Asbestos Litig.*, 90 F.3d at 974-93 (affirming settlement of asbestos class actions); *DeBoer*, 64 F.3d at 1176-78 (class action lawsuit against bank for overescrowing accounts); *White*, 41 F.3d at 408-09 (professional football players' antitrust class action); *A.H. Robins*, 880 F.2d

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[25] *See also Weinberger*, 698 F.2d at 73; *In re California Micro Devices Sec. Litig.*, 168 F.R.D. 257, 261 (N.D. Cal. 1996) ("*Particular scrutiny* is required under [Rule] 23(e) when the proposed settlement has been negotiated prior to class certification. . . . ") (emphasis added); *MCL 3d*, § 30.45, at 243 ("Approval under Rule 23(e) of settlements involving settlement classes . . . requires *closer judicial scrutiny* than approval of settlements where class certification has been litigated.") (emphasis added).

at 748-52 (Dalkon Shield products liability class action); *Weinberger*, 698 F.2d at 73-80 (securities fraud class action); *Beef Indus.*, 607 F.2d at 179-80 (cattlemen's anti-trust suit against beef packer).[26]

In *Chambers Dev.*, Judge Lee recently stated that "[t]he Rand-McNally of class action settlement review," 912 F. Supp. at 836, remains the nine-factor test enunciated by the Third Circuit in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975):

> (1) the complexity, expense and likely duration of the litigation;
>
> (2) the reaction of the class to the settlement;
>
> (3) the stage of the proceedings and the amount of discovery completed;
>
> (4) the risks to both sides of establishing liability;
>
> (5) the risks to both sides to establishing damages;
>
> (6) the risks of maintaining the class action throughout trial;
>
> (7) the ability of defendants to withstand a greater judgment;
>
> (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and

[26] In *Prudential*, Senior Judge Pollack recently stated that the Third Circuit's conclusion that the district court must "assure that settlement classes meet *all* the requirements of [Rule] 23(a) and (b)," *GM Trucks*, 55 F.3d at 797 n.19 (emphasis in original), "merely reflects the practice already employed by this Court." 163 F.R.D. at 205 n.6.

> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

A similar nine-factor test had previously been adopted by the Second Circuit in *Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), and has been rigorously applied by trial (and appellate) courts in that circuit, particularly in reviewing settlements of complex class actions arising under the federal securities laws.[27]

In reviewing the fairness, adequacy and reasonableness of proposed class action settlements, trial courts should be permitted to take the *fact* of settlement into account in applying Rule 23's requirements, as the majority of circuit courts have held in numerous cases. The rule adopted by the court below in *GM Trucks* and *Georgine* is misguided because it "require[s] a court to ignore important and relevant information that sits squarely in front of it when deciding whether to certify a settlement class." *Asbestos Litig.*, 90 F.3d at 975. For example, trial courts should be allowed to consider the fact that settlement negotiations occurred at arm's length between experienced counsel who are well aware of the risks inherent in

[27] *See, e.g., Drexel Burnham*, 960 F.2d at 292-93; *Prudential Sec.*, 163 F.R.D. at 209-10; *Michael Milken*, 150 F.R.D. at 52-54, 64; *Chatelain*, 805 F. Supp. at 213. *See also MCL 3d*, § 30.42, at 238-40 (elucidating role of district court in approving class action settlement under Rule 23(e); 7B Charles A. Wright, et al., § 1797.1, at 395-416 (analyzing factors to be considered by district courts in reviewing class action settlements); *id.* at 386-90 & n.7 (collecting cases in which securities fraud class action settlements were or were not approved by trial and appellate courts).

litigation and are knowledgeable about the facts of the particular case and the applicable law.[28] However, the alternative procedure adopted by the court below requires the district courts to address a hypothetical contested case that does not exist, rather than the actual case before the court.[29]

Moreover, the rule adopted by the Third Circuit in *GM Trucks* and *Georgine* is not based upon any sort of factual showing that the rule followed in other circuits (where the *fact* of settlement is taken into account in determining if Rule 23's requirements have been met) means that district courts are failing to discharge their duties under Rule 23(e) or that unfair, inadequate, or unreasonable settlements are being approved in the federal courts. If anything, the circuit and district court

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[28] In reviewing class action settlements pursuant to Rule 23(e), trial courts have often employed a presumption that a settlement is fair, adequate and reasonable because it is the product of arm's-length negotiations conducted by experienced counsel who are fully familiar with all aspects of class action litigation. *See, e.g., Prudential*, 163 F.R.D. at 205 ("[A] settlement class is appropriate because there is no likelihood of abuse, and the settlement is fair, reasonable and has been arrived at pursuant to informed arm's-length negotiations under the supervision of the Court."). *Accord Lake v. First Nationwide Bank*, 900 F. Supp. 726, 732 (E.D. Pa. 1995) ("Significant weight should be attributed 'to the belief of experienced counsel that settlement is in the best interest of the class.' ") (citation omitted); *MCL 3d*, § 30.43, at 241-42 (same).

[29] *Cf. Michael Milken*, 150 F.R.D. at 53 (" 'In evaluating the proposed settlement, the Court is not to compare its terms with a hypothetical or speculative measure of a recovery that might be achieved by prosecution of the litigation to a successful conclusion.' ") (citation omitted).

opinions cited in this brief demonstrate that the opposite is true.

If affirmed by this Court, the decision of the Third Circuit in this case may effectively preclude settlement of complex cases, a result which cannot be squared with the language of Rule 23, much less the philosophy of practical application underlying its adoption, or the strong public policy encouraging settlement of complex cases in general and class actions in particular.

III. CONCLUSION

For the reasons stated herein, the decision of the court below should be reversed.

DATED: December 16, 1996

Respectfully submitted,

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No. 96-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., ET AL.,

Petitioners,

v.

GEORGE WINDSOR, FT AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF *AMICUS CURIAE* OWENS-ILLINOIS, INC., IN SUPPORT OF RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF *AMICUS CURIAE* OWENS-ILLINOIS, INC., IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The settlement of this putative class action, if it were ever approved by a final judgment, would have the potential to affect dramatically the interests of *amicus curiae* Owens-Illinois, Inc. ("Owens-Illinois"), because the settlement purports to strip non-settling defendants in the asbestos-related personal injury litigation, including Owens-Illinois, of their contribution and settlement credit rights.

Owens-Illinois, while never a party to the proceedings in this case, participated in the fairness hearing in the District Court and submitted an *amicus* brief to the Third Circuit opposing class cer-

tification and the settlement. Neither Petitioners nor Respondents have any incentive to brief for this Court the effect that the settlement, if approved, would have on the rights of the non-settling defendants and the future course of this litigation.

There are three important facts about this case:

1. Defendants in the asbestos litigation, including Petitioners, are jointly liable. Any settlement, therefore, has important ripple effects on the other defendants' liability.

2. This settlement is being misrepresented by the parties as a "solution" to the asbestos-related litigation. In fact, if this settlement were approved, it would remove virtually no future asbestos plaintiff from the tort system. It would merely remove Petitioners (and their assets) from the list of defendants sued by plaintiffs.

3. The asbestos litigation is unmanageable only to the extent that courts permit plaintiffs who are not sick — that is, who have no physical impairment as a result of asbestos exposure — to maintain lawsuits. (This issue is before this Court in *Metro-North Commuter RR Co. v. Buckley*, No. 96-320 (U.S.)). The class action here can be certified, and the settlement approved, only if such unimpaired plaintiffs are found to have standing to maintain lawsuits. Such a finding would make this litigation unmanageable.

The issue of this settlement's impact on the rights of non-settling defendants received almost no attention in either court below. Thus, if this Court rejects the Third Circuit's view of settlement class actions, this case should be remanded to the Court of Appeals for consideration of the crucial issues of fairness and efficiency.

Owens-Illinois participated actively as an *amicus* below. It believes that its views on these issues in this *amicus* brief may be helpful to the Court.

SUMMARY OF ARGUMENT

I(A). Perhaps the most striking feature of this case is that even if this Court answers Petitioners' "Question Presented" as they request — even if the Third Circuit was wrong to ignore the existence of the settlement in its class certification review — this purported class action would *still* fail the test of Rule 23(b)(3). As Petitioners themselves acknowledge, consideration of a settlement does not abolish the need for review of the proposed class action for predominance and superiority (which requires efficiency and fairness). (Pet. Brief 40). This settlement, which is not efficient and not fair, cannot properly be certified as a Rule 23(b)(3) class action. Moreover, since these issues were not fully reviewed below, a reversal by this Court should result in a return of this matter to the Third Circuit.

I(B)(1). This class action is not, by anyone's definition, "efficient" within the meaning of Rule 23(b)(3), and Petitioners are clearly wrong to tout it as a "unique opportunity to unburden the federal and state courts of the 'scourge' of asbestos litigation." (Pet. Brief 38). First, the class action does not encompass the more than 100,000 asbestos claims presently pending in the federal and state courts. It concerns only future claims (*i.e.*, those that were future claims at the time it was filed).

Moreover, ***this settlement would remove virtually no plaintiff from the tort system***, because it does not resolve finally, and as to all parties, even a single future claim. Rather, it is merely a device for removing a subset of defendants from all future asbestos cases. In many instances, it would do so despite the fact that the class action defendants will have paid zero dollars to "settle" the claims. This remarkable turn of events is possible only because the settlement purports (1) to shift the liability shares of the class action defendants to the non-settling defendants pursuant to the doctrine of joint and several liability; and (2) to impair the contribution and settlement credit rights of those non-settling defendants. The class plain-

tiffs will be enjoined from naming the class action defendants in their tort suits, but they surely will sue the other potentially responsible parties. Those parties will then be asked to pay Petitioners' share of liability.

I(B)(2). The inefficiency of this settlement is multiplied by the fact that it includes an agreement among the settling parties that "exposure only" plaintiffs — individuals who were exposed to asbestos but have suffered no clinically detectable injuries — have an injury-in-fact sufficient to satisfy Article III. The class action defendants, who for many years properly and successfully have asserted that "exposure only" plaintiffs have not suffered compensable tort injuries, now agree that those plaintiffs may invoke the jurisdiction of the federal courts to "settle" their non-existent claims. Why this change of heart? The price tag (to them) to "settle" those claims is *zero* dollars. A release of the class action defendants will be "deemed" to have been issued free of charge.

As the *Buckley* case currently before the Court demonstrates, inviting every individual who has mere exposure to a potentially hazardous substance into the federal courts is likely to have disastrous consequences for the fair and efficient administration of justice. Indeed, this case goes well beyond *Buckley*, for there the purported right to sue is limited to those with "massive, lengthy and tangible" exposure to asbestos. (*Buckley* J.A. 645). Here, the settling parties have agreed, and the District Court held, that every man, woman and child in the United States who had occupational exposure to asbestos, ***or merely lived in the household of someone who did***, has Article III standing. (*See* Pet. App. 95a-96a).

I(C). The settlement also is not "fair" within the meaning of Rule 23(b)(3), because of its unconscionable treatment of the rights of non-settling defendants. The blatant manipulation of contribution and settlement credit rights serves as the settlement's financial cornerstone, but it impermissibly leaves the non-settling defendants with inordinate liability shares. The main inequity springs from the

"deemed release," whereby the claims of future plaintiffs are "settled" for literally no money. As settled parties, the class action defendants will be largely immune from contribution claims by non-settling defendants. In many jurisdictions, however, the settlement credit to which the remaining defendants will be entitled will be limited to the amount of money paid in settlement — zero dollars. Thus, the liability of the class action defendants is shifted to the non-settling defendants, but the damages sought by the plaintiffs remain precisely the same.

II. Although this settlement is profoundly flawed, asbestos-related class action settlements can be crafted that safeguard the rights of the non-settling defendants. Indeed, Owens-Illinois agreed to act as class representative for the non-party defendants in the class action settlement recently approved by the Fifth Circuit, *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), and achieved just that goal. That class action settlement, which is currently making its way to this Court on *certiorari*, protects the rights of non-settling defendants.

ARGUMENT

I. THIS PURPORTED CLASS ACTION DOES NOT SATISFY THE REQUIREMENTS OF RULE 23(b)(3)

A. Even If the Settlement Is Taken Into Account, this Class Action Fails the Tests of Rule 23(b)(3)

Petitioners' central proposition in this case is that courts should be allowed to consider the existence of a settlement in determining whether class certification is appropriate under Rule 23. (Pet. Brief 18). Yet even Petitioners do not suggest that the Rule 23(b)(3) requirements of predominance and superiority be entirely abandoned: "[A] district court that takes settlement into account is still obligated to conduct the certification inquiry specified by Rule 23." (Pet. Brief 40). Indeed, Petitioners repeatedly maintain that their scheme envisions robust application of the Rule 23 requirements and would not "liberalize" the certification inquiry. (*See* Pet. Brief at 21 & 40).

Under Petitioners' own view then, this putative class action must meet the requirements of Rule 23(b)(3) — common questions must predominate and the class method must be superior to other methods for the *fair* and *efficient* adjudication of the controversy — ***when examined as a settlement***. This settlement is so profoundly inefficient and unfair, however, that it cannot possibly satisfy the Rule 23(b)(3) criteria.

The Rule 23(b)(3) issues of fairness and efficiency are crucial to the non-settling asbestos defendants (*see* Section I(B)-(C), *infra*), and Owens-Illinois made these objections in both courts below. In addition, Owens-Illinois noted as *amicus* below that the future claimants could not possibly have Article III standing. These issues were nevertheless not fully — or even partially — explored by the courts below. The focus of the Third Circuit's opinion was on the appropriate Rule 23 review of settlement classes, so the Court of Appeals had no occasion to consider the fairness and efficiency issues; the District Court merely brushed them aside with almost no comment.[1] The Third Circuit also did not fully explore the Article III issue, although Judge Wellford used his concurrence to state his view that the "exposure-only" plaintiffs lack standing to sue. (Pet. App. 60a-66a (Wellford, J., concurring)).

Since these crucial issues were erroneously decided by the District Court and have yet to be considered by an appellate court, this class action is simply not ripe for final certification. If this Court were to reverse the Third Circuit's holding on the role of a settlement

[1] The District Court devoted only three of its 300 findings of fact to these critical issues of fairness. (*See* Pet. App. 103a-223a). The court dismissed the principal objections from the third-party defendant *amici* with the finding, based solely on testimony from *Petitioners' Vice President*, that "the practical impact on the non-settling asbestos manufacturers or suppliers of the release and contribution and indemnity provisions of the [Settlement] Stipulation is likely to be small." (Pet. App. 154a (citing Rooney Testimony, March 1, 1994, at 3)). The court disregarded without mention the extensive evidence that Owens-Illinois submitted on this issue.

in the class certification process, Owens-Illinois submits that this case must return to the Third Circuit for a full examination of the efficiency of the class settlement, the fairness of the settlement to the parties, the absent class members and the non-settling defendants, and the serious Article III issues identified by Judge Wellford.

B. This Settlement Is Not a "Superior" Method of Adjudication Because It is Not Efficient

1. The settlement is not "efficient" because it will not reduce the number of asbestos cases in the tort system.

Petitioners assert that the settlement at issue here arose as a partial solution to "the nation's well-documented asbestos litigation crisis." (Pet. Brief 2). Petitioners' proposed "solution" to this alleged "crisis," however, is in fact no solution at all, because this settlement does not resolve *even a single case* as to all parties. Indeed, the settlement "solves" the asbestos problem only for the few defendants involved in the agreement, and it does so by shifting much of their liability to the non-settling defendants. (See *infra* pp. 16-21). Far from offering a systemic solution, this settlement removes virtually no plaintiffs from the tort system.

Asbestos-related personal injury claims do not arise from a single, discreet incident or exposure. Rather, they almost invariably are based upon exposure to products of a large number of companies over a prolonged period of time. Resolving the claims as to a single manufacturer, or a even a subset of defendants, does not resolve the entire claim.

The joinder of multiple defendants in asbestos litigation goes hand-in-glove with the doctrine of joint and several liability, which is still the law in most states. *See* Jean M. Eggen, *Understanding State Contribution Laws and Their Effect on the Settlement of Mass Tort Actions*, 73 Tex. L. Rev. 1701, 1750 (1995). Under joint liability, an asbestos defendant's exit from the tort system — through

settlement or bankruptcy — does not cause its liability simply to evaporate. Instead, unpaid portions of that liability get shifted to other defendants, who remain jointly liable for the entirety of the plaintiff's damages. (As Owens-Illinois explains *infra*, this settlement seeks to assign to the non-settling defendants the financial burden of Petitioners' unpaid liability, by attempting to strip the non-settling defendants of their contribution and settlement credits rights. (*See infra* pp. 16-20)).

Petitioners' citation to an earlier Third Circuit decision for the proposition that the use of settlement classes "has proven extremely valuable for disposing of . . . class actions" is inapposite. (Pet. Brief 38 n.18 (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 778 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) ("*GM Trucks*")). In making its point about efficiency, the *GM Trucks* court explicitly referred to "Agent Orange," the Dalkon Shield, breast implants, and antitrust litigation. *Id.* None of these involved the most serious complications of asbestos ligation, including the combination of jointly liable defendants who manufactured many different, widely distributed products.

The main flaw in Petitioners' approach to asbestos-related docket control is that they would "resolve" most of the future claims with fictitious "settlements" for "zero dollars." Such "settlements" would apply not only to exposure-only claims, but also to claims involving detectable asbestos-related conditions that do not meet certain medical criteria.

Under the Stipulation of Settlement, the potential claimants receiving zero dollar settlements will be "deemed" to have released Petitioners from their asbestos-related claims in the tort system. (*See* J.A. 91-92). The release must be "deemed" into existence because Petitioners will have neither paid nor unconditionally promised to pay money to the claimants, and the claimants will have neither signed nor agreed to sign an actual release of liability. *Id.*

Why would class counsel ever have agreed to "settle" a multitude of future claims for zero dollars? The answer is quite simple: While the settling parties are liable for zero dollars, the non-settling defendants are not. Although they may have "settled" their cases against Petitioners for zero dollars, these claimants therefore would simply omit Petitioners from the list of defendants on their complaints — they will be enjoined from doing otherwise — and proceed in tort against the non-settling asbestos defendants.

The artifice of the "deemed release" often will reduce not at all the total damages claims against the remaining defendants. (This scheme is discussed fully *infra* at pp. 16-18). In sum, the Stipulation of Settlement gives Petitioners free releases, and then balances the equation by shifting unpaid liabilities to non-parties to the settlement. Reinstatement of the settlement would not help clear court dockets of asbestos cases, because it would not remove the class plaintiffs from the tort system.[2]

2. The settlement is not "efficient" because it could significantly increase the number of plaintiffs seeking damages for exposure to asbestos.

Perhaps even worse, by purporting to give legal standing to people who suffer from no clinically detectable asbestos-related condition, this settlement threatens to expand the asbestos-related litigation

[2] This fact belies Petitioners' claim that "[u]nless the decision below is reversed, the federal and state courts will be flooded with tens of thousands of new asbestos claims against petitioners." (Pet. Brief 38). While it is true that Petitioners have for several years been protected from new filings by the District Court's injunction, no such protection was afforded the non-settling defendants. As a result, the new claims that accrued during that period were filed, predominantly in state courts, against the non-settling defendants. Dissolving the injunction may cause plaintiffs with pending claims to implead Petitioners in a significant number of those pending cases, but it does not follow that there will be a flood of new lawsuits in either the federal or state systems.

beyond the claims of people who are sick and summon into the arena the many people who have only occupational or secondary exposure to asbestos and who are not sick. This is not only grossly inefficient, it poses a significant risk to the increasing stability in the asbestos-related litigation dockets.

First, it is important to emphasize what is — and what is not — happening in asbestos-related personal injury litigation outside the context of this class action settlement. The number of claimants alleging present impairment from asbestos exposure is coming under control. Indeed, the claims of people with fatal or disabling asbestos-related diseases now represent a relatively small and shrinking proportion of pending claims nationwide. Thus, in the time since the Chief Justice appointed the Ad Hoc Committee on Asbestos Litigation, the lower courts have begun effectively to come to grips with what the Committee warned could be a "crisis" in docket control. *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* 22, 26-27 (March 1991).

Among the most significant successes in this regard has been MDL 875, the federal multidistrict asbestos litigation. Judge Charles Weiner, who is overseeing MDL 875, has reported that more than 38,000 cases have been removed from the active federal asbestos docket during the pendency of the MDL. *In re Asbestos Prods. Liab. Litig. (No. VI)*, No. MDL 875, 1996 WL 239863, *1 (E.D. Pa. May 2, 1996). That means that approximately 65% of all pending federal cases have been resolved as active matters as to all parties. These cases were not resolved by mass settlements of the type Petitioners propose. Rather, they were resolved through the active and often innovative efforts of Judge Weiner within the context of the pretrial consolidation.

Another striking fact about the asbestos litigation dockets is that they increasingly are dominated by the claims of people who are not sick. The "unimpaired" plaintiffs generally fall into two categories: (1) those who allege benign bodily changes that are detectable only by x-ray (usually these plaintiffs allege benign thickening of the pleural membrane lining the lungs); and (2) those who have no detectable bodily change at all and allege merely occupational or secondary exposure to asbestos (like most of the absent class in the present settlement).

Although up until now, most "nonimpairment" claimants have been of the first type (those with pleural thickening), plaintiffs are beginning to bring claims of the second type, based on exposure alone. Indeed, another case currently before this Court raises the question of whether such "exposure-only" plaintiffs have cognizable claims, or whether the asbestos-related personal injury litigation under the Federal Employer's Liability Act, 45 U.S.C. § 51, should be restricted to claimants who at least allege present impairment. *Metro-North Commuter RR Co. v. Buckley*, No. 96-320 (U.S.). Owens-Illinois has submitted an *amicus curiae* brief in the *Buckley* case, noting that the overwhelming weight of legal authority suggests that unimpaired claimants do not have a compensable tort injury. *See Buckley*, Brief of *Amicus Curiae* Owens-Illinois, Inc. In Support of Petitioner, at 13-20.

Experience in a growing number of jurisdictions has shown that the huge flood of nonimpairment claims (of both types) can be stemmed through a variety of means. *Id.* at 8 (citing cases). Some courts have dismissed these claims outright, while others have placed them on inactive dockets until such time (if ever) that an asbestos-related disease develops. *Id.* Judge Weiner disposed of more than 18,000 nonimpairment cases by "administratively" dismissing the claims, without prejudice and with all statutes of limitations tolled. *In re Asbestos Prods. Liab. Litig. (No. VI)*, at *4.

While many jurisdictions have begun to deal responsibly with the claims of the unimpaired, Petitioners' settlement would take the federal courts in precisely the opposite direction. This settlement maintains that unimpaired claimants not only have a compensable tort claim, they are actually in a position to *settle* their "claims"

for the sum of zero dollars.

Petitioners' assertion that unimpaired claimants have legal standing raises enormous implications for the federal courts, since the number of these claimants may be significant. As Owens-Illinois argued as an *amicus* below, mere exposure to asbestos does not give rise to an injury-in-fact required by Article III of the Constitution to support federal jurisdiction. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975) (injury-in-fact must be "distinct and palpable"). Although the Third Circuit's decision did not reach this issue, Judge Wellford identified this as a central flaw in Petitioners' claim. (Pet. App. 60a-66a) (Wellford, J., concurring). In responding to this obvious defect, Petitioners were put in the odd position of seeking to establish that the absent class suffered an injury-in-fact, in order to provide themselves the opportunity to prove, in the class action context, that unimpaired future claimants are *not*, in fact, injured (and therefore are adequately compensated by zero dollars from Petitioners).

Not even Petitioners believe that the federal courts should actively adjudicate the possible asbestos-related claims of every individual in the country who has occupational or secondary exposure to asbestos. Petitioners repeatedly have indicated that this class should not, indeed cannot, proceed as a litigation class. (*See* Pet. Brief 41-49). Petitioners thus believe the class has Article III standing only for the purpose of bringing a case that is "settled" the moment it is filed.

Neither the non-settling defendants nor the courts, however, will be able to avoid the ramifications of conferring Article III standing on, and thus inviting into the tort system, substantial numbers of individuals who previously have been held to lack the standing necessary to invoke federal jurisdiction. *See, e.g., Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985). This class action should not become a vehicle for expanding dramatically the definition of a justiciable controversy.

Such a result would directly violate the efficiency prong of the Rule 23(b)(3) superiority inquiry. One court, in declining to "breathe the spirit of judicial combat into 8,500 persons [the absent class] who, so far, have shown no desire to litigate [the] matter," noted,

> [I]n deciding whether a class action is superior to individual actions, the Court must find that the number of individual actions will actually be reduced . . . The treatment of [these] claim[s] in a class action would not reduce the total amount of litigation. To the contrary, certification of [these] claim[s] as a class action would create a judicial nightmare which would be partially litigated in this forum and partially litigated throughout the state courts of this nation. Fed. R. Civ. P. 23, which is designed as an instrument of convenience, should not be abused to create such a burden on judicial resources.

Elster v. Alexander, 76 F.R.D. 440, 443 (N.D. Ga. 1977); *see also In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) (noting that the "drum-beating" of a well publicized class action "may well attract excessive numbers of plaintiffs with weak to fanciful cases"), *cert. denied sub nom., Adams v. United States*, 484 U.S. 1004 (1988).

It is clear that this class is an enormously inefficient means of clearing asbestos dockets. Since, as Petitioners acknowledge, Rule 23 criteria must be applied "strictly" in the settlement class context (Pet. Brief 21), this Court should reject the proposed class action for failing to provide an efficient resolution of the class members' claims.

C. This Settlement Is Not a "Superior" Method of Adjudication Because It is Unfair To the Non-Settling Defendants.

1. To be "superior," a settlement must be fair.

Rule 23(b)(3) requires that a class action be superior to other available methods for the "*fair* . . . adjudication of the controversy." (Pet. Brief 2a) (emphasis added). Petitioners' proposed class action is so manifestly unfair that it utterly fails this prong of the Rule 23(b)(3) analysis.[3]

Owens-Illinois will leave it to others to make the case that this settlement would be unfair to the absent class.[4] Like the absent class members, Owens-Illinois and the other non-settling defendants were not party to the settlement negotiations, but they nevertheless had important rights at stake. When the negotiations ended, however, the non-settling defendants were faced with a settlement that *purposefully* trammels their right to credit for Petitioners' liability. This unfairness is enough to find that the settlement fails the superiority test of Rule 23(b)(3).

First, it is well-established that the fairness determination made by a court reviewing a class settlement should not be limited to the interests of the settling parties. Rather, the court must weigh the

[3] This is not to suggest that *all* class action settlements in the asbestos context are necessarily unfair to non-parties. On the contrary, as Owens-Illinois discusses in Section II *infra*, the Fifth Circuit recently approved a settlement that safeguards the rights of non-settling defendants. *In Re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996).

[4] Owens-Illinois would note, however, that the due process rights of an absent class that this Court identified in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), clearly is not confined to litigated class actions. Justice Ginsburg recently stressed the "centrality of the procedural due process protection of adequate representation in class action lawsuits, *emphatically including those resolved by settlement.*" *Matsushita Elec. Co. Ltd. v. Epstein*, 116 S. Ct. 873, 890 (1996) (Ginsburg, J., concurring) (emphasis added).

fairness of the settlement's impact on the rights of the non-settlers. *See* Manual for Complex Litigation 2d, § 23.14 at 166 (1985); *In re Masters, Mates & Pilots Pension Plan*, 957 F.2d 1020, 1026 (2d Cir. 1992) ("[W]here the rights of one who is not a party to the settlement are at stake, the fairness of the settlement to the settling parties is not enough to earn the judicial stamp of approval."); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991) (due process requires the interest of absent persons be represented); *Katz v. Carte Blanch Corp.*, 496 F.2d 747, 757 (3d Cir.) (the superiority finding requires, among other things, consideration of the "fairness to all whose interests may be involved"), *cert. denied*, 419 U.S. 885 (1974).

Those courts' concern for the rights of non-settlers is founded on the array of contribution and settlement credit laws in the fifty states. While the state laws are by no means uniform, they consistently provide meaningful procedural and substantive protections against settlements that unfairly increase the liability of non-settlers to plaintiffs. A settlement that impairs the rights of non-settling parties to these substantive protections cannot pass the test of fundamental fairness. *See Masters, Mates & Pilots*, 957 F.2d at 1032 (finding that the district court erred in approving the settlement because it failed to "make a proper determination that the settlement would compensate [the non-settling party] fairly for his lost right to contribution"). The Second Circuit has found that the state law contribution and settlement credit rights of alleged joint tortfeasors create an interest that is so substantial that it requires independent representation in the course of comprehensive settlement negotiations. *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 982 F.2d 721, 739-40 (2d Cir. 1992).

2. In most states, the settlement's "deemed release" provision would result in zero-dollar settlement credits.

The present settlement not only impairs the rights of the non-settling parties to contribution and settlement credits, it goes through astonishing contortions to ensure that those rights will be impaired regardless of the nature of state law. Most egregiously, the character of that impairment shifts depending upon the nature of state law.

The Stipulation of Settlement defines the three principal alternative approaches to settlement credits used in the various jurisdictions:

> (1) ***Pro Tanto*** — A judgment against a non settling defendant is reduced by the amount of money paid by the settling party.
>
> (2) ***Per Capita*/Percentage Share Without a Contribution Bar** — A judgment against a non-settling defendant is reduced by the *per capita* or percentage share of the settling party's fault, and the non-settling defendant may bring an action for contribution against the settling party.
>
> (3) ***Per Capita*/Percentage Share With a Contribution Bar** — Same as Number 2, except that contribution actions are impermissible.

(J.A. 92-93).

In *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 114 S. Ct. 1461 (1994), this Court conducted a detailed review of the three alternatives and held that the percentage share rule would apply in admiralty cases, since the *pro tanto* approach is "likely to lead to inequitable apportionments of liability." 511 U.S. at ____, 114 S. Ct. at 1468. As the Ninth Circuit recognized, the percentage share rule is the only set-off which satisfies "the statutory goal of punishing

each wrongdoer," the "equitable goal" of limiting liability to relative culpability, and the "policy goal of encouraging settlement." *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1231 (9th Cir. 1989), *cert. denied sub nom., Franklin v. Peat Marwick Main & Co.*, 498 U.S. 890 (1990). Despite the manifest unfairness of the *pro tanto* approach, however, it remains the law in "a substantial majority of jurisdictions." Eggen, *supra*, 73 Tex. L. Rev. at 1709-1710 and n.38 (citing authority); *cf.* Stipulation of Settlement at XII (A)(2) (J.A. 92) (claiming 21 jurisdictions follow the *pro tanto* approach).

The ordinary unfairness of the *pro tanto* rule identified in *McDermott* pales, however, in comparison to the inequity resulting from a combination of the *pro tanto* rule and the "deemed" zero-dollar releases in this settlement. Owens-Illinois actively participated in the District Court's fairness hearing in this case, and the testimony it elicited proved that the "deemed releases" would often produce zero-dollar "settlements." Moreover, under cross-examination by Owens-Illinois' counsel Robert Riley, Michael Rooney, an executive for Petitioners, and Robert Hatten, a lawyer for the plaintiffs, both were unable to deny that the "deemed releases" in *pro tanto* jurisdictions will generate zero-dollar settlement credits:

Testimony of Michael Rooney (Petitioners' Vice President for Claims):

> **Mr. Riley (Counsel for Owens-Illinois):** Well let's assume you do claim you're settled and that the deemed release bars the contribution claim, alright? If it's barred, then the action's going to go forward against the other defendants, right?
>
> **Mr. Rooney:** Under your hypothetical, that would seem to be what would happen, yes.
>
> **Mr. Riley:** Alright. And the amount of money you, as a quote, "settled defendant" will have paid the defendant is zero dollars, right?

> **Mr. Rooney:** . . . [W]e would not have paid any money at that point in time, that's correct.
>
> **Mr. Riley:** And under my hypothetical, in Illinois, a *pro tanto* jurisdiction, the amount of the settlement credit is the amount of money paid?
>
> **Mr. Rooney:** My understanding is if and when a co-defendant takes a verdict, that would be correct.

Rooney Testimony, March 9, 1994, at 234-35.

Testimony of Robert Hatten (Plaintiffs' Class Counsel):

> **Mr. Riley (Counsel for Owens-Illinois):** [In a *pro tanto* state] assume [Petitioners] paid zero dollars and the plaintiff has sued other companies. So assume you're a lawyer representing the plaintiff. Isn't it true your position would be that the settlement credit available to the non-settling parties by virtue of [Petitioners'] class action settlement would be zero dollars?
>
> **Mr. Hatten:** Yes.

Hatten Testimony, March 8, 1994, at 211.

If the non-settling defendant is entitled to credit only for the amount actually paid by the settling defendant (*pro tanto*), and the release is for zero dollars, the non-settling defendants would be forced to assume *all* of Petitioners' share of liability. When this Court identified the "large potential for unfairness" under the *pro tanto* approach, *McDermott*, 511 U.S. at ____, 114 S. Ct. at 1469, it had not had occasion even to contemplate such a brazen exploitation of the *pro tanto* rule.

3. When combined with a contribution bar, the "deemed release" and the *pro tanto* rule are particularly unfair.

In most jurisdictions, the non-settling party is barred from bringing a claim for contribution against a settling defendant. Eggen, *supra*, 73 Tex. L. Rev. at 1708-09 n.30; *see also* Stipulation of Settlement at XII (A)(3) (J.A. 92) (claiming 12 jurisdictions allow contribution claims by non-settling defendants). This is unsurprising, since, as this Court has noted, a contribution claim "burdens the courts with additional litigation." *McDermott*, 511 U.S. at ____, 114 S. Ct. at 1467.

In the absence of the right to a contribution action, settlement credits are even more important: "[I]f the right to contribution is extinguished by a bar order, the credit offset must adequately compensate the nonsettling defendant for the barring of its contribution claim." *United States Fidelity & Guar. Co. v. Patriot's Point Dev. Auth.*, 772 F. Supp. 1565, 1572 (D.S.C. 1991); *see also Jiffy Lube*, 927 F.2d at 160 ("If the non-settling defendant loses his right to contribution, [the court must] ensure that the non-settling defendant pays no more than his share of any future judgment that may be entered against him in favor of plaintiffs."); *In re Granada Partnership Sec. Litig.*, 803 F. Supp. 1236, 1238 (S.D Tex. 1992) ("The terms under which the bar orders are imposed must be fundamentally fair and equitable to the non-settling defendants.").

Where the right of contribution is barred and the settlement offset is *pro tanto*, unfairness is particularly likely. As Justice White has noted, "The critical point both in *McDermott* and the instant case is that the provision of a *pro tanto* credit alone without any additional right to contribution (however the negation of that right is achieved) is inimical to the nonsettlors' rights." *TBG, Inc. v. Bendis*, 36 F.3d 916, 931 n.3. (10th Cir. 1994) (White, Associate Justice (Ret.), concurring). The artifice of the "deemed release" means non-settling defendants face a *pro tanto* set-off of zero *and* no right to contribution in many — if not most — future cases.

4. In other states, the "deemed release" would disappear.

Another illustration of the manipulative nature of the settlement is the fact that the "deemed release" does not apply in all jurisdictions. (*See* J.A. 94-95) (no deemed release for Settlement Class Members in Per Capita or Percentage Share Jurisdictions with Contribution Bars). As noted above, whether a release is to be "deemed" into existence turns on the manner in which state law quantifies settlement credits. Not surprisingly, where the method favors the non-settling defendants, there are no "deemed releases" under the Stipulation.

For example, granting Petitioners the status of settled defendants in New York would entitle the non-settling defendants in every future case to a settlement credit equal to the greater of the amount actually paid in settlement (*pro tanto*) or the percentage of liability assigned to the settling defendants at trial. *See* Eggen, *supra*, 73 Tex. L. Rev. at 1713 (describing New York's two-tiered approach). A "deemed release" for zero dollars in New York thus would still provide the non-settling defendants with a settlement credit equal to Petitioners' shares of liability. Rather than be consistent in its terms, the settlement is consistent merely in its purpose — as it is designed to facilitate, not prevent, the unfair shifting of liability to the non-settling defendants, there is no "deemed release" concerning future New York claimants.

5. The settlement is replete with other provisions unfair to the non-settling defendants.

Moreover, the "deemed release" is augmented by an array of additional provisions with the purpose and effect of frustrating attempts to enforce settlement credit and contribution rights under state law. For example, claimants who "settle" for zero dollars may never sue Petitioners in the tort system, but they are free to sue the non-settling defendants (J.A. 87); successful efforts to

bring cross-claims against Petitioners will be met with joint (defendant/plaintiff) motions to sever (J.A. 95) (meaning that the cross-claims are, as a practical matter, unlikely ever to be heard in court); and those qualifying claimants permitted to sue Petitioners will be delayed by the Settlement Stipulations "case flow" restrictions on such claims — but only as to their claims against Petitioners, not the non-settling defendants (J.A. 87).

Among the most remarkably unfair aspects of the settlement is the provision stating that the claimants' factual submissions to Petitioners are to be kept secret from the non-settling defendants. (J.A. 53-54). This means that the settlement prohibits disclosure to the non-settling defendants of any proof of a claimant's exposure to Petitioners' products. Thus, in those jurisdictions where a *per capita* settlement credit is recoverable, the non-settling defendants may be unable to produce the necessary proof of the claimant's exposure to obtain their rightful verdict off-sets.

In sum, the Settlement Stipulation is unfair to the non-settling defendants on its face. If the Settlement Stipulation were fair, it would not be necessary to extinguish the contribution and settlement credit rights of the non-settling defendants through the artifice of zero dollar "deemed releases" that appear and disappear as one moves from jurisdiction to jurisdiction and claimant to claimant. If the Settlement Stipulation were fair, secrecy agreements, joint motions to sever and restrictions on trial proof would have no place in the settlement.

These carefully crafted provisions are in the Settlement Stipulation because Petitioners intend to pay only part of the cost of resolving at a single stroke their potential liability share of future asbestos-related claims. They intend that the rest of the bill be paid by the non-settling defendants. This palpable inequity — the shifting from Petitioners' to the non-settling defendants the true cost of Petitioners' plan to exit the asbestos litigation tort system — means that the settlement fails the fairness prong of the Rule 23(b)(3) superiority requirement.

II. THE SETTLEMENT HERE IS IN CONTRAST TO THE FIBREBOARD SETTLEMENT RECENTLY APPROVED BY THE FIFTH CIRCUIT

The Fifth Circuit recently approved an asbestos-related class action settlement that, in contrast to this one, protected the rights of non-settling defendants. *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996). That case involves a limited fund class action brought under Rule 23(b)(1)(B) by a class of future asbestos-exposed claimants against Fibreboard Corporation. Fibreboard's "Global Settlement Agreement" with the plaintiffs establishes a trust funded with $1.535 billion, representing the proceeds of a settlement that Fibreboard reached with two insurers. *Id.* at 972. Underlying the Global Settlement was the risk that, if Fibreboard lost a pending insurance coverage dispute, there would be virtually no monies available to pay asbestos claims against Fibreboard (either by the plaintiffs or by the non-settling defendants). *Id.* at 976.

Under the Fibreboard Global Settlement Agreement, a claimant must first seek to settle with the trust after providing information for evaluation of his or her claim. If no settlement is reached, the claimant may proceed through mediation, non-binding arbitration and then, finally, the tort system (where recovery is limited to $500,000, with no punitive damages). *Id.* at 973. In addition to the Global Settlement Agreement, Fibreboard settled with all of its co-defendants in a Third-Party Settlement Agreement and reached a "Trilateral Settlement Agreement" with its two insurers, discharging them of all policy obligations in exchange for $2 billion ($1.535 billion for the settlement of future cases and almost $500 million for pending cases, which are not related to the Global Settlement). *Id.*

There are many significant differences between the Fibreboard settlements and Petitioners' proposed class action. For example, Fibreboard's is a limited fund class action brought under Rule 23(b)(1)(B). *Id.* at 982. Moreover, the Fibreboard settlement is brought in equity, and it provides only a pool of money and a

distribution process to pay claimants. "Determinations of individual awards will be made by the trust and the plaintiff's attorney in settlement negotiations or in a full trial on the merits." *Id.* at 976 n. 7. The Fifth Circuit found this to stand in "stark contrast" to the present settlement, which awards damages to individual claimants based solely on the severity of their injuries. *Id.* at n.8.

Most importantly to Owens-Illinois, the Global Settlement Agreement provides that good-faith settlement payments by Fibreboard generally will result in settlement credits or verdict off-sets that eliminate or substantially reduce the liability of non-settling defendants for Fibreboard's share under joint and several liability. *Id.* at 973. Furthermore, "any third-party co-defendant who suffers a judgment before the trust settles with the plaintiff and pays a Fibreboard share, succeeds to the plaintiff's rights against the trust." *Id.* The fairness to the non-settling defendants of the Global Settlement Agreement stands in sharp contrast to the manipulative settlement credit and contribution machinations of Petitioners' proposal.

CONCLUSION

The judgment below should be affirmed, or the case should be remanded to the Third Circuit for further inquiry into the fairness and efficiency of the proposed settlement and the issues relating to Article III standing.

Respectfully submitted,

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IN THE
Supreme Court Of The United States
OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., *et al.*,

Petitioners,

v.

GEORGE WINDSOR, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF *AMICUS CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C., IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

As part of its efforts to ensure the proper working of the civil justice system, TLPJ has established a Class Action Abuse Prevention Project dedicated to monitoring, exposing, and preventing abuses of the class action device nationwide. Through this work, TLPJ has become especially concerned about efforts by corporate defendants to use the class action device as a tool for capping their liability in mass tort cases and depriving injured victims of their rights. One means to this end is to create "settlement-only" class actions that include all individuals who have been exposed to a hazardous product -- whether or not they have yet manifested any disease. TLPJ submits this brief to urge the Court to reject this approach and make clear that, at least under the circumstances of this case, due process prohibits the adjudication or release of absent class members' unaccrued future personal injury claims.

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[1] Letters of consent to the filing of this brief have been filed with the Clerk.

STATEMENT

This class action seeks to settle the personal injury claims of millions of individuals who have been exposed to asbestos products manufactured by a consortium of companies known as the Center for Claims Resolution ("CCR"). If approved, the settlement will extinguish the personal injury claims of every individual who has been exposed to asbestos made or supplied by CCR, even though most of those individuals have not yet gotten sick and could not currently seek damages for their future injuries in individual lawsuits. In the Third Circuit's words, "[t]hese 'futures claims' of 'exposure-only' plaintiffs would be extinguished even though they have not yet accrued." *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 617 (3d Cir. 1996).

The inclusion of future claims in the class settlement was the culmination of CCR's efforts to limit its members' liability in asbestos cases. The saga began in 1991, when the Judicial Panel on Multidistrict Litigation transferred all existing federal asbestos personal-injury litigation to the Eastern District of Pennsylvania. Thereafter, CCR approached two members of the plaintiffs' asbestos bar in an attempt to negotiate a settlement of all *future* (rather than pending) asbestos claims against the CCR defendants. *See Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246, 305 (E.D. Pa. 1994).

CCR achieved its goal on January 15, 1993, when the two attorneys and CCR filed a class action complaint, an answer, and a stipulation of settlement. The class was defined to include "all persons exposed occupationally . . . to asbestos supplied by any CCR defendant, and . . . the spouses and family members of such persons, who had not filed an asbestos related lawsuit against a CCR defendant as of the date the class action was commenced." 83 F.3d at 619 (footnote omitted).

By defining the class to include "all persons exposed occupationally" to asbestos supplied by the CCR defendants, CCR was able to achieve a settlement that not only included individuals who had already gotten sick as a result of asbestos exposure, but also encompassed the future claims of "exposure-only" plaintiffs who had not yet manifested any asbestos-related disease. Moreover, by defining the class to include the "spouses and family members" of future personal injury victims, CCR was also able to settle the claims of individuals who cannot possibly be known and, in some cases, do not yet even exist -- *i.e.*, spouses yet to be married and children yet to be conceived.

Because the exposure-only class members lacked standing to assert claims based on future personal injuries, the class complaint merely alleged that these individuals were entitled to receive medical monitoring and recover damages for their emotional distress and increased risk of cancer. *See* J.A. 4-21 (Class Complaint).[2] These claims were abandoned, however, in exchange for a settlement that purports to settle all present and future claims of class members for asbestos-related personal injury or wrongful death against the CCR members that were not filed before January 15, 1993. In essence, the settlement establishes a complex administrative procedure that would, over a period of years, provide various levels of compensation for class members meeting certain exposure and medical criteria. *See* 83 F.3d at 620-21; 157 F.R.D. at 267-85.[3] Notably, the

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[2] With respect to the presently-injured class members, in contrast, the class complaint sought compensatory and punitive damages related to the class members' asbestos-related personal injuries. *See id.*

[3] For those class members who qualify, the settlement establishes a range of damages that CCR will pay for each disease, and places caps both on the amount that a particular victim may recover and on the number of qualifying claims that may be paid in any given year. 83 F.3d at 620. Claimants found to have "extraordinary" claims can be awarded more than the

claims asserted by the exposure-only plaintiffs -- claims for increased risk of cancer, fear of future injury, and medical monitoring -- do not receive any compensation under the settlement. Instead, these individuals are only eligible for relief when and if they contract certain asbestos-related diseases. *See* 83 F.3d at 620.

Shortly after the proposed settlement was filed, the district court conditionally certified the class under Fed. R. Civ. P. 23(b)(3), which requires that class members be given notice and the right to exclude themselves from the class. Subsequently, the court approved a plan to give notice to the class through a combination of TV and print ads, an "800 number," and union-sponsored publicity. *See* 157 F.R.D. at 314-36. The notice also explained that class members who did not want the relief proposed in the settlement had the right to exclude themselves from the litigation by filing an opt-out form by a certain deadline. All class members who did not opt out by that deadline are bound -- even if they had no current injury and no idea they were ever exposed to asbestos.[4]

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cap allows, but only a limited number of claims can be found to be "extraordinary," and even persons with those claims are barred from seeking or recovering punitive damages. *Id.* In addition, the total amount of compensation available to victims is itself capped. Payment under the settlement is not adjusted for inflation. *Id.*

[4] The settlement provides a limited "back-end opt-out" right that will permit a few class members to pursue their claims in court after their injuries have become manifest. This right, however, is limited to two percent of the total number of mesothelioma and lung cancer claims, one percent of "other cancer" claims, and one-half of one percent of "non-malignant conditions" claims from the previous year. *See* 83 F.3d at 620. Thus, if the settlement is approved, exposure-only plaintiffs who failed to opt out by the original deadline will remain in the class in perpetuity. Moreover, even class members who are eligible for the "back-end opt out" must agree to waive any claim for punitive damages and must comply with numerous procedural restrictions. *See* J.A. 87-90 (Stipulation of Settlement).

The district court ultimately approved the settlement as fair, adequate, and reasonable within the meaning of Fed. Rule Civ. P. 23. *See id.* at 325. The court subsequently enjoined class members from pursuing any claims against CCR outside of the settlement. *See Georgine v. Amchem Products, Inc.*, 878 F. Supp. 716, 723 (E.D. Pa. 1994). Numerous objectors appealed the district court's injunction, arguing, among other things, that the inclusion of future victims' personal injury claims in the class settlement violated the absentee class members' constitutional rights to due process. In particular, the objectors argued that, in a futures class action with virtually no delayed opt-out rights, notice to absent class members cannot meet the requirements of the U.S. Constitution. *See* 83 F.3d at 622.

On appeal, the Third Circuit ultimately did not decide whether the inclusion of future personal injury claims in the class settlement violated due process. *See id.* at 634. Instead, the lower court vacated the settlement on the ground that the class could not meet the various certification requirements of Rule 23. *Id.* at 626. In so holding, however, the court emphasized that the inclusion of future personal injury claims in the class settlement contributed to the class' inability to meet the certification requirements of Rule 23. Thus, for example, regarding the "commonality" and "predominance" requirements of Rules 23(a) and (b)(3), the court noted that the exposure-only plaintiffs "share little in common, either with each other or with the presently injured class members." *Id.* at 626. Similarly, regarding the "adequacy-of-representation" requirement of Rule 23(a)(4), the court held that the "serious intra-class conflicts" between the present claimants and future victims rendered the class representatives incapable of adequately representing the class. *See id.* at 630.[5]

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[5] Concerns relating to the inclusion of future victims in the class

The Third Circuit also emphasized its "serious concerns about the constitutional adequacy of class notice" with respect to the exposure-only class members. *Id.* at 623. Those concerns were rooted in the fact that these class members "may not know that they have been exposed to asbestos within the terms of this class action." *Id.* at 633. The court added that even those class members who manage to hear about the class settlement and realize they fall within the class definition "may lack adequate information to properly evaluate whether to opt out of the settlement." *Id.* at 633 (footnote omitted). Although the court did not decide whether these concerns rendered the class notice constitutionally infirm, it stressed that "this situation raises serious fairness concerns." *Id.* at 634.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners would have this Court believe that this case is in some way similar to the type of garden-variety class action settlements that numerous courts have approved, time and again, since Rule 23 was first restructured to permit opt-out class actions for damages. Thus, they argue that the Third Circuit's decision constitutes a "radical change in long-settled class action practice" that would, among other evils, "make numerous beneficial class action settlements impossible." Brief for Petitioners at 2.

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were also at the core of the Third Circuit's findings that the class did not meet the "typicality" requirement of Rule 23(a)(3) or the "superiority" requirement of Rule 23(b)(3). *See, e.g.*, 83 F.3d at 632 ("[e]ven though the named plaintiffs include a fairly representative mix of futures and injured plaintiffs, the underlying lack of commonality and attendant conflicts necessarily destroy the possibility of typicality."); *id.* at 634 (class action not superior method of adjudication because, among other things, "it is obvious that if this class action were approved, some plaintiffs would be bound despite a complete lack of knowledge of the existence or terms of the class action.")

In reality, however, this is an unprecedented action. It began with the pre-packaged filing on a single day of a class action complaint, answer, *and* stipulation of settlement of a case that both parties admit they never intended to litigate -- and that, in truth, no parties ever *could* litigate. Unlike any other case before or since, it seeks to constrain future asbestos victims to a pre-determined, administrative remedy -- or, in some cases, no remedy at all -- without any averments by the defendants of limited funds and without any recourse to bankruptcy proceedings. It attempts class-wide adjudication of a mass tort -- an area where courts have been traditionally wary of certifying classes because the claims are deeply personal and "vitally affect a significant aspect of the lives of the claimants." *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76, 79 (E.D. Pa. 1970). *See also* Fed. R. Civ. P. 23, Advisory Committee Notes (1966 Amendment) ("[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action"). And it is a settlement class, "the subject of considerable controversy" because of the dangers of abuse and collusion in reaching an agreement before the procedural protections of Rule 23 are in place. *See Plummer v. Chemical Bank*, 668 F.2d 654, 657-58 (2d Cir. 1982).

But the most notorious -- and constitutionally suspect -- aspect of this case is its attempt to extinguish, in one fell swoop, the unaccrued *future* claims of literally millions of individuals who have been occupationally exposed to asbestos -- and may not even know it. In this sense, this case represents the pinnacle of attempts by defendants to use class actions as vehicles for capping their liability in damages cases. On occasion, defendants have tried to attain this goal by seeking to create mandatory, "no-opt-out" classes that strip victims of their right to exclude themselves from class litigation. This approach, however, has met with uneven success, because defendants often have difficulty shoehorning their cases into one

of the mandatory certification "prongs" of Rule 23.[6] Another, more insidious approach is to create "opt-out" damages classes under Rule 23(b)(3) that include both present and *future* victims of a defendant's mass tort. While such actions theoretically grant class members a right to pursue their own individualized litigation, they in fact leave many class members with no meaningful opportunity to exercise this right, trapping them in the class action for perpetuity. In this way, defendants achieve their goal of limiting their future liability for mass torts without having to persuade a court that circumstances warrant certification of a mandatory class under one of the other prongs of Rule 23.

This case represents this trend at its worse. Although other opt-out class action settlements have sought to encompass the "future" personal injury claims of mass tort victims, *see, e.g., Bowling v. Pfizer*, 143 F.R.D. 141 (S.D. Ohio 1992) (heart valves); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1995) (breast implants), the classes in those cases have included only persons who could plainly determine -- at the time of certification -- whether they are or are not class members, *i.e.*, whether they do or do not have heart valves or breast implants.

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[6] Regarding Rule 23(b)(1)(B), *compare In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996) (affirming, over vehement dissent, no-opt-out damages class of future asbestos victims under Fed. R. Civ. P. 23(b)(1)(B)) *with In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984) (rejecting no-opt-out damages class of drug victims under Fed. R. Civ. P. 23(b)(1)(B) for failure to demonstrate limited fund). Regarding Rule 23(b)(2), *compare Brown v. Ticor Title Ins. Co.*, 982 F.2d 383 (9th Cir. 1992) (refusing to afford preclusive effect to no-opt-out class under Fed. R. Civ. P. 23(b)(2) that included both damages claims and injunctive relief), *cert. dism'd as improv. granted sub nom. Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1292 (1994), *with Adams v. Robertson*, 676 So.2d 1265 (1995) (affirming no-opt-out class under Alabama Rule 23(b)(2) that included both damages claims and injunctive relief), *cert. granted*, 117 S. Ct. 37 (1996) (No. 95-1873).

This class goes light years farther by attempting to simultaneously extinguish the unaccrued future claims of millions of individuals who are entirely unaware that they have even been exposed to a hazardous product, let alone that their rights are being extinguished in a class action settlement. If this unique and extraordinary class action is permitted to stand, it will serve as a green light for manufacturers and suppliers of insidiously dangerous products to use Rule 23 as a device for limiting the rights of their "future victims" before those individuals' claims ever accrue. That practice cannot be -- and is not -- constitutional.

We recognize, of course, that the Third Circuit did not ultimately decide whether the Constitution prohibits binding future plaintiffs through a 23(b)(3) opt-out class action. *See* 83 F.3d at 634. Rather, it held that the presence of future claimants contributed to the class' inability to meet the various certification requirements of Rule 23. However, we submit that -- particularly since the Rule 23 safeguards were deliberately drawn in light of due process requirements -- the more natural way to approach the case is to hold that the settlement's attempt to extinguish the rights of "future victims" whose personal injury claims had not yet accrued fails to pass muster under the U.S. Constitution.

This settlement violates the due process rights of future victims in two distinct ways. First, the settlement cannot be reconciled with the class members' constitutionally mandated rights to receive meaningful notice of a class settlement and a full and fair opportunity to exclude themselves from the class. These rights are embodied in Rule 23(c)(2), which requires that absent class members be given notice and the right to opt out of damages classes certified under Rule 23(b)(3). This provision was created in 1966, when Rule 23 was amended to permit, for the first time, absent class members to be bound to a judgment in a common-question damages class action without their

affirmative consent. The history of this provision reveals that it was expressly designed to protect the constitutional rights of absent class members to control their own individual litigation. This Court has since affirmed that the mandatory notice and opt-out rights embodied in Rule 23(c)(2) are minimal safeguards mandated by due process.

These minimal safeguards are rendered impotent in this case due to the settlement's attempt to extinguish the unaccrued personal injury claims of exposure-only class members. First, many of the future victims in the class had no way of knowing they were included in the settlement, either because they were unaware of their asbestos exposure or had no idea that their ability to sue in the future could be limited now, when they have no personal injury. Future spouses and children, of course, could not possible receive proper notice, since the former cannot identify themselves and the latter do not exist. Even those class members who were aware of their inclusion in the class, moreover, lacked any meaningful way to evaluate the settlement's terms, since they had no way of knowing what asbestos-related disease they might ultimately contract and how much that disease would be "worth" under the terms of the settlement (which is not adjusted for inflation). As a result, the notice and opt-out rights provided in this case were essentially meaningless -- a result that cannot be reconciled with due process.

Second, the proposed settlement violates the future victims' constitutional right to adequacy of representation, which is set forth in Rule 23(a)(4). Like the notice and opt-out rights applicable to Rule 23(b)(3) damages classes, the adequacy-of-representation requirement was carefully drawn to satisfy minimal requirements of due process in class actions. Since Rule 23 was amended to its present form in 1966, this Court has repeatedly reaffirmed that adequacy of representation is a core element of due process that must be satisfied in every

class action.

This requirement was violated in this case because the class representatives lacked authority to release the future personal injury claims of exposure-only class members. It is axiomatic that class representatives' authority is limited to the claims they possess in common with other members of the class. This limitation is designed to ensure that the class representatives, through the driving imperative of self interest, will achieve the best possible result for the class. No such imperative exists in a case where -- as here -- the settlement seeks to extinguish future personal injury claims that, by their very nature, are unrelated in critical respects to those claims held by the class representatives. As the Third Circuit recognized, the unaccrued future personal injury claims encompassed in the settlement will vary radically from class member to class member, especially with respect to the nature of their damages. Given these disparities, the class was incapable of "generat[ing] a typical representative" (83 F.3d at 632), let alone one able to adequately represent the full range of interests encompassed in the class -- either for litigation *or* settlement purposes. Thus, the inclusion of future personal injury claims in the settlement renders this class action unconstitutional, regardless of how one interprets the various protections of Rule 23.

ARGUMENT

THE INCLUSION OF FUTURE PERSONAL INJURY CLAIMS IN THE CLASS RENDERS THE SETTLEMENT UNCONSTITUTIONAL.

As petitioners have framed this case, the key question is whether the Third Circuit erred in holding that "each of [Rule

23's] requirements must be satisfied without taking into account the settlement, and as if the action were going to be litigated." 83 F.3d at 626. Resolution of this question, however, is ultimately unnecessary, since the inclusion of future personal injury claims in this class means that the case could not constitutionally be certified for settlement *or* litigation purposes. As is explained in further detail below, both the mandatory notice and opt-out provisions of Rule 23(c)(2) and the right to adequacy of representation embodied in Rule 23(a)(4) were "carefully drawn" to protect the minimal due process rights of absent class members in damages classes certified under Rule 23(b)(3). *See* Charles A. Wright, *et al.*, 7B *Federal Practice and Procedure* ("*Federal Practice*") § 1789, at 251 (1986 & Supp. 1996). Neither of these constitutionally mandated safeguards serves its purpose in a case where -- as here -- a class settlement attempts to extinguish simultaneously a vast array of present and future personal injury claims on behalf of a widely disparate class of individuals, many of whom have no idea they were ever exposed to the defendant's product and have no way of determining what related disease -- if any -- they will ultimately contract. Because these core procedural safeguards are rendered largely meaningless in the context of this "future victims" settlement, this class violates the due process rights of the absent class members -- and *a fortiori* violates the various certification criteria of Rule 23.

I. The Class Settlement Violates the Future Victims' Constitutionally-Mandated Notice and Opt-Out Rights.

The constitutional underpinnings of the rights to notice and opt-out embodied in Rule 23(b)(3) are best revealed by the history of the modern class action rule. Prior to 1966, when Rule 23 was amended to its present form, the federal rules did not permit *any* class actions seeking damages at law to bind absent class members without their express consent. At the

time, Rule 23 limited the binding effect of "common question" damages classes to the parties and class members who affirmatively chose to intervene in the action -- in other words, a type of "opt-*in*" procedure. *See* 3B James W. Moore & John E. Kennedy, *Moore's Federal Practice* ("*Moore's*") ¶ 23.02-1, at 23-73 (2d ed. 1993). This restriction reflected the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).[7]

The 1966 amendments to Rule 23 expanded the reach of class actions. Most notably, new Rule 23(b)(3) permitted, for the first time, absent class members to be bound to a judgment in a common-question damages class action without their affirmative consent. Recognizing the dangers this posed, the Rules Advisory Committee included a number of procedural protections in the new Rule to safeguard the due process interests of absent class members. Foremost among these protections were the mandatory notice and opt-out provisions of

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[7] Original Rule 23 did permit mandatory class actions in two other types of cases -- known as "true" and "hybrid" -- where the class members share an indivisible, unified interest in a common result. *See* 3B *Moore's* ¶ 23.02-1, at 23-73. "True" classes were defined as involving rights that were "joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it." Fed. R. Civ. P. 23(a)(1) (1938). "Hybrid" classes involved rights that were "several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action." Fed. R. Civ. P. 23(a)(2) (1938). In 1966, these classes were transformed into the mandatory classes permitted under Fed. R. Civ. P. 23(b)(1) and (2), which apply in cases where a group of individuals seek *in rem* recoveries against a common fund (under prong (b)(1)) or seek relief that is predominantly injunctive in nature (under prong (b)(2)). Neither of these circumstances applies in this case.

new Rule 23(c)(2), which requires that absent class members be given notice and the opportunity to exclude themselves from classes certified under Rule 23(b)(3). At the time, the Committee noted that, in damages cases:

> the interests of individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. *Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request.*

Notes of Rules Advisory Committee to 1966 Amendments to Rule 23, 39 F.R.D. 69, 104-05 (1966) (emphasis added). The Committee Notes further reflect that the mandatory notice and opt-out provisions were necessary "to fulfill requirements of due process to which the class action procedure is of course subject." *Id.* at 107 (citing, *inter alia*, *Hansberry v. Lee*, 311 U.S. 32 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)).

Even with the protection of the new notice and opt-out provisions, many commentators expressed strong reservations about the constitutionality of the new Rule 23(b)(3) damages class. For example, Professor Wright wrote:

> In the situation which (b)(3) covers, there is a strong feeling that the person who wants to go it alone, and to bring his individual action with his own lawyer, should be permitted to do so. . . . Even with this protection [of the right to opt-out], (b)(3) is a novel and controversial proposition . . .

Charles A. Wright, *Proposed Changes in Federal Civil,*

Criminal and Appellate Procedure, 35 F.R.D. 317, 338 (1964).

Similarly, Judge Frankel called the sweep of the (b)(3) class "among the more debatable" provisions of Rule 23, and compared the opt-out procedure to the Book-of-the-Month Club. *See* Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 44 (1967). He indicated his preference for an affirmative opt-in procedure, so that silence would not constitute consent to inclusion. *See* Marvin E. Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 Antitrust L.J. 295, 299 (1966). In the end, he urged that Rule 23 not "be pressed to the limits of its logic or to the literal dimensions that its language might possibly suggest." *Id.* at 297.

Notwithstanding these reservations, the constitutionality of Rule 23(b)(3) classes was affirmed by this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-13 & n.3 (1985). *Shutts* made clear, however, that the notice and opt-out requirements embodied in the Rule are not merely procedural niceties, but rather are indispensable requirements of due process. Thus, this Court stated that a court wishing "to bind an absent plaintiff concerning a claim for money damages or similar relief at law . . . must provide minimal procedural due process protection." 472 U.S. at 810. Such minimal protection must include "notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel . . . [and] an opportunity [for the absent plaintiff] to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.*

By requiring that courts provide absent class members the right to exclude themselves from actions involving claims for money damages, *Shutts* recognized the constitutionally-protected interest of absent plaintiffs to control their own inherently

particularized damages claims. Thus, while the procedural device of the class action has made some inroads on "our deep-rooted historic tradition that everyone should have his own day in court," *Martin v. Wilks*, 490 U.S. 755, 762 (1989), there can be no question that the notice and opt-out rights embodied in Rule 23(c)(2) are indispensable requirements of due process in class actions seeking damages at law. *Shutts*, 472 U.S. at 810.

Against this backdrop, it is readily apparent that the class action at issue in this case fails to withstand constitutional muster. First and foremost, many -- if not most -- of the future victims in the class had no way of knowing they were included in the settlement. As the Third Circuit recognized, exposure-only class members may be entirely in the dark about whether they were ever occupationally exposed to asbestos and, if so, to what extent. *See* 83 F.3d at 633-34. Yet even individuals who have had only "slight and incidental exposure" to asbestos can develop crippling diseases such as mesothelioma, which is always fatal, "generally within two years of diagnosis." *Id.* at 633.[8] These problems are magnified with respect to exposure-only class members' future spouses and other family members, who may have had no relationship with the class members -- and may not even have existed -- during the notice and opt-out period. Even currently-existing family members might have had no way of knowing during the notice period that their spouse or parent was ever occupationally exposed to asbestos. For these class members, the notice and opt-out rights afforded by the settlement are essentially meaningless.[9]

In these respects, this case is far more troubling than other class action settlements that have sought to affect claims for future personal injuries. For example, class members in cases involving medical devices implanted through surgery presumably have little difficulty identifying themselves as falling within the class definition. *See, e.g., Bowling v. Pfizer*, 143 F.R.D. 141 (S.D. Ohio 1992) (heart valves); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1995) (breast implants). Although these cases may present other problems, the future victims included in those settlements at least had a fair chance of knowing that their rights were at risk. What makes the present case so uniquely unfair is that it includes thousands, if not millions, of individuals who had no conceivable way of identifying themselves as members of the class. *See generally* Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.* ("*Feasting*"), 80 Cornell L. Rev. 1045, 1086 (1995) ("*Georgine* . . . is atypical because it involves a class composed largely of persons who could not be identified by the parties, who had not yet manifested injury at the time the action was brought, and who might not have known then or now that they had been exposed to the hazardous product.")[10]

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[8] As the Third Circuit explained, mesothelioma "has been known to occur in persons who lived with an asbestos-exposed parent, or in household members who washed the clothes of people who worked with asbestos. . . . The unpredictability of mesothelioma is further exacerbated by the long latency period between exposure to asbestos and the onset of the disease, typically between fifteen to forty years. As a result, persons contracting the disease today may have little or no knowledge or memory of being exposed." 83 F.3d at 633.

[9] These problems were massively exacerbated by the form of notice provided to the class. At least when individual notice is given, class members can be informed that the class action includes them. In this case, however, notice principally took place through television, print ads, and other forms of publicity to the public at large.

[10] In *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994), the Second Circuit rejected a collateral attack on a mass tort class action settlement that include the future personal injury claims of individuals who had been exposed to "Agent Orange," but had not yet contracted any related disease. Although we believe

Equally important, even those individuals who *were* able to identify themselves as class members had no meaningful way to determine whether to object to the settlement's terms or to opt out of the class. As the Third Circuit found, the exposure-only class members' futures are "completely uncertain" insofar as they have no way of knowing whether they will eventually get sick and, if they do, which of the wide variety of asbestos-related diseases they will contract. *See* 83 F.3d at 632. These individuals also had no way of knowing whether their unknowable, future disease would be compensable under the settlement, and, if it was, how much that disease would be "worth," particularly in light of the fact that the settlement does

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that *Ivy* was wrongly decided, the case is also distinguishable from *Georgine* for several reasons. First, the Second Circuit emphasized that, unlike plaintiffs in asbestos litigation, the *Agent Orange* plaintiffs had only "speculative" or "dim prospects of success" and that the "crucial issue of 'general causation' . . . remains unsettled." *Id.* at 1436-37. In addition, the Second Circuit stressed that there was no conflict between the present and future claimants in the class because both groups were eligible for compensation from the same fund, presumably on the same terms. *Id.* at 1429, 1435-36. This is strikingly different from this case, where the interests of the present and future claimants are in direct conflict. *See* 83 F.3d at 630-31. Third, and perhaps most important, the Second Circuit made clear that class certification was only appropriate in *Agent Orange* because of the unique presence of one, overriding legal issue -- the "military contractor defense" -- common to the entire class. Thus, the court stressed "the cardinal fact" that Agent Orange was "'sold by private manufacturers under contract for the government for use in a war.'" *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 166 (2d Cir. 1987) (quoting *In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858, 860 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984)). The court further stated that, "[w]ere this an action by civilians based on exposure to dioxin in the course of civilian affairs, we believe certification would have been in error." *Id.* Even the district court in *Agent Orange* acknowledged that, "*[u]nlike litigations such as those involving DES, Dalkon Shield and asbestos*, the trial is likely to emphasize critical common defenses" -- particularly the military contractor defense -- "applicable to the plaintiffs' class as a whole." *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 723 (E.D.N.Y. 1983) (emphasis added).

not compensate for inflation. In short, because they cannot predict their own future, even class members who could identify themselves as such had no way to make an intelligent decision whether to opt out of the class or accept the settlement and waive their constitutional rights, including the right to a jury trial. *Cf. Brady v. United States*, 397 U.S. 742, 748 (1970) (waiver of constitutional rights "must be knowing, intelligent [and] done with sufficient awareness of the relevant circumstances and likely consequences.")

In this respect, too, this case is far more extreme than other class action settlements involving future personal injuries. In the heart-valve settlement, for example, class members will at least be afforded a second, unlimited "back-end" right to opt out of the class settlement and pursue their own relief when and if their heart valves fracture in the future. *See Bowling*, 143 F.R.D. at 157. In this case, in contrast, only a tiny percentage of the class will be permitted to opt-out of this case at the "back-end," and they will still be bound in constitutionally impermissible ways. *See* n.4, *supra*. The vast majority of the exposure-only class members will have no further opportunities to exclude themselves from the class no matter what injuries they incur in the future and regardless of the effect of inflation on the real value of their recovery under the settlement.

For these reasons, this case cannot be reconciled with the constitutionally-mandated notice and opt-out rights embodied in Rule 23. These rights were designed to give absent class members the ability to protect their own interests by objecting to a proposed settlement or by opting out of the case to pursue individual litigation. This role, however, cannot be fulfilled in a case where -- as here -- most class members were not given any meaningful notice of their inclusion in the settlement or any means of evaluating its terms as applied to them. Thus, this core procedural safeguard -- firmly rooted in the U.S. Constitution -- is simply lacking in this case.

II. The Class Settlement Violates the Future Victims' Constitutionally-Mandated Rights to Adequate Representation.

The second constitutional infirmity in the proposed settlement is that it deprives the future victims of their due process right to adequate representation. To begin with, there is no question that Rule 23(a)(4)'s adequacy-of-representation requirement is a minimal requirement of due process. As Justice Ginsberg recently wrote in her concurrence in *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873, 875 (1996), "adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members." *See also Shutts*, 472 U.S. at 812; Herbert Newberg & Alba Conte, 1 *Newberg on Class Actions* (*"Newberg"*) § 1.13 (3d ed. 1992). With regard to the class representatives, this safeguard requires, at a minimum, that "the interests of the named plaintiffs must be sufficiently aligned with those of the absentees." 83 F.3d at 630 (citing *In re General Motors Corp. Pick-Up Trucks Fuel Tank Prods. Liab. Litigation*, 55 F.3d 768, 800 (3d Cir.), *cert. denied sub nom., General Motors Corp. v. French*, 116 S. Ct. 88 (1995)).[11]

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[11] The adequacy-of-representation requirement also applies to class counsel, "who must be qualified and must serve the interests of the *entire* class." 83 F.3d at 630 (emphasis in original). *See also Matsushita*, 116 S. Ct. at 888 n.5 (Ginsberg, J., concurring); *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982). In the proceedings below, the objectors to the class settlement "forcefully argued that class counsel cannot adequately represent the class because of a conflict of interest" -- namely, that counsel "brought a collusive action on behalf of the CCR defendants after having been paid over $200 million to settle their inventory of previously filed cases." 83 F.3d at 630. However, the Third Circuit did not ultimately decide whether class counsel in fact suffered from a disqualifying conflict of interest (*see id.*), and we do not address that issue here.

As with the mandatory notice and opt-out provisions of Rule 23(c)(2), the drafters of the modern class action rule regarded the adequacy-of-representation requirement as an essential safeguard of the due process rights of absent class members. *See* 7A *Federal Practice* § 1765, at 263. This Court has since repeatedly affirmed that adequacy of representation is a basic element of due process in opt-out damages class actions brought under Rule 23(b)(3). *E.g., Shutts*, 472 U.S. at 812 ("the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.") (citing *Hansberry v. Lee*, 311 U.S. 32 (1940)). *See also Matsushita*, 116 S. Ct. at 875 (Ginsburg, J., concurring).

Rule 23 incorporates this constitutional standard by requiring a showing of adequacy of representation in every class action. *See* Fed. R. Civ. P. 23(a)(4). In this case, the Third Circuit held that the class failed this requirement due to the inherent, irreconcilable "intra-class" conflicts between the presently injured and future plaintiffs -- in particular, the fact that "the former have an interest in preserving as large a fund as possible while the latter seek to maximize front-end benefits." 83 F.3d at 618; *see also id.* at 630-31. These conflicts, in the court's view, rendered the class representatives incapable of adequately representing the class, since "the named plaintiffs' interests cannot align with those of absent class members if the interests of different class members are not themselves in alignment." *Id.* at 630.[12]

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[12] The lower court added that the conflict between the future victims and the presently injured class members was not cured by the fact that the named plaintiffs included representatives from both categories due to the "lack of any structural protections in the case." *Id.* at 631. One possible "structural protection" that could mitigate this conflict of interest is to create separate subgroups of presently-injured and exposure-only class members, each represented by their own attorneys. No such protection existed here, since the

We agree that, in this case, the intra-class conflicts between present claimants and future victims prevented the adequacy-of-representation requirement from being met. However, there is another, equally compelling reason why the class representatives failed to adequately represent the class: the release of the absent class members' future claims violates the "most fundamental principles underlying class actions, [which] limit the powers of the class representatives to the claims they possess in common with other members of the class." Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 Neb. L. Rev. 646, 694 (1994). This restriction is rooted in the basic rationale underlying the adequacy-of-representation requirement: "the court must be satisfied that the class representative, by litigating his or her personal claim, will also necessarily be litigating common claims that are shared by the class." 1 *Newberg* § 1.13, at 1-36. As one commentator put it,

> The basic philosophy of class actions has remained unchanged through the centuries. Self-interest, the motivating force that sparks the adversary system, also sustains the doctrine of class actions. We may trust man to help his fellow man if by doing so [he] helps himself. Building on that simple premise, the [class action] device provides for the use of man's natural instinct to act in his own best interest in order to achieve justice and procedural efficiency in mass litigation.

Homburger, *State Class Actions and the Federal Rule*, 71 Columbia L. Rev. 609, 610 (1971).

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entire class was represented, *en masse*, by the same set of class representatives and the same counsel.

By restricting class representatives' authority to claims that they hold in common with the entire class, the adequacy-of-representation requirement ensures that the class representatives -- through the "motivating force" of self-interest -- will achieve the best result possible for the class. Thus, "[w]hen the class representative's claims are the same as or similar to those of the class members, the court may rely in part on the representative's self-interest in prosecuting those claims to protect the interests of the class members." 3 *Newberg* § 3.01, at 3-5.[13] Conversely, "[t]o the extent the plaintiff or class members also have unique individual claims, the plaintiff cannot adequately represent the class on uncommon claims, nor will the adjudication of common issues affect or be binding on the individual uncommon claims possessed by the plaintiff or class members." *Id.* § 1.13, at 1-37 (footnotes omitted).

The Second Circuit followed these principles in *National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981), which reversed a district court's approval of a class action settlement releasing claims that did not arise out of the facts pled in the complaint. There, the district court had certified a class of purchasers of potato futures contracts who liquidated the contracts between April 13, 1976, and May 7, 1976. The class members alleged that the wrongful conduct of the defendants had depressed the price of those contracts. Class counsel and the defendant agreed to a settlement that released both the claims alleged in the complaint *and* any claims

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[13] This observation was made in connection with the "typicality" requirement of Rule 23(a)(3), as opposed to the adequacy-of-representation requirement of Rule 23(a)(4). As many commentators have noted, however, the two tests are closely related, and courts frequently discuss both of them together in their class rulings. 3 *Newberg* § 3.13, at 3-73 to 3-74 & n.190. *See also General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (noting that the commonality and typicality requirements of Rule 23(a) "tend to merge with the adequacy-of-representation requirement").

regarding futures contracts that were liquidated *after* May 7, 1976. Over objections, the district court approved the fairness of the settlement. *See id.* at 15.

The Second Circuit, per Judge Friendly, reversed, holding that the representative plaintiffs were empowered to represent the class "solely with respect to the contracts in which all members of the class had a common interest: contracts liquidated between April 13 and May 7." Judge Friendly added that, "if a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either." *Id.* at 17-18. Thus, the Second Circuit held that the authority of the representative plaintiffs under Rule 23 to release claims on behalf of the class is limited by the scope of the class complaint, which describes the claims all class members have in common. *Id.* at 18-19. *See also International Union of Electronic, Electrical, Salaried, Mach., and Furniture Workers, AFL-CIO v. Unisys*, 155 F.R.D. 41, 48 (E.D.N.Y. 1994) ("*National Super Spuds* thus stands for the proposition that a federal district court may not approve a class-action settlement that seeks to release claims that are inadequately represented by the named plaintiffs"); 7B *Federal Practice* § 1797.1, at 41-42 (quoting *National Super Spuds* with approval and noting that, "[i]n evaluating the fairness and reasonableness of any proposed settlement, the court should make certain . . . that the agreement does not impermissibly waive future claims"); J. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Columbia L. Rev. 1343, 1435 (1995) ("Judge Friendly's view in *National Super Spuds* that an atypical plaintiff cannot meet the 'adequacy of representation' standard in Rule 23(a) rests on a sound perception of the conflicts of interest that arise under any contrary rule.")[14]

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[14] *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873

The proposed settlement in this case violates these basic principles by releasing claims that the class representatives do not hold in common with the rest of the class. Although the unaccrued future personal injury claims of the exposure-only class representatives and the unnamed class members they purport to represent share some common "liability facts" with respect to the CCR defendants -- *e.g.*, the defendants' production of, and failure to warn about, asbestos products -- the vast majority of the facts relating to class members' damages vary radically and depend on proof of events that *have not yet occurred*. As the Third Circuit found in connection with its holding that the class did not meet the "typicality" requirement of Rule 23(a)(3),

> the course of each plaintiff's future is completely uncertain. . . [S]ome plaintiffs may ultimately contract mesothelioma, some may get asbestosis, some will suffer less serious diseases, and some will incur little or no physical impairments. Given these uncertainties, which will ultimately turn into vastly different outcomes, the futures plaintiffs share too little in common to generate a typical representative.

(1996), is not to the contrary. There, this Court reversed a decision of the Ninth Circuit refusing to recognize the preclusive effect of a state court class action settlement that released federal claims brought under the Securities Exchange Act of 1934 that the class representatives held in common with the rest of the class and which, under the Exchange Act as construed by the Court, could be released by a state court. *See id.* at 881-82. In so doing, the Court merely held that the Ninth Circuit erred in refusing to afford full faith and credit to the state court judgment, and did not reach the question of whether the release of federal claims that could not have been pled in the state court proceeding violated due process. In a concurring opinion, Justice Ginsburg stressed that the Court's opinion did not decide whether the class representatives' release of unpled claims violated the absent class members' due process rights, and warned that the issue of adequacy of representation remained open on remand. *Id.* at 885.

> It is simply impossible to say that the legal theories of named plaintiffs are not in conflict with those of the absentees, . . or that the named plaintiffs have incentives that align with those of absent class members.

83 F.3d at 632 (citations omitted).[15] Given this radical disparity among the future personal injury claims held by the exposure-only class members, the class representatives in this case cannot adequately represent the broad and varying interests of the future victims encompassed by the class settlement with respect to those claims -- either for litigation *or* settlement purposes.

Petitioners attempt to sidestep this irremediable defect in the class by arguing that, in the settlement-class context, it is unnecessary to establish that the interests of the named plaintiffs are sufficiently aligned with those of the class to satisfy the adequacy-of-representation requirement. Rather, they claim that "a court's determination that the terms of the settlement are fair presumptively establishes that the class received adequate representation." Brief for Petitioners at 46. Thus, in petitioners' view, it is irrelevant that the class itself is riddled with conflicts, and that the class representatives are not qualified to represent the interests of future victims whose claims necessarily differ from their own. Rather, in their view, the sole question is whether the settlement itself is fair. *See id.*

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[15] Similarly, in connection with its holding that the class failed to meet the "commonality" and "predominance" requirements of Rules 23(a)(2) and (b)(3), the Third Circuit stated that the exposure-only plaintiffs "especially share little in common, either with each other or with the presently injured class members." 83 F.3d at 626. The court elaborated that, for these plaintiffs, "[i]t is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories." *Id.*

This argument hinges on an unrealistic belief that courts are able to adequately police the fairness of all class action settlements. To be sure, under Rule 23(e), no class settlement may be finalized without court approval. As with the other safeguards of Rule 23, this provision was designed to protect the rights of absentee class members from unfair compromise of their rights. *See generally* 7B *Federal Practice* § 1797, at 341-43. *See also Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982) (under Rule 23(e), the court "sit[s] as a guardian for class members who have not received notice or who lack intellectual or financial resources to press objections"), *cert. denied*, 464 U.S. 818 (1983).

It is well understood, however, that courts face serious constraints in their ability to curb abuse by reviewing class action settlements. As the Fifth Circuit cautioned in *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1169 (5th Cir), *cert. denied*, 439 U.S. 1115 (1978), "[l]acking a fully developed evidentiary record, both the trial court and the appellate court [are] incapable of making the independent assessment of the facts and law required in the adjudicatory context." *Id.* at 1169. This absence of a full evidentiary record is due to the lack of any true adversarialness in the context of a class action settlement: "when a class settlement is presented to a court for approval, there may be no 'opposing party.' The settling parties are aligned, and there may be no objector represented at the fairness hearing." *Feasting*, 80 Cornell L. Rev. at 1126. Even when an objector does appear to oppose a settlement,

> this does not transform a fairness proceeding into an ordinary adversary proceeding. Fairness hearings are not supposed to resemble full blown trials, and they do not. Objectors are rarely allowed to conduct extensive discovery on the compromises

> made by the settling parties in their negotiations. Even when the court is persuaded to allow discovery into the negotiation process to expose collusion or other evidence of unfairness, it is highly unlikely to order the depositions of class counsel or defendants' lawyers. Thus, objectors are routinely denied the best evidence by which to establish their position.

Id. at 1126-27 (footnotes omitted). Even in this case, where numerous objectors were represented by counsel throughout the fairness hearing and were granted some discovery, they were denied permission to depose class counsel to obtain information regarding negotiation of the class settlement.

The information problems inherent in evaluating class action settlements, moreover, are massively exacerbated in the context of a "future victims" settlement, where there is often no one available to advocate the rights of the absentees. Even if someone does appear to speak for the future victims, it is impossible to fully evaluate the fairness of the settlement with respect to their claims, since they rest on facts that do not yet exist and legal theories that may have yet to be developed. Finally, even the most diligent court, applying the most rigorous scrutiny possible to a proposed class action settlement, would have no way of knowing how much "fairer" the settlement would have been if the class had been represented by plaintiffs who actually held claims in common with the absentees. *See In re Asbestos Litig.*, 90 F.3d at 1009 n.42 ("No one can tell whether a compromise found to be 'fair' might not have been 'fairer' had the negotiating [attorney] . . . been animated by undivided loyalty to the cause of the class.") (Smith, J., dissenting) (internal quotation omitted).

For all these reasons, petitioners' attempt to avoid the adequacy-of-representation inquiry in this case should be rejected. No matter how "fair" this settlement may have

appeared to the district court in this case, the fact remains that the class representatives lacked any authority to release the unaccrued personal injury claims of the exposure-only class members. Any other result would fly in the face of due process, which forbids absent class members from being bound by a class judgment in which they were represented by individuals "whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). Thus, the settlement in this case violates the constitutional rights of the absent class members and should not be permitted to stand.

CONCLUSION

For these reasons, we urge this Court to affirm the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., *et al.*,

Petitioners,

—v.—

GEORGE WINDSOR, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, ARKANSAS, DELAWARE, HAWAII, IDAHO, KANSAS, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEVADA, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA AND VIRGINIA AND THE DISTRICT OF COLUMBIA AND THE TERRITORY OF GUAM AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE STATES

The States of New York, California, Arkansas, Delaware, Hawaii,[1] Idaho, Kansas, Kentucky, Michigan, Minnesota, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Virginia and the District of Columbia and the Territory of Guam, as amici curiae, respectfully submit this brief pursuant to Supreme Court Rule 37. The matter before the Court concerns a federal district court's certification and the Third Circuit's subsequent decertification of a "settlement class" (*i.e.*, a class sought to be certified for the sole purpose of settlement) in a federal multidistrict class action lawsuit involving claims of occupational exposure to asbestos. The specific issue before the Court is whether and in what circumstances a settlement class that admittedly could not be certified under Rule 23 of the Federal Rules of Civil Procedure for purpose of trial, may nevertheless be certified under that rule by a federal district court for the purpose of settlement.

The case before this Court implicates critical due process and fairness concerns. For this reason, the interests of the amici States are many and of great moment. Indeed, the amici States believe we have a unique perspective which should be heard because vast numbers of our citizens are members of the *Georgine* class. The class includes occupationally exposed people who are presently suffering from asbestos-related illnesses, as well as people who were exposed but are not yet sick (the "futures" or "future claimants"). These citizens are largely unaware that they have been made members of the broadly defined class in this case, or that their rights to file lawsuits to recover damages for asbestos-related illnesses (the

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[1] Of the states participating, all except Hawaii are represented by the Attorneys General of the respective states. Hawaii is represented by its Office of Consumer Protection, an agency which is not a part of the state Attorney General's office, but is statutorily authorized to undertake consumer protection functions, including legal representation of the state. For the sake of simplicity, we will refer to the whole group, including the District of Columbia and the Territory of Guam, as the "Attorneys General" or the "amici States".

symptoms of which may not have yet manifested themselves) could be irretrievably lost.

The rights of our citizens would be seriously compromised if the Court were to pronounce a rule recognizing the validity of settlement classes without stringent review and safeguards. Therefore, we as State Attorneys General, charged with responsibility for protecting the public interest, urge the Court to take heed of the critical constitutional concerns raised. We seek to ensure that the constitutional requirements of due process—including that adequate notice and adequate representation are fully and meaningfully implemented for all class members, and that class members have the right to opt out of a class action lawsuit or settlement at a time that is meaningful to them—are not forgotten.

At the outset, we wish to emphasize our belief that class action lawsuits (and settlements of those lawsuits) are important devices for citizens to vindicate legal rights that may have been infringed on a broad scale. We recognize as well that innovation may ultimately be necessary to solve the tangled legal, medical and social problems presented by mass tort litigation, particularly in areas involving latent diseases caused by contact with or exposure to harmful products. Nevertheless, because vital personal interests of our citizens are implicated, particularly in the mass tort context where individuals may have their rights to file lawsuits seeking very substantial sums in compensatory and punitive damages taken from them without their knowlege, courts must ensure that innovation does not override the requirements of constitutional due process and fundamental fairness. As observed by Judge Smith in his dissenting opinion in *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996):

> In exchange for losing the right to prosecute his own action, a class member must receive a variety of substitute protections. . . .[T]he safeguards required by due process necessarily differ according to the type of action, and when confronted with a new animal, we must analyze those safeguards anew. Reliance on strained analogies to inapposite traditional actions leaves us in what one commentator has aptly labeled a "due process quandary," Thus the irony: The majority eviscerates well-established due process protections because of the "unique facts" of the case. . . , but fails to recognize that those novel facts may actually call for *enhanced*, not lessened, protections for vulnerable asbestos victims. [citations omitted]

Id. at 999. Amici ask this Court to define and require due process protections for mass toxic tort victims who, knowingly or not, are made class members in settlement class actions.

SUMMARY OF ARGUMENT

The case before this Court is a settlement class action of the most far-reaching proportions[2], in which the majority of the class members are "future claimants." Those class members are not yet ill, and, for the most part, are completely unaware that their rights to file lawsuits for damages for life threatening illnesses[3] they may later develop will be forever lost, because they are unaware of their right to opt out of the class. While the goals of efficiency and of bringing closure to complicated mass tort litigation are laudable, important due process rights of the victims must not be sacrificed along the

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[2] The class is defined as all people who did not file suit against the CCR defendants by January 15, 1993 and were occupationally exposed to defendants' asbestos products or who were exposed to asbestos from those products through the occupational exposure of a family member. *Georgine v. Amchem Prods., Inc.*, 83 F.3d at 619 (3d Cir. 1996) ("*Georgine*").

[3] For example, future claimants who may be unaware of their exposure to asbestos may someday develop mesothelioma, the only known cause of which is exposure to asbestos. Individuals suffering from mesothelioma usually die within two years of onset of the illness. *Id.* at 626.

way.[4] The settlement class action before the court is constitutionally deficient in this very respect. The inherent dangers of settlement class actions, particularly those which cannot be certified under Rule 23 for the purpose of trial, require heightened judicial scrutiny to ensure that the due process requirements of adequate notice, adequate representation and the right to opt out are not sacrificed in the desire to bring closure to mass tort litigation.

The amici States propose that the Court adopt objective standards by which to judge mass tort settlement class actions. First, for notice to be adequate, a district court should be required to find that the notice is comprehensible to a lay reader of ordinary intelligence and contains all those disclosures (including the costs as well as the benefits of settlement, along with information on what similarly situated plaintiffs have obtained as compensation in the tort system) that a class member would need to make an informed judgment as to whether to opt out of or object to the settlement, or retain counsel. Second, for representation to be found adequate, class counsel should not be permitted simultaneously to represent class members with competing interests. Whenever the class contains such claimants, they should be separately represented in distinct subclasses, and in cases involving future claimants, the court should consider the appointment of a special advocate to the class. The district court should further be required to consider the following factors as indicia of the inadequacy of representation: (a) parallel

[4] While Petitioners recognize that the "touchstones" for interpreting the Federal Rules are "efficiency and fairness" (Br. for Petitioners at 33), they devote the majority of their 49 page brief to a discussion of the principles of judicial efficiency served by Rule 23 settlement class actions, save for approximately four pages of discussion on the issue of fairness. It is precisely this unequal weighting of efficiency over fairness that concerns the amici States and requires that this Court impose a standard of heightened scrutiny and provide objective standards against which courts must measure the constitutional sufficiency of settlement class actions.

representation, by class counsel, of both the class and of similarly situated non-class claimants, (b) negotiation of settlement agreements for class counsel's non-class clients in conjunction with the negotiation of a class settlement, (c) settlement terms negotiated for the non-class clients that are more favorable than the terms negotiated for the class; (d) selection of class counsel by defendants to negotiate a global settlement of all claims; and (e) definition of the class to include only those claimants who have not filed lawsuits against the defendants by a given date. Finally, when the settlement class action involves substantial numbers of future claimants, a district court should be required to find that class members are afforded an opportunity to opt out of the settlement at a point in time that is meaningful to them, *e.g.*, in this matter, at the time a future claimant develops asbestos-related illness.

ARGUMENT

I

SETTLEMENT CLASS ACTIONS THAT CANNOT BE CERTIFIED UNDER RULE 23 FOR THE PURPOSE OF TRIAL SHOULD BE GIVEN HEIGHTENED JUDICIAL SCRUTINY

The amici States believe that where settlement class actions are used to solve the problems of mass tort cases, the courts, through constitutionally required heightened oversight, must see that minimum due process protections are not only afforded in theory, but are meaningfully implemented as safeguards against the inherent dangers of this class action device.

Various courts and commentators have expressed concerns that settlement classes[5] which could never be certified for

[5] A "settlement class" is a class sought to be certified for the sole purpose of settlement. MANUAL FOR COMPLEX LITIGATION § 30.45 (3d ed. 1995). *Georgine* was filed as a "settlement class action" *i.e.*, the class action complaint and stipulation of settlement were filed simul-

purposes of litigation, raise serious agency problems that undermine the accountability of class counsel and create a substantial risk of collusion between class counsel and defendants. *See, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768,786-94 (3d Cir.), *cert. denied*, 116 S.Ct. 88 (1995); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 152 (S.D. Ohio 1992); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837 (1995); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7 (1991) [hereinafter Macey & Miller]; James A. Henderson, Jr., *Comment: Settlement Class Actions and The Limits of Adjudication*, 80 CORNELL L. REV. 1014, 1021 (1995). Critics argue that settlement class actions effectively enable defendants to conduct a "reverse auction,"[6] allowing defendants to seek out the

taneously. All parties admit that the class could never be certified under Fed.R.Civ.P. 23 for purpose of trial because of its breadth and the enormously different factual and legal issues that would need to be tried. The Third Circuit in *Georgine* thus noted that "this case is so much larger and more complex than all other class actions on record that it cannot conceivably satisfy Rule 23." *Georgine v. Amchem Prods., Inc.*, 83 F.3d at 618.

Petitioners argue that the Third Circuit's opinion conflicts with long-standing case law allowing settlement classes. (Br. for Petitioners at 22-25). However, the cases Petitioners rely on do not authorize the settlement of cases that all concede could not possibly be certified for trial. *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) defined "settlement classes", not as class actions that could not possibly be tried, but as class actions in which the class was certified after the settlement, with notice of the action and settlement issued simultaneously. *In re Beef Industry Anti-Trust Ligtigation*, 607 F.2d 167, 177 (5th Cir. 1979) used the term "tentative settlement class", which was defined as "nothing more than a tentative assumption indulged in by the court to facilitate the amicable resolution of the litigation, rather than as some sort of conditional class ruling under Rule 23 criterion".

[6] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1354 (1995) [hereinafter Coffee, *Class Wars*] and note 35, *infra*, for a discussion of the "reverse auction."

plaintiffs' attorneys most willing to accept the lowest settlement for the class in return for a substantial award of fees.[7]

As discussed in a letter from a steering committee of 144 law professors to the Standing Committee on Rules of Practice and Procedure of the United States Judicial Conference, (*see* letter dated May 18, 1996 and addendum [hereinafter *Steering Committee Letter*]) there is a great risk in authorizing class actions that can be settled, although not tried, where the only lawyers who may serve as class counsel are those who have struck a deal with the defendant to settle not only the class' claims, but also class counsel's whole inventory of non-class claims.[8] The steering committee argues that such a regime enables defendants to select class counsel and to shop for the lawyer who asks the least on behalf of the class.

Moreover, the collusion invited by class action settlements is not limited to collusion engaged in by a few consciously corrupt lawyers. Even well-intentioned lawyers may be hard pressed to walk away from settlements which are not in the

[7] *See Mars Steel Corp. v. Continental Ill Nat'l Bank & Trust*, 834 F.2d 677, 681 (7th Cir. 1987) (wherein court acknowledged that "a lawyer may be able to obtain a large fee not just by outbidding another class lawyer but, alternatively, by 'selling out' the class"); *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982) (noting, in context of class settlement negotiated prior to filing suit, that "the interest of the lawyer and the class may diverge" and that "certain interests may be wrongfully compromised, betrayed or 'sold-out' without drawing the attention of the court." [citations omitted]); *In re Asbestos Litig.*, 90 F.3d at 993-95 (Smith, J., dissenting); Roger C. Cramton, *Individualized Justice, Mass Torts, And "Settlement Class Actions"; An Introduction*, 80 CORNELL L. REV. 811, 826 (1995) [hereinafter Cramton]; John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L. REV. 1222,1224 (1995); Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 515 (1996).

[8] John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. at 851, 853-54 (1995) [hereinafter Coffee, *Corruption of the Class Action*] (discussing that plaintiffs' attorneys chosen as class counsel have the "linked ability to settle on a superior basis" their entire existing inventory of cases.)

best interests of the class when they know that some other lawyer would be more than willing to accept the same or perhaps a worse settlement.[9]

Settlement class actions also change the dynamics between the plaintiffs' lawyers and defendants. Plaintiffs' lawyers in such cases are in a substantially weakened bargaining position because they do not have the leverage that comes from the ability to force a defendant to trial.[10]

Finally, the availability of information in such settlement class actions is substantially reduced, greatly limiting the class members' and the court's ability to assess the fairness of the settlement or the adequacy of the representation afforded by class counsel. *See* MANUAL FOR COMPLEX LITIGATION § 30.45. A court's ability independently to assess the fairness of the settlement in the fairness hearing is severely restricted in such cases because the court is dependent on the information provided jointly by the defendant and class counsel.[11] Moreover, such hearings are not typically adversary proceedings; objectors are rare and they, too, have limited information. *See supra* note 11. Finally, because certification may be requested before any significant discovery has been conducted, much less information is available at the certification

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9 Steering Commitee Letter at 5; Cramton, *supra* note 7, at 826 (recognizing that "incentives involved may overwhelm the judgment of otherwise highly ethical lawyers."); Arthur Bryant, *An Open Invitation to Class Action Abuse*, Litigation News, Nov. 1996, Vol 22, No.1, pp. 4,11.

10 *In re General Motors*, 55 F.3d at 788 (noting that settlement class actions create possibility that plaintiffs' attorneys will be negotiating from a "postion of weakness"); Coffee, *Class Wars*, *supra* note 6, at 1453 (noting that plaintiffs' attorneys are "effectively negotiating with one arm tied behind their back.")

11 *In re General Motors*, 55 F.3d at 787; Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1126-1128 (1995) [hereinafter Koniak, *Feasting*].

hearing than in a litigated class action.[12] The potential for collusion, changed dynamics, and diminished information available in settlement class actions demand a standard of heightened scrutiny to ensure that class members are afforded the constitutionally required safeguards of adequate notice, adequate representation and opportunity to opt out. The need for heightened scrutiny is even more compelling where large numbers of future claimants are class members.

Considerable precedent exists for the application of a standard of heightened scrutiny to settlement class actions. Thus, in *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971), the Third Circuit applied a standard of heightened scrutiny to a nationwide antitrust class action settlement negotiated by plaintiff's counsel prior to his designation as class counsel:

> . . . when the settlement is not negotiated by a court designated class representative, the court must be doubly careful in evaluating the fairness of the settlement to plaintiff's class.

Id. at 33. *See also In re A.H. Robins Co., Inc.*, 880 F.2d 709, 728 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989) (a district court is to make assessment required for class certification after "a rigorous analysis of particular facts of case"); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992) (when settlement of class action is reached prior to class certification, court must apply higher level of scrutiny in evaluating fairness of settlement, *citing Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust*, 834 F.2d 677, 681 (7th Cir. 1987);

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12 Even in the unusual circumstances of this case where relatively extensive discovery was conducted by objectors, the district court, nevertheless, did not allow depositions of class counsel as to the course of the negotiations. Thus discovery on the issues of trade-offs made as between presently ill and future claimants and collusion between defendants and class counsel, which go to the very heart of the adequacy of representation, was not permitted. *See* Koniak, *Feasting*, *supra* note 11, at 1097-98 and n.242 at 1098.

Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982) (requiring "clearer showing of a settlement's fairness, reasonableness and adequacy and the propriety of the negotiations leading to [the settlement]" in cases where class settlement is filed before class has been certified and thus before class counsel and named class representatives have been found adequate to represent class); MANUAL FOR COMPLEX LITIGATION, § 30.45 (approval under Rule 23(e) of settlements involving settlement classes requires closer judicial scrutiny than approval of settlements where class certification has been litigated.)[13]

The amici States request the Court to make clear that heightened scrutiny must precede certification of the class in settlement class actions to ensure that class members' due process rights are not compromised for the sake of economy or efficiency.

II

GEORGINE-LIKE SETTLEMENT CLASS ACTIONS RAISE SERIOUS CONCERNS ABOUT THE ADEQUACY OF NOTICE

Notice is a critical constitutional protection, particularly in settlement class actions where the terms of settlements governing the extent of class members' ultimate recoveries are determined before class members even learn of such lawsuits. Indeed, class members' ability to participate in the case, decide whether to retain counsel, object to the certification of the class or the fairness of the settlement, or opt out of the lawsuit cannot be ensured unless meaningful notice is provided. Notice concerns are even greater when the settlement affects future claimants.

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[13] Even the district court in *Georgine*, in citing *Ace Heating*, *supra*, gave lip service to the need for heightened scrutiny in settlement class actions. However, its analysis fell far short of that standard.

In determining that due process requires notice to interested parties, this Court opined in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Thereafter, in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974), this Court held that individual notice to identifiable class members is an unambiguous requirement of Rule 23 of the Federal Rules of Civil Procedure, which incorporates due process standards[14], and that the individual notice requirement may not be waived in a particular case. Subsequently, in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1984), the Court applied the notice requirement of *Mullane* to absent class members lacking the minimum contacts with the forum which would support personal jurisdiction over a defendant.[15]

The protections set forth in *Mullane*, *Eisen*, and *Shutts* are necessary to overcome the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *accord*, *Richards v. Jefferson County, Ala.*, 116 S.Ct. 1761, 1765-66 (1996); *see also McKinney v. Alabama*, 424 U.S. 669 (1976).

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[14] *Eisen* makes clear that any rule change, including the United States Judicial Conference's proposed Rule 23(b)(4), would have to satisfy minimum due process standards.

[15] The Court in *Shutts* thus held that minimal due process protections which must be afforded to such absent class members include giving the best practicable notice, "reasonably calculated . . . to apprise", plus an opportunity to be heard and participate in the litigation. *Shutts*, 472 U.S. at 812 (*quoting Mullane*, 339 U.S. at 314-15).

A. Georgine-like settlement class actions raise special concerns as to whether notice will reach a significant percentage of the class members

Toxic exposure class actions like the *Georgine* case and medical mass tort class actions (*e.g.*, silicone breast implant, Dalkon Shield, DES) present special difficulties in notifying class members.[16] Because of the vast number and types of claims, industries, occupations[17], and products[18] involved, and the fact that many individuals (particularly those exposed indirectly through direct exposure of a spouse or other family member) may not even be aware of having been exposed or otherwise medically harmed, the court faces great difficulties in identifying those individuals who should receive individual notice of the action.[19] Where, as here, the majority of the class—the future claimants—may never even hear of the settlement class action and will never have an opportunity

[16] For this reason and the lack of commonality of the issues presented, the use of the class action device in such cases has been criticized. *See, e.g., Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734, 745-747 (5th Cir. 1996); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1084-86 (6th Cir. 1996); Coffee, *Class Wars*, *supra* note 6, at 1343, 1358; Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1174-76 (1995).

[17] *See* Jt. App. at 236-7.

[18] *Id.* at 235-6.

[19] In *Georgine*, individual notice was sent only to the slightly more than 9,000 plaintiffs who had filed suit against one or more of the CCR defendants since the class action was filed. The class, however, has been alleged to include 250,000 to 2,000,000 members. Despite the difficulty of notifying class members in cases like *Georgine*, it nevertheless strains credulity that no class members other than the 9,000 plus who had filed their own lawsuits were identified to receive individual notice. Clearly, the twenty companies comprising the CCR could have identified many more individuals who were occupationally exposed to asbestos by working with their products. Thus, the notice in *Georgine* failed to satisfy the due process requirement enunciated in *Eisen* that individual notice be provided to identifiable class members.

to opt out of the class or to object to the settlement, the due process concerns are even more compelling.[20]

The Court of Appeals for the Third Circuit in *Georgine* expressed "serious concerns as to the constitutional adequacy of class notice" in this case, finding that "[p]roblems in adequately notifying and informing exposure-only plaintiffs of what is at stake in this class action may be insurmountable." *Georgine v. Amchem Prods., Inc.*, 83 F.2d at 623, 633. The court concluded that, if the class action were approved, "it is obvious that . . . some plaintiffs would be bound despite a complete lack of knowledge of the existence or terms of the class action." *Id.* at 634.

[20] For example, movants Peggy and Charles Palmer, along with approximately 400 other class members, sought to opt out of the *Georgine* settlement on grounds of "excusable neglect" after the opt-out deadline had expired. The Palmers argued that good cause existed because they did not receive notice of the class action until three weeks after the deadline to opt out had passed. The district court denied their motion, based on its finding that failure to receive actual notice of the *Georgine* class action before the close of the opt-out period is not sufficient reason for extending the opt-out period. *Georgine v. Amchem Prods., Inc.*, 1995 WL 251402, at *16 n.35 (E.D.Pa. Apr. 26, 1995). The court likewise rejected the arguments of the 227 putative class members who contended that they should be given additional time to exclude themselves from the class because their local unions (that were to disseminate the notice under the notice plan) were unable to complete their mailings until after the close of the eight week notification period, leaving less than two weeks within which the recipients had to review, comprehend, decide and respond to the notice. The court stated that these movants had not demonstrated why the unions did not disseminate the notice at an earlier date (as if that information would be within movants' knowledge), and that other unions had been able to timely disseminate their notices. In rejecting all of the movants' requests to opt out, the district court also found that the movants were not prejudiced because the court had already ruled that the settlement was fair! *Id.* at 12. Yet, where the majority of class members never receive notice of the class action and might each wish to opt out of the class if they had learned of it, can due process truly have been provided to the class? Due process does not permit the court's rulings on the fairness of a settlement to substitute for adequate notice or other procedural protections. *See* Koniak, *Feasting*, *supra* note 11, at 1122-23.

Moreover, even if all class members, including the futures, had received individualized notice (and it is undisputed that they did not, *see, e.g., Georgine v. Amchem Prods., Inc.* 157 F.R.D. 246, 312 (E.D. Pa. 1994)), they still would not have been capable of making an intelligent choice as to whether to opt out, retain counsel or object. Futures class members, even if they are aware of their past asbestos exposure (and many are not) "may pay little attention to class action announcements." *Georgine v. Amchem Prods., Inc.*, 83 F.3d at 633. Without physical symptoms of past exposure, "people are unlikely to be on notice that they can give up causes of action that have not yet accrued." *Id.* As the State of Alabama explained in the district court, "the class members lack any basis for making an informed decision on whether to remain in the litigation. At best, class members could only guess whether the proposed settlement would be beneficial or detrimental to their interests." Br. Amicus Curiae at 4 (filed Apr. 29, 1993). The State of Texas added in the Third Circuit that "[m]any must have treated even individual written notices—if they received any—as junk mail." Br. Amicus Curiae at 3 (filed Feb. 27, 1995).

The Third Circuit thus found that even if class members learn about the class action and realize that they fall within the class, "they may lack adequate information to properly evaluate whether to opt out of the settlement."[21] *Georgine v.*

[21] Given the long latency period and the fact that not everyone exposed to asbestos will suffer health impairments, class members have no way to assess a number of critical issues: (a) when, if ever, they might become ill or even die from asbestos exposure; (b) whether the settlement described in the notice would even be in place if and when they might need it (because any CCR defendant may exit the settlement agreement after ten years); (c) what the settlement might mean to them if it were still in place, inasmuch as the settlement provides for a wide range of compensable and noncompensable categories into which they may fall, as well as caps on the defendants' exposure; (d) what the settlement's dollar figures might mean in view of the failure to adjust for inflation; and (e) what the world outside the settlement might look like in terms of common law and statutory remedies for asbestos-related illness in the distant future.

Amchem Prods., Inc., 83 F.3d at 633. Similarly, in *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996), a products liability class action against the manufacturers of an epilepsy drug, the court expressed serious due process concerns as to whether adequate notice could be given to all class members to enable them to make an intelligent choice as to whether to opt out. The Ninth Circuit found the notice deficient because the number of known users who reportedly had suffered actual injury from the drug was relatively small in comparison with all the users of the drug. Thus, many potential members of the class could not, at the time notice was given, know whether they were part of the class, and consequently could not make an intelligent choice about whether to opt out. *Id.* at 1234.[22] *See* 7B, CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D, § 1786 at 197-98 (2d ed. 1986).

The prospect of the wholesale termination of tort claims before they accrue, and before their holders are even aware of them or able to exercise an intelligent choice regarding them, is at odds with basic norms of fundamental fairness. Thus, in *Urie v. Thompson*, 337 U.S. 163 (1949), this Court held that an individual who had contracted silicosis "can be held to be injured only when the accumulated effects of the deleterious substance manifest themselves." *Id.* at 170. This Court

[22] Class member Martha Parker demonstrates the problem of requiring futures class members who are not presently suffering to decide whether to opt out of class settlements at the time notice is given. As reported by Barry Meier in *Lawsuits to End All Lawsuits*, N.Y. TIMES, January 10, 1996, at D5:

> Mrs. Parker said it came as a shock to her when she was diagnosed in 1994 with mesothelioma. She never worked around asbestos, but she figures she was exposed to it as an infant during World War II, when her father and grandfather worked in shipyards where asbestos was used as insulation. . . .
>
> Never suspecting she was a candidate for the disease, Mrs. Parker said, she paid no attention to local television ads instructing mesothelioma sufferers who wanted no part of the Philadelphia asbestos settlement to opt out of it.

rejected the alternative rule requiring a plaintiff to act on his claim before it accrued:

> It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, [the plaintiff] was charged with knowledge of the slow and tragic disintegration of his lungs; under this view [his] failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.

Id. at 169. This Court concluded that compelling such an uninformed and unknowing waiver of claims by potential plaintiffs would mean that they had been afforded "only a delusive remedy."[23] *Id.*

B. Due process requires that notices contain, in comprehensible form, the information needed to make an informed decision as to whether to opt out, retain counsel or raise objections

"[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315. Incomprehensible notices which fail to include significant disclosures cannot truly apprise class members of both the merits and the disadvantages of a class action settlement. Such notices do not satisfy the constitutional requirements of

[23] *See also Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting) ("Except in topsy-turvy land you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal 'axiom', that a statute of limitations does not begin to run against a cause of action before that cause of action exists, *i.e.*, before a judicial remedy is available to the plaintiff.")

adequacy and should never be approved. *See Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 395 (3d Cir. 1981) (description of proposed settlement in class notice must be amenable to "lay comprehension".)

Nevertheless, such constitutionally deficient class action notices are regularly approved by the courts. Because of the common use of technical language, it appears that "most notices are not comprehensible to the lay reader." Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 134 (1996) (Final Report to the Advisory Committee on Civil Rules) (Federal Judicial Center 1996).[24]

The notice in the case at bar, particularly those sections addressing the amounts class members may expect to recover under the settlement, is like so many class action notices, practically incomprehensible to the lay reader.[25] To ensure that the content of the class action notice is reasonably calculated to achieve the constitutional purposes of the notice, it should be written in language that a lay person of reasonable but unexceptional intelligence can be expected to understand, with all necessary disclosures set out clearly and conspicuously.

For notice to be meaningful and thus satisfy the constitutional requirement of adequacy, the notice must contain sufficient disclosure of the costs and benefits of participation in

[24] *See also* Arthur R. Miller, *Problems of Giving Notice in Class Actions, in Class Actions*, 58 F.R.D. 313, 321 ("The sad truth is that notices issued by courts or attorneys are much too larded with legal jargon to be understood by the average citizen."); Susan Adams, *Deliberate Obfuscation*, FORBES, September 9, 1996, at 152-54; Eddie Curran, *Settlement Irks Policyholders*, MOBILE PRESS REGISTER, December 16, 1996 (Class counsel in *Adams v. Robertson*, 676 So. 2d 1265 (Ala. 1995), acknowledged in court that notice to class members was full of legalese in tiny print, that it would take three to five hours to read notice himself, and that many policyholders would not be able to understand notice.)

[25] *See* Jt. App. at 258, 259.

the class action to allow class members to make an informed decision as to whether to opt out. When the notice concerns a proposed economic settlement of a mass tort class action, the following disclosures should be required: (a) a good faith estimate of the aggregate sum of any monies to be paid to class members and others by the defendants, how these monies would be divided among class members, and the impact of payment caps and case flow maximums[26] upon the class members' likelihood of receiving compensation under the settlement; (b) in class settlements covering future claimants, the notice should disclose whether the settlement will be adjusted for inflation; (c) disclosure of the rights that class members would lose or waive under the settlement (*e.g.*, generalized statistics as to amounts class members might expect to recover in their respective jurisdictions for their alleged injuries if they opted out of the settlement and sued in the tort system), and obligations imposed upon them by virtue of the settlement; (d) disclosure of the amount and method of calculation of all attorney's fees[27]; and (e) disclosure of class

[26] Nowhere in the Notice in the case at bar are class members apprised that the the total number of claims that may have compensation determined in the court system or through binding arbitration is severely restricted. The fact that only .5% - 2% of the total claimants per medical category may use these procedures to have their compensation determined in a given year, is not disclosed until page 10 of the Appendix to the Notice.

[27] *See General Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996) (notice sent to over 600,0[illegible] truck owners was deficient in that it did not set forth maximum amount of attorney's fees sought by class counsel and specify method of calculating those fees); *cf.* Reduction of Abusive Litigation Act, 15 U.S.C. § 77z-1(a)(7) (in private securities litigation, requiring notice to class members of settlement terms, including amount of aggregate and individual proposed recovery, information on potential outcome of case, and amount and explanation of attorney's fees); S.1501, 104th Cong., 1st Sess. (Protecting Class Action Plaintiffs Act of 1995) (requiring similar disclosures in class action notices). As the court reasoned in *Bloyed*, notice of the attorney's fees is essential because without such notice, class members cannot gauge the possible influence of the fees on the settlement when they consider whether to object to it. 916 S.W.2d at 958.

counsel's simultaneous representation of similar non-class claimants, settlements which class counsel have achieved for those non-class claimants, and the timing of such settlements in relation to the filing of the settlement class action. The settlement in the case at bar fails to include these disclosures to any significant degree.[28] Thus, to ensure that class members can decide whether to present objections or to opt out of a mass tort class settlement based upon informed judgment, courts should require that class notices disclose the disadvantages as well as the benefits of participating in the class action, including disclosure of class counsel's related non-class representations and activities.

[28] For example, the Notice in the case at bar included no concrete information on (a) the settlements negotiated by class counsel for their non-class clients; (b) the potential disadvantages of the settlement, such as the fact that the case flow provisions might result in significant delays before recovery is received for those electing individualized treatment under the settlement, that the settlement does not ensure any adjustment for inflation for future claimants, or that the settlement extinguishes certain claims recognized in some states, such as claims for loss of consortium and medical monitoring; and (c) the size of class counsel's attorney's fee or the amount class counsel received in fees for negotiating inventory settlements of non-class clients' claims that were contingent on the filing of this class action settlement. An ordinary client would be entitled to all such disclosures from his or her lawyer before being asked to decide whether to accept a settlement. The court (acting as the class' guardian) and class counsel should be required to provide at least as much information to absent class members, who are more vulnerable to attorney self-dealing and less capable of monitoring their attorneys' conduct. *See* Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1 (1995).

III

GEORGINE-LIKE SETTLEMENT CLASS ACTIONS RAISE CONCERNS ABOUT THE ADEQUACY OF REPRESENTATION AFFORDED TO CLASS MEMBERS

As this Court stated in *Phillips Petroleum Co. v. Shutts*, *supra*, the Due Process Clause "of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." 472 U.S. at 812 (*citing Hansberry v. Lee*, 311 U.S. at 42-43, 45). The constitutional requirement of adequacy applies equally to class counsel. *See In re General Motors* , 55 F.3d at 801.[29] The Court reaffirmed this requirement last term in *Richards v. Jefferson County, Ala.*, 116 S. Ct. 1761 (1996). *See also Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 890 (1996) (wherein Justice Ginsburg, in her concurring opinion emphasized the "centrality of the procedural due process protection of adequate representation in class action lawsuits"). If the requirement of adequate representation is to be met, the class representative and class counsel must be free of conflicts that threaten to compromise the interests of class members. *See Matsushita*, 116 S. Ct. at 888 n.5 (Ginsburg, J., concurring) (*citing General Tel. Co. v. Falcon*, 457 U.S. 147, 157-58 n.13 (1982)).[30] Settlement class actions, in particular, create "unparalleled opportunity for collusion between defendants and class counsel, as both stand to gain from negotiating a deal providing generous fees for counsel and meager recovery for the class." *In re Asbestos Litig.*, 90 F.3d at 1000 (Smith, J., dissenting) (*citing In re General Motors*, 55 F.3d at 788).[31]

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29 *See also North American Acceptance Corp. v. Arnall, Golden & Gregory*, 593 F.2d 642, 644 n.4 (5th Cir. 1979); *In re Fine Paper Antitrust Litig.*, 617 F.2d 22,27 (3d Cir. 1980).

30 *See also Prezant v. De Angelis*, 636 A.2d 915, 925 (Del. 1994) (*cited in Matsushita*, 116 S. Ct at 889).

31 *See supra* at note 7; *see also* (with respect to conflict of interest) John C. Coffee, Jr., *Rethinking the Class Action*, 62 IND.L.J. 625,

These concerns are heightened when, as in the case at bar, class counsel simultaneously settle their "inventory" of similar claims outside of the class[32], on better terms than those negotiated for the class. *In re Asbestos Litig.*, 90 F.3d at 993-95 (Smith, J., dissenting); Coffee, *Corruption of the Class Action*, *supra* note 8, at 852; Koniak, *Feasting*, *supra* note 11, at 1051-55.

A. Where Fundamental Conflicts Exist Between Class Members, the Same Counsel Cannot Adequately Represent the Entire Class.

The Third Circuit, after examining the class action settlement in the case at bar and finding that it allocates relief among different types of class members whose interests are at odds, concluded that serious intra-class conflicts exist between the presently injured and futures plaintiffs.[33] Those conflicts, the Third Circuit held, precluded the class from meeting the adequacy of representation requirement. *Georgine v. Amchem Prods., Inc.*, 83 F.3d at 630. The Third Circuit correctly found, moreover, that absent structural protections to ensure that differently situated plaintiffs negotiate for their own unique interests, the fact that plaintiffs of different types were among the named plaintiffs did not rectify the conflict. *Id.* at 631.

Upon comparing the treatment of presently ill class members and futures (exposure-only) class members, the inade-

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628-29 (1987); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest*, 4 J. LEGAL STUD. 47, 61 (1975); Macey & Miller, *supra* p. 6, at 7-8.

32 Attorneys in the mass tort field commonly accumulate a large inventory of clients with similar claims and deal with these cases, not on an individual basis, but rather by settling them on an inventory-wide basis with a particular defendant. Coffee *Class Wars*, *supra* note 6, at 1364-65.

33 Petitioners argue that the Third Circuit completely ignored the settlement agreement and framed the issue before this Court to say that. The opinion of the court below belies that claim. *See Georgine v. Amchem Prods., Inc.*, 83 F.3d at 630-31.

quacy of the representation provided to all members of the purported class is clear. That the interests of futures class members were compromised is aptly demonstrated by the following aspects of the settlement:

> (a) Exposure-only class members receive no compensation. (Jt. App. at 52).
>
> (b) There is no adjustment for inflation. (*Id.* at 77).
>
> (c) The number of future claimants who may opt out when they finally show asbestos-related symptoms is limited to only a few persons per year. (*Id.* at 87-88).
>
> (d) The causation provisions do not account for changes in science that could benefit the ability of the futures plaintiffs to establish their claims at such time as they may develop illnesses in the future. (*Id.* at 52, 56-65).

Presently ill claimants should not be favored over future claimants in class settlements simply because they became ill first.

The inherent intra-class conflicts in mass tort class actions such as the one at bar demand that the courts prohibit class counsel from representing both the futures and presently ill class members. One solution is to divide the class into formal subclasses, each represented by independent counsel. *See* Fed.R.Civ.Pro. 23(c)(4); *In re Joint E. & S. Dists. Asbestos Litig.*, 982 F.2d 721,739 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993); *In re "Agent Orange" Prod. Liab. Litig.*, 869 F.2d 1425 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994) (suggesting requirement of separate representation for subclass of future claimants not presently suffering).[34] While the use of subclasses and separate representation for those subclasses would impose greater costs and involve greater difficulties in reaching settlements (*See* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 55 (1995), the advantages warrant this Court requiring

[34] *See also* Koniak, *Feasting*, *supra* note 11, at 1086-95.

such separate representation. The desire to achieve efficiency and economy must not override due process considerations. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980) (upholding remand to district court to consider possibility of certifying subclasses as not imposing undue burdens on district courts.)

B. The Dynamics Between Defendants and Class Counsel in Georgine-like Settlement Class Actions May Result in Settlements of Reduced Benefit to the Class, Raising Concerns about the Adequacy of the Representation Afforded to the Class

Settlement class actions like the *Georgine* case—where trial of the action is concedely impossible and where the action is commenced only after and because opposing parties have finalized a deal resolving the claims of largely unknowing class members—change the dynamic between defendants and class counsel. No longer able to hold out the risk to defendants of being forced to litigate and face the best plaintiffs' lawyers at trial as in the typical class action, class counsel's negotiating position is substantially weakened. Likewise, defendants' calculus in entering into a settlement is fundamentally changed. Defendants' selection of counsel with whom to negotiate and design a class action settlement to resolve vast numbers of claims may result in what has been referred to as a "reverse auction" phenomenon.[35] As observed

[35] The most ethically disturbing problem with the mass tort class action may be its tendency toward "structural collusion." . . . At its worst, this process can develop into a reverse auction with the low bidder among the plaintiffs' attorneys winning the right to settle with the defendant.

Coffee, *Class Wars*, *supra* note 6, at 1354.

In a reverse auction, "[t]he first team of plaintiffs to settle with the defendants in effect precludes negotiations with the others (who may have originated the action and litigated it with sufficient skill and zeal that the defendants were eager to settle with someone else)." *Id.* at 1370. That is exactly what happened in the case at bar. The district court found "no suggestion in the . . . discovery and litigated record that CCR exec-

by Judge Smith in his dissenting opinion in *In re Asbestos Litig.*, 90 F.3d at 1000, "a defendant may pick his opposing counsel and then negotiate with absolutely nothing to lose from walking away from the deal; class counsel, on the other hand, work *pro bono* unless they consent to a settlement."

These concerns are further heightened and complicated by class counsel's parallel representation of inventories of non-class clients, whose claims are settled as part of the overall agreement between defendants and class counsel, but on terms more beneficial than those negotiated for the class. The *Georgine* case presents just such a scenario; class counsel's 14,000 non-class clients participated in an inventory settlement of more than $200 million (for which class counsel received $70 million in attorney's fees), that was concluded simultaneously and in conjunction with the filing of the class action complaint, answer, and stipulation of settlement. The benefits class counsel achieved for their non-class clients in those inventory settlements were clearly more advantageous than the terms class counsel negotiated for the class.[36]

utives or attorneys met and decided to 'choose' plaintiffs' counsel with the largest inventory of unsettled claims in order to facilitate a global settlement by creating an atmosphere of collusion") (*Georgine v. Amchem Prods., Inc.*, 83 F.3d at 294). Nevertheless, the court acknowledged that after it became clear that settlement negotiations between the CCR defendants and class counsel in the MDL proceeding would not produce a global agreement, the CCR defendants approached class counsel, who were representing thousands of asbestos victims nationwide, to pursue individual global settlement negotiations.

[36] For example, pleural claims, which involve asbestos-related plaques on the lungs but no physical impairment, received no cash compensation under the class settlement even though such claims regularly receive substantial monetary payments in the tort system. Non-class clients with such claims received cash compensation. Second, class claimants suffering from mesothelioma (whose only known cause is asbestos exposure) were limited to relatively modest recoveries under the class settlement ($20,000 - $200,000, with a negotiated average value range of $37,000 - $60,000 (*See* Jt. App. at 110)), even though mesothelioma plaintiffs in the tort system generally recover amounts running into the millions of dollars (*See Georgine v. Amchem Prods.*,

The amici States are concerned that the district court did not take appropriate heed of the change in dynamics between defendants and class counsel, or class counsel's divided interests in negotiating settlements for both class and non-class clients as part of an overall settlement package. Under these circumstances, where there were no other safeguards designed to remedy the inherent conflicts in the representation afforded by class counsel, the due process requirement of adequate representation was not satisfied. *See In re Asbestos Litig.*, 90 F.3d at 994, 1009-11 (Smith, J. dissenting).

To the extent settlement class actions are to be used to resolve complex mass tort litigation as in *Georgine*, this Court should announce objective standards with reference to which the district courts must test the adequacy of the representation afforded to class members. The Court should require the district courts to consider the following factors as indicia that the requirement of adequate representation is not met: (a) parallel representation by class counsel of both the class and of similarly situated non-class claimants,[37] (b) settlement agreements negotiated by class counsel for their non-class clients in conjunction with the negotiation of a class settlement, (c) more favorable settlement negotiated for the non-class claimants than those negotiated for the class; and (d) that the class is defined to include only those claimants who have not filed lawsuits against the defendants by a given date. This Court should also require that district courts not merely accept the competency and experience of counsel as sufficient

Inc., 83 F.3d at 630). Non-class clients' recoveries for mesothelioma were not so limited. Additionally, class members with lung cancer were required to produce evidence of causation, while non-class clients with lung cancer did not. Finally, compensation for the class was limited by negotiated average value ranges which did not apply to the non-class clients.

[37] *See also In re Asbestos Litig.*, 90 F.3d at 1010-11 (Smith, J., dissenting) (advocating that parallel representation of class members and individuals with similar claims in separate actions against defendant be prohibited as entirely inconsistent with adequate representation).

indicators of adequacy as the district court did in the case at bar.[38]

Additionally, class counsel should be required to provide the court with sufficient information on the costs as well as the benefits of any recommended settlement so as to allow the reviewing court to make an informed evaluation of the fairness of the settlement.[39] Class counsel should be required to disclose to the Court and in the notice to the class, information on settlements previously achieved by class counsel for similarly situated non-class clients and information regarding the payment of attorney's fees in the non-class clients' settlements and in the class settlement. *See supra* p. 18. A further standard would be a requirement that when ruling on the adequacy of representation, courts must find that class counsel do not simultaneously represent claimants with competing interests and that in any mass tort class action covering such claimants, subclasses are separately represented by counsel. *See supra* pp. 22-23.

Finally, the Court should require the district courts to consider the appointment of an advocate for the class, at least in those situations with the greatest potential for harm to the interests of class members (*e.g.* in settlement class actions involving future claimants), and either appoint such an advocate or find that such appointment is not required to ensure the adequacy of the class' representation. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 310 (court appointed special guardian and attorney for class members); *In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d at 1437 (court ordinarily would anticipate appointment of guardian to represent interests of absent class members in cases involving future claimants where notice is not likely to be effective).

[38] *See* Br. for Petitioners at 4.

[39] *See* Manual for Complex Litigation § 30.43 (counsel must disclose to court any facet of proposed class action settlement that may adversely affect any member of class or result in unequal treatment of members of class).

IV

DUE PROCESS AND RULE 23(b)(3) REQUIRE THAT FUTURES CLASS MEMBERS SHOULD BE AFFORDED DELAYED OR BACK-END OPT-OUT RIGHTS

Under the settlement in the case at bar, only a very few futures class members are entitled to delayed or "back-end" opt-out rights, *i.e.*, the right to opt out of the settlement upon discovery of injury resulting from exposure to or use of the defendant's harmful product. Because mass toxic torts typically have long latency periods, decades may pass between the time the class is certified and the settlement approved, and when a futures class member discovers that he or she is ill. A delayed or back-end opt-out right for future claimants is essential to allow such claimants to make the decision whether to opt out of the class at a point in time that is meaningful—if and when they actually develop asbestos-related illnesses. Otherwise, as occurred under the settlement certified by the district court in *Georgine*, the futures class members must decide whether to opt out before they ever become sick and can properly assess what the settlement's terms mean to them. Coffee, *Corruption of the Class*, *supra* note 8, at 856 n.11.

Precedent exists for affording class members the option of a delayed opt-out to ensure the meaningful implementation of opt out rights. *See In re A.H. Robins Co.*, 880 F.2d 709, 745 (4th Cir.), *cert. denied*, 473 U.S. 959 (1989) (stating that any class member who was dissatisfied with the settlement offer had, under the settlement, "the right to elect to have her claim settled in a trial with all the procedural rights normally attaching to a jury trial.");[40] *see also Bowling v. Pfizer, Inc.*,

[40] Although the election in *Robins* was not labeled as an opt-out right as such, in effect it amounted to a delayed opt-out right.

143 F.R.D. 141 (S.D. Ohio 1992); *Silber v. Mabon*, 18 F.3d 1449 (9th Cir. 1994) (the Federal Rules, *e.g.*, Fed. R. Civ. P. 6(b)(2), 23, and 60(b)(6), permit a district court to extend an opt-out period). Particularly in the case at bar, where the majority of the class are future claimants who are denied any delayed opt-out rights, while each of the CCR defendants may decide to back out of the settlement at the end of a ten year period, fundamental fairness demands that futures class members be afforded back-end opt-out rights.

This Court should clarify that such a back-end opt-out right must be afforded to futures class members as an essential requirement of constitutional due process. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812-813 (1985), this Court held that absent class members have a constitutional due process right to opt out of class actions brought in state court where plaintiffs' claims are wholly or predominately for money judgments. Thereafter, in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. granted*, 510 U.S. 810 (1993), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994), the Ninth Circuit extended the constitutional due process right to opt out to absent plaintiffs with claims for monetary damages in federal multidistrict class litigation.

The extension of *Shutts*' due process requirement of opt-out to federal multidistrict class litigation involving claims for monetary damages and, further, the application of that right to a back-end opt-out right for futures class members is consistent with the notion of due process as a "flexible concept" designed to ensure "fundamental fairness." *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *citing Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985). In ruling that this due process standard of "fundamental fairness" was met by the delayed trial-election right afforded certain class members, the Fourth Circuit focused not on "semantics", *i.e.*, " not . . . whether the talismanic word 'opt-out' is used but whether the right given exists in effect." *In re A.H. Robins*, 880 F. 2d at 745, *citing Walters v. National Ass'n of Radiation Survivors*, 473 U.S. at 321. *Georgine* presents the flip-side of the class settlement in *In re A. H. Robbins*. Although the language of the settlement specifically grants the futures class an opt-out right, this right does not exist in reality for the future claimants who comprise the majority of the class.[41] Under the settlement, the futures class members are required to exercise the opt-out right at a point in time when they lack the wherewithal to make an informed judgment as to the impact of the settlement on their particular situation. Without an opportunity to exercise the right at a meaningful point in time, its mere inclusion in the settlement does not satisfy the requirements of due process.

The same result obtains under a Rule 23(b)(3) analysis. In Rule 23(b)(3) class actions (the provision under which the class in *Georgine* was certified), Rule 23(c)(2) requires that class members be afforded a right to opt out of the class. However, this right cannot meaningfully be afforded to future claimants unless such claimants are permitted to exercise that right at a relevant time, *i.e.*, if and when they become ill. A delayed or back-end opt-out right for futures class members is thus necessarily required under Rule 23 if the opt-out requirement for (b)(3) classes is to be meaningfully implemented with respect to futures claimants.

In sum, the failure of the *Georgine* settlement to provide back-end opt-out rights to almost all of the future claimants in the class renders the settlement unconstitutional. Additionally, certification of the class under Rule 23(b)(3) was also improper because (c)(2)'s opt-out requirements for (b)(3) class actions were not meaningfully implemented with respect to futures class members.

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41 *See* George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 279 (1996) (arguing for delayed opt-out for futures and asserting that right to opt out "should not be effectively denied by inadequate notice.")

CONCLUSION

WHEREFORE, for all the foregoing reasons, the amici States respectfully request that the decision of the Court of Appeals for the Third Circuit be upheld. The amici States request further that the Court articulate guidelines for lower courts to follow when dealing with settlement class actions which cannot meet the class certification requirements of Fed.R.Civ.P. 23, to ensure that the due process requirements of adequate notice, adequate representation and the right to opt out of the class at a meaningful point in time are afforded to all class members. In requiring such heightened scrutiny of these settlement class actions, the Court should impose objective standards as suggested by the amici States against which the district courts must measure the constitutional sufficiency of class action notices, the representation afforded to class members, and opt-out rights.

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No. 96-270

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., *et al.*
Petitioners,

v.

GEORGE WINDSOR, *et al.*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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January 15, 1997

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MOTION OF LAW PROFESSORS FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

Pursuant to rule 37.3 of the Rules of this Court, the professors of law who are signatories to the accompanying brief move for leave to file it as *amici curiae*.

Amici are professors at law schools in the United States who are concerned that, unless the decision of the Third Circuit is affirmed, absent plaintiffs in class actions throughout the country will be denied due process of law. As scholars of the federal courts, the rules of civil procedure, and legal ethics, Amici's sole interest is to ensure that the procedural system facilitates the enjoyment of substantive legal rights fairly, efficiently, and expeditiously. Amici have no stake in the present controversy. Amici therefore offer a perspective different from that of the parties in this case. Amici file this Brief because we believe that Petitioners' proposed application of Federal Rule of Civil Procedure 23 would endanger absent class members by weakening the incentives plaintiffs' attorneys have to maximize the value of their claims, by encouraging collusive settlements judges will have difficulty policing, and by ignoring important respects in which some absent plaintiffs' interests conflict with those of others.

Consent letters were received from all but one of the parties and no party affirmatively objected. However, because of time constraints, the law professors had not yet received written consent from all parties at the time of the filing of this brief. Accordingly, the law professors move for leave to file the accompanying brief as *amici curiae*.

January 15, 1997

Respectfully submitted,

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INTEREST OF AMICI

Amici are professors at law schools in the United States who are concerned that, unless the decision of the Third Circuit is affirmed, absent plaintiffs in class actions throughout the country will be denied due process of law.[1] As scholars of the federal courts, the rules of civil procedure, and legal ethics, Amici's sole interest is to ensure that the procedural system facilitates the enjoyment of substantive legal rights fairly, efficiently, and expeditiously. Amici have received no compensation or promise of compensation for submitting this Brief. Amici file this Brief because we believe that Petitioners' proposed application of Federal Rule of Civil Procedure 23 would impede the proper operation of the procedural system. It would endanger absent class members by weakening the incentives plaintiffs' attorneys have to maximize the value of their claims, by encouraging collusive settlements judges will have difficulty policing, and by ignoring important respects in which some absent plaintiffs' interests conflict with others'. Permitting a class action to proceed in the face of these defects would undermine this Court's holding in *Hansberry v. Lee*, 311 U.S. 32 (1940), that absent plaintiffs cannot be bound by a prior proceeding unless they are adequately represented.

SUMMARY OF ARGUMENT

Rule 23 of the Federal Rules of Civil Procedure creates a single set of certification requirements that applies to all class actions, including those that are tried and those that settle. When absent plaintiffs are sufficiently numerous, when common questions of law or fact predominate over individual ones, when named plaintiffs and their attorneys are adequate representatives, and when the other Rule 23 requirements are met, a class can be

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[1] A complete list of the signatories to this brief and their law school affiliations is attached as an appendix.

certified and a named plaintiff can stand in judgment on an absent plaintiff's behalf. Whether the requirements are met depends in all cases upon the actual litigation facts. When absent plaintiffs are few, when individual questions predominate, when named plaintiffs and their attorneys are inadequate representatives, certification is not permitted under the rule. Unless the actual litigation facts support certification, a lawsuit can be neither tried nor settled as a class.

A proposed settlement agreement between a named plaintiff or a named plaintiff's attorney and a defendant cannot cure a defect that would otherwise prevent certification of a class. A contrary rule would render the limiting portions of Rule 23 ineffective by grounding the certification decision in a world of make-believe. If absent plaintiffs were too few in number to certify a class, a contrary-to-fact stipulation in a settlement agreement would establish otherwise. If predominant common questions were lacking, a contrary-to-fact settlement agreement would create them. If the interests of the named plaintiffs or their attorneys were in conflict with those of the absent plaintiffs, this difficulty too would be dealt with by an agreement stating otherwise and the trial court would find the harmony of interests that Rule 23 requires. When settlement agreements can turn fiction into fact, there can be nothing left of the constraints imposed by Rule 23.

Petitioners' argue that judges should take contrary-to-fact settlement stipulations into account when deciding whether to certify class actions. If this Court were to accept that argument, it would put absent plaintiffs at the mercy of named plaintiffs, their attorneys, and defendants, whose ability to extinguish their rights via inadequate and possibly collusive settlements would be unconstrained. Settlement sell-outs would be encouraged because plaintiffs' attorneys would lack incentives to maximize

the value of absent plaintiffs' claims, because named plaintiffs would fail to speak for absent plaintiffs' diverse interests as they should, and because defendants would benefit by paying less than absent plaintiffs' claims are worth. Absent plaintiffs would be represented by unfaithful champions and bound without due process of law in violation of *Hansberry v. Lee*, 311 U.S. 32 (1940).

ARGUMENT

I. RULE 23'S CERTIFICATION CRITERIA CANNOT BE SATISFIED BY CONTRARY-TO-FACT STIPULATIONS OF THE NAMED PARTIES

Concern to ensure due process is the hallmark of class action jurisprudence and must be the hallmark of class action practice. Ordinarily, due process permits only a person joined and served as a party (or in privity with such a person) to be bound by a judgment. Class actions are an exception to this rule. All members of a class are bound by a judgment on a theory of virtual or vicarious representation. Because class actions deprive plaintiffs of their individual day in court, class actions have been permitted only when rigorous due process protections are met. Only then can there be sufficient assurance that absent plaintiffs will be adequately represented before their legal rights are extinguished.

To appreciate fully the importance of due process protections, one must understand that the only true parties to a class action are the named plaintiffs and the named defendants. Absent class members are not true parties, although that label is sometimes loosely applied to them. They are non-parties whose interests are represented by others acting under authority of the federal rules. *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d

1348, 1352 (7th Cir., 1996) (Easterbrook, J., joined by Posner, C.J., and Manion, Rovner, and Wood, J.J., dissenting from denial of rehearing en banc) ("Absent class members are represented by the named plaintiffs and their lawyers, but they aren't parties"). *See also* Diane Wood Hutchinson, *Class Actions: Joinder or Representation Device?*, S. CT. REV. 459 (1983) (explaining that absent plaintiffs are not joined as parties under Rule 23).[2]

Named parties gain the power to represent and bind absent plaintiffs by satisfying the requirements of Rule 23. That is what class certification is all about. It determines whether a named plaintiff and an attorney representing a named plaintiff can make decisions for and stand in judgment on behalf of a group of absent plaintiffs. When certification is denied, a named plaintiff

[2]Because absent plaintiffs are not true parties, the contention that the Third Circuit's approach violates the Rules Enabling Act or is otherwise objectionable because it prevents litigants from settling is wholly lacking in merit. See, e.g., Brief for Rhone-Poulenc Rorer, Inc. et al. as Amici Curiae in Support of Petitioners, at p. 7. The Third Circuit's opinion leaves *parties*, i.e., named plaintiffs and named defendants, free to settle at their pleasure. What it limits is the freedom named parties have to represent and bind others, namely, absent plaintiffs. That, obviously, is something named parties have no inherent right or power to do.

Ironically, the Enabling Act issue in this case is raised by Petitioners' effort to convert Rule 23(b)(3) into a means by which the tort rights of a vast number of current and future victims of asbestos-related illnesses, which are governed by diverse bodies of state law, are subjected to a single legal rule and extinguished. It is doubtful that the rulemaking power of the Court can lawfully or wisely be employed to enact or interpret a rule so replete with substantive consequences and having so little to do with the decision of cases or controversies. See Paul D. Carrington & Derek Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Invalidity of Proposed Rule 23(b)(4)*, ARIZ. L. REV. (forthcoming 1997).

and a lawyer acting for a named plaintiff can take few actions that bind absent plaintiffs. When certification is granted, a named plaintiff and plaintiff's counsel can make many decisions for absent plaintiffs and can conduct a lawsuit that may extinguish their rights.

Rule 23 thus creates and regulates a relationship at law between a named plaintiff and an attorney, on the one hand, and a group of absent plaintiffs, on the other. It authorizes the former to speak and act for the latter. It does so, however, in limited circumstances. The named plaintiff must be a member of the class to be represented. The absent plaintiffs must be too numerous to join by other means. The claims of the named plaintiff and the absent plaintiffs must involve predominant common questions of fact or law. The named plaintiff must be typical and must adequately represent the class. And a class action must be the superior means of processing the claims. These requirements are set out in Rule 23, paragraphs (a) and (b)(3). Only when every requirement is met can a named plaintiff acquire the power to represent an absent plaintiff, as the rule expressly states. Fed. R. Civ. P. 23(a).[3]

It should be obvious that neither a named plaintiff nor an attorney acting for a named plaintiff can waive the requirements of Rule 23. Allowing named plaintiffs or their attorneys to waive the requirements would permit them to conscript absent plaintiffs

[3]It may help to think of Rule 23 as creating an at-law agency relationship between a group of absent plaintiffs, as principals, and a named plaintiff and plaintiff's counsel, as agents/fiduciaries, when such a relationship would be advantageous but cannot practicably be negotiated face-to-face. *See* Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991)(characterizing class actions in quasi-contractual terms).

at their pleasure.[4] It would be equally improper to permit a named plaintiff, putative class counsel, and a defendant to work a waiver of any Rule 23 requirement by acting together. The relationship established and governed by Rule 23 runs between a named plaintiff, a lawyer seeking to act for a class, and a group of absent plaintiffs. It does not involve a defendant. Consequently, a named plaintiff and plaintiff's counsel can no more waive a Rule 23 requirement via an agreement with a defendant than they can do so by themselves.[5]

A rule allowing a named plaintiff, plaintiff's counsel, and a defendant to modify the requirements of Rule 23 by agreement would make the limiting portions of Rule 23 meaningless and ineffective. If there were only 5 absent plaintiffs--too few to meet the numerosity requirement--the named parties could conscript them by stipulating that 5 is enough or by falsely positing that the number of absent plaintifs is really 500. If a named plaintiff was atypical, the atypical named plaintiff and the defendant could pretend otherwise. If the requirements of

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[4]Continuing the metaphor begun in footnote 3, to permit a named plaintiff and plaintiff's counsel to waive a Rule 23 requirement would be to allow them to authorize themselves to act as absent plaintiffs' agents, eliminating the need either to obtain absent plaintiffs' consent or to meet the requirements for an at-law agency. Obviously, this would be improper. There is no general legal right to appoint oneself agent for another with whom one has no prior relationship.

[5]Finishing the metaphor begun in footnote 3, allowing a named plaintiff and plaintiff's counsel to waive a Rule 23 requirement by agreement with a defendant would be like allowing B and C to authorize B to act as A's agent without A's consent and without meeting the conditions for an at-law agency. Obviously, this would be improper. There is no general legal right for two persons to appoint one of their number the agent of a third party who is a stranger to them.

commonality, predominance, and superiority were not met, a named plaintiff, plaintiff's counsel, and a defendant could meet these requirements by means of contrary-to-fact stipulations. If a named plaintiff or plaintiff's counsel suffered a conflict of interests and could not adequately represent a class, that difficulty too could be erased. A rule giving named plaintiffs and defendants the powers just described would nullify the limiting parts of Rule 23.

Petitioners' contention that judges should consider the fact of settlement when deciding class certification is simply a disguised version of the claim that named plaintiffs and defendants can work together to waive the requirements of Rule 23. It is the assertion that two endpoints of a triangle can conspire against the third. Consider Petitioners' assertion that the predominant common questions needed to satisfy Rule 23 can arise from a settlement. Pet. Br. at 42. The assertion is nothing less than the claim that when individual questions predominate, a named plaintiff and a defendant can stipulate otherwise and bind a class. Permitting this practice would make hash of Rule 23. It would allow named plaintiffs, their lawyers, and defendants to conscript classes whenever it was in their mutual interest to do so, whether or not prosecution of a class action was fair to absent plaintiffs or consistent with other purposes served by Rule 23.

Petitioners' contention that settlements can be the source of typical claims is flawed for the same reason. Pet. Br. at 43. It is the assertion that a named plaintiff and a defendant can create a relationship between a named plaintiff and a class of absent plaintiffs at will. Imagine the conversation that could occur during settlement negotiations: "Typicality lacking? No problem. We'll stipulate that the claims of the named plaintiff and the absent plaintiffs rest on the same theory of recovery."

Similar conversations could eliminate all other difficulties that might be encountered under Rule 23. Instead of grounding the decision to certify a class in the facts of the world, judges following Petitioners' approach would ground their decisions in a make-believe world where contrary-to-fact stipulations are taken as true.

The settling parties disguise their argument by claiming to support "the application of the *same* criteria to settlement classes as are applied to all other classes." They just want trial judges "to consider all of the evidence relevant to" certification, including the fact of settlement and inferences to be drawn therefrom. Class Plaintiffs' Br. at 17-18. This is a ruse. Once judges take settlements into account, the Rule 23 criteria disappear. They cease to perform a limiting function because named plaintiffs and defendants can always negotiate around them. This is clear from the statement, in a sentence immediately following the remarks just quoted, that "the Rule 23 criteria can often be met more easily in the settlement context than in the litigation context . . . because the fact of settlement can increase the commonality of, or eliminate divergences in, class members' interests." Id. "Conflicting interests prevent certification? No problem. We'll agree that class members' interests are really all the same."

Given Petitioners' desire to have federal judges base certification decisions on settlement agreements that contradict actual litigation facts, it is remarkable that they condemn the Third Circuit for requiring judges to perform a hypothetical inquiry. A false assertion is always false. It does not become true when a named plaintiff, plaintiff's counsel, and a defendant endorse it. Thus, the assertion that "exposure to asbestos is a predominant common issue," if false to begin with, does not become true by virtue of being incorporated into a settlement

agreement. Although Petitioners accuse the Third Circuit of ignoring the facts, it is they who do so. They would have judges defer to agreements between named plaintiffs, plaintiffs' counsel, and defendants no matter how distorted or false the factual assertions in those agreements may be. The consequences for absent plaintiffs--live human beings who depend on named plaintiffs and their lawyers for protection--could be devastating, as shown below.[6]

By contrast, the Third Circuit's approach is faithful to the real world, the world in which legal and factual questions are either common or individual, in which interests either align or conflict, in which absent plaintiffs either are many or few. The Third Circuit would apply the same criteria in the same way to all class actions, settled and tried. Is the numerosity requirement met? Find out how many absent plaintiffs there are and whether it is practicable to join them as plaintiffs. Are there predominant common questions of law or fact? Identify the claims and determine the extent of the legal and factual overlap. Is a class action superior? Investigate the size and importance of absent plaintiffs' claims, the extent to which they are in a position to litigate individually, and the intensity of their desire to do so. Will the named plaintiffs adequately represent the class? Determine whether named and absent plaintiffs have important opposing interests, and whether conflicts between absent plaintiffs require separate representation of their interests. Will class counsel be faithful champions of absent plaintiffs' rights? Find out whether the lawyers possess the experience, financial resources, and professionalism needed to handle a class suit, whether their duties to other clients conflict with duties they will owe the class, and whether their financial interest in the lawsuit

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[6] *See* Part III.

will encourage them to maximize the value of absent plaintiffs' claims. District court judges regularly make these determinations when defendants resist class certification. They can easily make the same determinations on the basis of the same information and analysis when absent plaintiffs challenge the proposed certification of settlement classes.

Petitioners' claim that the Third Circuit's approach forces judges to decide hypothetical questions and to ignore facts is specious. The concreteness of an objection to certification depends on the nature of the objection, not on its source or the stage a proceeding has reached. When an objector complains that there are too few absent plaintiffs to satisfy the numerosity requirement, that a named plaintiff is not typical or is otherwise inadequate, or that the requirements of commonality, predominance, and superiority are not met, a judge decides the same question that a defendant challenging certification might have raised, does so on the basis of the same evidence, and reaches an equally concrete conclusion. The inquiry is not hypothetical in any respect.

If anything is true, it is that objections raised by absent plaintiffs are *more* appropriate for judicial resolution than defendants' objections to certification. An objecting absent plaintiff asserts: "You (a named plaintiff) have no right to represent *me*." An objecting defendant asserts: "You (a named plaintiff) have no right to represent *them* (other absent plaintiffs)." Petitioners would have this Court believe that defendants' objections to litigation classes create concrete disputes but that absent plaintiffs' objections to settlement classes embroil judges in hypothetical questions. The truth is exactly the reverse. Defendants' objections entail the greater risk of having judges decide hypotheticals because defendants often oppose class actions that absent plaintiffs would rationally want to

proceed. Judges have always viewed third-party objections with suspicion and have preferred that persons in danger of being injured speak for themselves. Absent plaintiffs' objections are first-party complaints.

II. THE THIRD CIRCUIT'S INTERPRETATION OF RULE 23 WILL NOT UNDULY IMPEDE THE SETTLEMENT OF CLASS ACTIONS.

Petitioners contend that if the Third Circuit's decision stands, class actions will never settle because defendants will never concede that classes are certifiable for trial. This argument also lacks merit. A defendant does not have to concede certifiability for trial to settle a lawsuit as a class action. A defendant need only agree not to contest certification, with the understanding that certification for trial will be an open issue should a proposed settlement fall through. Defendants regularly use this strategy in state and federal courts. It protects them, and it complies with Rule 23.

There is no inconsistency in saying (1) that a single set of certification requirements applies to all class actions, tried and settled, and (2) that a defendant can agree not to contest certification for settlement purposes without conceding certification for trial. Proposition (2) implies only that a defendant can agree not to contest a named plaintiff's showing on certification at a fairness hearing. Proposition (2) does not imply that a defendant's agreement to sit on its hands would prevent absent plaintiffs from opposing certification. Nor does proposition (2) imply that such an agreement would determine, influence, or even bear upon a judge's determination to certify or not certify a class. If the named plaintiff convinces the court that the Rule 23 requirements are satisfied, the court will certify the class for settlement only. If the named plaintiff makes an

inadequate showing or is bested by an absent plaintiff, certification will not occur. Either way, the defendant will not have to concede certifiability for trial and the matter will be determined on the basis of the facts as they actually exist in the world.

The most Petitioners can correctly contend is that a disgruntled absent plaintiff can prevent a defendant from settling claims *en masse* by showing that a proposed settlement class fails to satisfy Rule 23. This is a weak complaint. First, some lawsuits should not be settled or tried as class actions because they do not meet the requirements of Rule 23. Rule 23 does not permit certification whenever a defendant confronts a large number of claims. It permits certification when the number of claims is large *and other enumerated conditions are met*. When the other conditions are not met, judges must deny certification and defendants must find other means of settling claims.

Second, Petitioners' "class actions will never settle" argument overlooks the fact that many class actions settle after contested certifications and that many more are resolved on the merits before or after certification. *See generally* Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N. Y. U. L. REV. 74, 141 (1996) (hereafter "*Empirical Analysis of Rule 23*"). Petitioners hope to create the impression that unless judges are permitted to take the fact of settlement into account when deciding certification, trial courts will be clogged with class actions that will never go away. This is an exaggeration. If the Third Circuit is upheld, many putative class actions will be resolved on the merits adversely to plaintiffs before certification and the matter of certification will never be reached. Many putative class actions will also settle as non-class cases without a decision on the merits and again prior to certification. Many

cases will be tried on the merits or settled after a contested certification is denied. Many cases will also be tried or settled after a contested certification is granted. If this Court upholds the Third Circuit, it will prevent named plaintiffs, their lawyers, and defendants from using contrary-to-fact settlement stipulations to obtain class certification. But it will not clog district court judges' dockets with stalled class actions. Class actions will be resolved in other, and more proper, ways.

Third, the risk that an objecting absent plaintiff will stall a proposed class settlement is minute. Absent plaintiffs rarely challenge the certifiability of proposed settlement classes. The authors of the Federal Judicial Center's recent empirical study of class actions found that

> [t]he most frequent type of objection [submitted by absent plaintiffs] was to the amount of attorneys' fees as being disproportionate to the amount of the settlement[.] The next most frequent objection . . . related to the insufficiency of the award to compensate class members for their losses. Next in line were objections that the settlement disfavored certain subgroups.

Willging, *et al.*, *Empirical Analysis of Rule 23*, at 141.[7] Objections to certifiability per se did not make the list. When attorneys' fees are reasonable and benefits are good, the vast majority of absent plaintiffs are happy to enjoy the ride.

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[7]The authors continued by noting that "[a] wide variety of objections were grouped in a miscellaneous category. Many of the miscellaneous objections raised serious concerns that were difficult to categorize." *Id.* None of the "miscellaneous" objections related to certifiability. *Id.* at n.274.

The Federal Judicial Center's findings make sense when the economics of objecting are considered. Usually, it is far cheaper to opt out than to object, so rather than complain most disgruntled absent plaintiffs head for the doors. Of those who remain, many will not object to a class action per se. They will merely want more in benefits than a proposed settlement offers them. They will therefore complain about fee requests that give their money to attorneys, about the total size of settlements, and about allocation formulas that give other absent plaintiffs money they want for themselves. But they will not dispute certifiability. Only disgruntled absent plaintiffs who oppose the very idea of a class action will do that. These absent plaintiffs rarely act, however, because the expected payoff from challenging certifiability is most often negative.

To win a certification contest in a substantial class action, an absent plaintiff (or an attorney representing an absent plaintiff) must be prepared to spend hundreds of thousands of dollars or more.[8] Objecting plaintiffs must invest heavily because named plaintiffs (or their attorneys) and settling defendants will vigorously defend their deal, as they have defended this one. Moreover, a successful challenge to certification will not put money in an objector's pocket. It will only enable an objector to continue litigating alone. Only an absent plaintiff with an exceedingly high-value claim (or an attorney representing such a plaintiff or a plaintiff group) will find it economically rational to spend the money needed to obtain this meager reward. Finally, the odds of prevailing on an objection to certification are

[8]The objectors or their attorneys in this case have spent and are continuing to spend substantial amounts of money fighting certification and approval of the proposed settlement class. We repeat that Amici Curiae have received no compensation from counsel for the objectors or any other source with an interest in this case.

tiny, almost vanishingly small.[9] This alone will cause most absent plaintiffs to give up without a fight.

Given the economic irrationality of contesting certifiability, Petitioners' nightmare scenario in which every class action becomes as protracted as *Jarndyce v. Jarndyce*[10] will never materialize. The history of class litigation shows that class actions settle at a very high rate and that objectors rarely succeed in slowing the train, much less derailing it. By affirming the Third Circuit, this Court would not create a new impediment to settlement. This Court would merely recognize the propriety of an existing objection that rarely is used and that succeeds even less frequently. The class action settlement rate will remain high.[11] In truth, the settlement rate will probably be higher than it should be. The economic irrationality of opposing proposed class settlements undoubtedly discourages absent plaintiffs from

[9]Willging, et al., *Empirical Analysis of Rule 23*, at 141 (reporting that in class actions where objections were filed, "[a]pproximately 90% or more of the proposed settlements were approved without changes" and that "[i]n a small percentage of cases, the court approved the settlement conditioned on the inclusion of specified changes").

[10]Charles Dickens, BLEAK HOUSE.

[11]Recent experience in high-dollar class lawsuits suggests that even successful objections merely delay settlement instead of preventing it. For example, after the Supreme Court of Texas rejected the proposed settlement of the General Motors pick-up truck litigation, a new settlement was negotiated and submitted for approval in Louisiana. After Judge Posner reversed a trial judge's decision to certify a nationwide class of hemophiliacs exposed to the AIDS virus by tainted blood products, the parties negotiated a nationwide class settlement which has also been submitted for approval. Absent plaintiffs who wish to challenge these proposed settlements will face expensive, uphill struggles, despite the prior opinions in their favor.

challenging many settlements that, owing to inadequate benefits or a failure to meet the requirements of Rule 23, should not proceed.

III. BY ALLOWING CERTIFICATION FOR SETTLEMENT PURPOSES OF CLASSES THAT COULD NOT BE CERTIFIED FOR TRIAL, THIS COURT WOULD ENCOURAGE THE USE OF PROCEDURES THAT DENY ABSENT CLASS MEMBERS DUE PROCESS OF LAW

This case is the relatively rare one in which plaintiffs with large personal injury claims and a strong interest in controlling their destinies are represented by sophisticated, well-heeled attorneys and are willing to fight class certification. The mere existence of the battle demonstrates two things. First, objections to certification lodged by absent plaintiffs create concrete disputes judges can readily decide, just as they regularly decide the same objections when raised by defendants. This was shown above and is confirmed by the Third Circuit's opinion, which reads like any of the recent opinions federal district court and circuit court judges have written about mass tort cases where certification was contested. Second, it is important to allow absent plaintiffs to dispute certification even though they rarely do. When absent plaintiffs and their attorneys find it worth the time and effort to litigate certification, federal judges should listen to what they have to say.

The danger absent plaintiffs are most likely to complain about (and which is inherent in Petitioners' approach) is that the true parties--the named plaintiffs, their lawyers, and the defendants--are working together against the non-parties--the absent plaintiffs. This danger existed in *Martin v. Wilks*, 490 U.S. 755 (1989), where the true parties in litigation attempted to

use a settlement to extract a benefit from unrepresented third parties and secure it for themselves.[12] This Court permitted the true parties to settle between themselves, but it also allowed the third parties to attack the consent judgment, noting that the third parties' interests would be threatened if the named parties, whose interests conflicted with theirs, were permitted to bind them without their consent. *Martin*, 490 U.S. at 768. See also *Local No. 93, International Ass'n Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986).

The danger here is the same. Once a class is properly certified, there is reason to hope the named plaintiffs and their attorneys will adequately represent the absent plaintiffs. But before certification, and especially when absent plaintiffs object to certification, there is a classic trilateral dispute in which the interests of the named plaintiffs, their attorneys, and the settling defendants conflict with those of the absent plaintiffs, and there is a palpable danger that the former will seek to profit at the latters' expense. The cure is to allow the true parties to bind themselves and to allow the non-party absent plaintiffs to challenge certification and test its propriety.

A practice of allowing judges to take settlements into account when deciding whether the requirements of Rule 23 are met would effectively bind absent plaintiffs to agreements reached among named parties and lawyers who have not yet been authorized to represent them and whose interests may strongly

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[12]The problem of third-party exploitation is clearly explained in Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189, 241-47 (1992); and Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL FOR. 103, 104 (1987).

conflict with theirs. It would prevent them from challenging certification when the danger of inadequate representation is greatest. The result must often be a deprivation of due process, as an examination of the economics of class litigation and this Court's decision in *Hansberry v. Lee*, 311 U.S. 32 (1940), will reveal.

A. Permitting certification of claims that could never be tried as a class action creates economic incentives for class counsel to settle absent plaintiffs' claims too cheaply.

When the Rule 23 requirements are met for trial purposes, a plaintiffs' attorney possesses two important bargaining advantages in settlement negotiations: a credible threat to stick a defendant with an adverse class-wide judgment; and a fee-related interest in trying the lawsuit unless the defendant offers its expected value in settlement. The threat is a club. The desire for the largest possible recovery yielding the largest possible fee award is an incentive to use it. Both advantages disappear when the Rule 23 requirements can be met only in settlement. There can be no threat of an adverse class-wide judgment because the lawsuit cannot be tried as a class, and there can be no incentive to try the case because a trial will predictably yield nothing in fees. A plaintiffs' attorney who can obtain certification only if a defendant agrees to it in settlement is a boxer whose hands are tied.

A plaintiffs' attorney who has no leverage over a defendant may nonetheless pose a real danger to a group of absent plaintiffs, as an example will show. Suppose Plaintiffs 1 through 100 have claims against the same defendant and that each claim is worth an expected $100,000 in a conventional, single-plaintiff

lawsuit.[13] As a group, the claims are worth an expected $10 million in individual trials. Now suppose the following: Attorney 1 is representing Plaintiff 1 for a one-third contingent fee; Attorney 1 files a class action on behalf of all one hundred plaintiffs; the Rule 23 requirements can be met only if the defendant agrees to settle the lawsuit as a class; and the fee award in a class settlement would also be one-third of the recovery.[14] If the defendant makes a low-ball offer to settle the class action for $4 million (40 percent of the expected value of the claims), will Attorney 1 be better off accepting or rejecting the offer? The answer is that Attorney 1 will profit by accepting the low-ball offer. Unless there is a class settlement, Attorney 1 will earn only $33,333, the fee Plaintiff 1's lawsuit is expected to yield. By comparison, a $4 million class settlement would generate a fee of $1,333,333, 40 times as much. Self-interest would therefore lead Attorney 1 to view the low-ball offer favorably, even though it settles the plaintiffs' claims for pennies on the dollar, saving the defendant an expected $6 million.[15]

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[13]The $100,000 figure assumes that appropriate discounts have been made for the risk of losing at trial, the time value of money, and all other relevant factors.

[14]Fee awards in class action settlements range from 20 to 40 percent of the total recovery and average around 33 percent when costs are included. Willging et al., *Empirical Analysis of Rule 23*, at 155; Denise N. Martin, Vinita M. Juneja, Todd S. Foster, Frederick C. Dunbar, *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?*, National Economic Research Associates, Table 9 (November 1996) (hereafter "*Recent Trends IV*").

[15]It is not necessary to imply that Attorney 1 will actually and consciously collude with the defendant to sell-out the absent plaintiffs. There is no need for actual collusion. Self-interest will motivate the defendant to make an inadequate settlement offer, and self-interest will motivate Attorney 1 to accept it. Collusion is induced by the bargaining

One might think Attorney 1 would hold out for more money because the fee would be even larger if the class were to receive more than $4 million. It is true that Attorney 1 would prefer more money to less, but Attorney 1 cannot extract more money from the defendant because Attorney 1 has no settlement leverage. Attorney 1 cannot threaten the defendant with a $10 million class-wide judgment because the lawsuit cannot be tried as a class. Attorney 1's only threat is that the individual lawsuits will proceed to trial unless the case settles as a class action. That is a weak threat for two reasons. First, Attorney 1 stands to make nothing in fees off the individual cases of Plaintiffs 2 through 100. Attorney 1 must therefore strongly prefer a class action that will yield him a sizeable fee to a series of individual lawsuits that will not. Second, other plaintiffs' attorneys are waiting in the wings. If Attorney 1 rejects the $4 million offer, the defendant can shop it to Attorney 2, to Attorney 3, and so on until someone accepts it. Once another attorney signs on, Attorney 1 will forfeit (all or part of) the meager $33,333 fee to be earned from Plaintiff 1's case if the settlement is approved. As a non-lead attorney in a class action, Attorney 1 will receive little or nothing in fees.

One might also think the suggested low-ball strategy would fail because absent plaintiffs would opt out of an inadequate class settlement. Unfortunately, the right to opt out may fail to protect absent plaintiffs, including those who have large claims, as many in this case do. That is so even though even though the irrationality of settling for 40 cents on the dollar is apparent. The right to opt out is a valuable and potentially effective safeguard only for absent plaintiffs who learn about proposed

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structure. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995).

settlements and come to appreciate their importance in time to exclude themselves. Absent plaintiffs who know of their injuries, who receive timely notice, and who are properly educated by their attorneys about the pros and cons of proposed settlements can usually protect themselves. But those who learn about the class action too late or who, being unaware of their exposure to asbestos or the risk of injury they face, fail to understand its importance, will be swept into the class. The Third Circuit was greatly concerned about the adequacy of notice in this case, and what it wrote is directly on the mark. See Cert. App. 55a-56a. Because it is predictable that uninformed plaintiffs, including plaintiffs whose injuries are not yet manifest, will not opt out, defendants can extinguish their claims cheaply by means of a settlement-only class.

What of judicial review? Can judicial scrutiny of proposed class settlements, required by Rule 23(e), protect absent plaintiffs? Regrettably, judicial review is a weak antidote to defective incentives, even though federal judges expend substantial resources and energy scrutinizing class settlements. When bargaining toward settlement, a zealous plaintiffs' attorney will attempt to maximize the amount recovered from a defendant, never settling for less than the expected value of a group of claims at trial. By contrast, a plaintiffs' attorney who is concerned mainly about judicial approval will figure out the smallest settlement a judge will let pass and be content with that. The second number can be considerably smaller than the first because judges' approval thresholds are low. The most recent empirical study shows that judges regularly approve class settlements that return as few as 3 to 5 pennies on the dollar of absent plaintiffs' estimated losses. Martin et al., *Recent Trends IV*, at Figure 3. If individual trials would yield an expected 10 cents on the dollar of estimated loss, a class settlement at 4 cents on the dollar would deprive absent plaintiffs of 60 percent of the

value of their claims. Continuing the example involving Plaintiffs 1 through 100, a defendant could extinguish their claims, worth an expected $10 million in individual trials, by paying $4 million to a class in settlement. A judge would likely approve this low-ball settlement because it is not clearly inadequate under prevailing standards. See Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B. U. L. REV. 1257, 1272 (1995) (concluding that imprudent class settlements are "structurally impervious to enlightened scrutinization from without" and that only clearly inadequate settlements are likely to be disapproved).[16]

B. *Hansberry v. Lee* requires that the interests of named plaintiffs and class counsel align closely with those of absent plaintiffs.

The lesson of *Hansberry v. Lee* is that it would violate due process of law to bind absent plaintiffs to actions taken by representatives whose incentives are defective. In *Hansberry*, the defendants disputed the validity of a racially restrictive covenant. The plaintiffs argued that the defendants were precluded from challenging the covenant, which was tested and upheld in prior class litigation. This Court disagreed, holding that a decision to preclude the second challenge would extinguish the defendants' rights without due process of law. The conclusion rested on this Court's belief that all of the named parties in the first lawsuit who might have been said to represent

[16]Judges have difficulty policing inadequate settlements because they must rely heavily on named plaintiffs, their lawyers, and defendants for information about the merits. Obviously, these persons have no interest in offering evidence that will jeopardize a settlement they support. The job of presenting such evidence is one objectors are uniquely well-placed to perform.

the interests of the defendants in the second lawsuit had defective incentives.

Most of this Court's analysis focused on a conflict of interests within the plaintiff class. The class encompassed all owners of property subject to the covenant. However, it was clear to this Court that the named plaintiffs favored enforcement while some absent plaintiffs, such as the defendants in the second action, opposed it. It was equally clear that the named plaintiffs were inadequate representatives of property owners with whom they disagreed on the essential point in dispute. This Court therefore concluded that allowing the named plaintiffs in the first action to speak for the defendants in the second would deprive the defendants of due process of law.[17]

This Court's analysis of the interests of the defendants in the first action is also important. Both the defendants in the first action and the defendants in the second action opposed enforcement of the covenant. This raised the possibility that the first defendants adequately represented the second defendants. This Court found otherwise for two reasons. First, the first action appeared not to contain a defendant class. Second, the defendants in the first action had faulty incentives. They stipulated that owners of 95 percent of the frontage had signed the covenant even though, in truth, owners of only 54 percent of the frontage had. By entering into this contrary-to-fact stipulation, the defendants in the first action tossed away their most powerful weapon. Their incomprehensible conduct led this Court to describe them as "nominal defendants" whose "interest

[17]*Hansberry*, 311 U.S. at 45 ("Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.").

in defeating the contract [did not appear to] outweigh[] their interest in establishing its validity." 311 U.S. at 45. In other words, this Court concluded that because the defendants in the first action shared an interest with the plaintiffs in validating the covenant, they were unfaithful champions of the second defendants and did not adequately represent them.

The instant lawsuit combines incentive defects akin to those condemned in *Hansberry*. The class is riven by conflicts of interests that equal the conflict over enforcement of the restrictive covenant in importance. Injury plaintiffs and exposure-only plaintiffs are lumped together, even though the former want as much money as possible paid out today while the latter want as much money as possible paid out in the future. Plaintiffs with moderate injuries like pleural disease, plaintiffs with severe injuries like lung cancer, and plaintiffs with the invariably fatal disease of mesothelioma are all thrown together, even though they (or their survivors) will necessarily differ over how any recovery should be divided. Smokers and non-smokers are jointly represented, even though the former face unique affirmative defenses and arguably should receive smaller payments than the latter. The class includes plaintiffs from different states, ignoring differences in applicable law that might make some plaintiffs' claims more valuable than others'.

The point is not that it is impossible to process the claims of personal injury plaintiffs in a class action. It is that each distinctively different and important interest must be separately and adequately represented in a class suit. Here, plaintiffs possessing important divergent interests are lumped together and represented by a single group of named plaintiffs and a single set of attorneys. "The lack of any structural protections ... thwarted the adequate representation of the disparate groups of plaintiffs," as the Third Circuit observed. Cert. App. 52a. It would

therefore violate the Due Process Clause to permit the actions of the putative class representatives to bind the objecting absent plaintiffs.

The conflict between the absent plaintiffs and putative class counsel in the instant lawsuit is like that between the second defendants and the first defendants in *Hansberry*. Although nominally counsel for the plaintiffs, the attorneys share an overriding interest with the defendants because they cannot secure class certification without the defendants' help. The attorneys can earn a fee off the absent plaintiffs' claims only if there is a class action, and there can be a class action only if the defendants want one. Rather than being adverse to the defendants, putative class counsel is dependent on them. The defendants' offer to settle the lawyers' inventories of existing clients for approximately $200 million in connection with a class settlement made the lawyers even more dependent on the defendants for fees. It would violate due process of law to allow the objecting absent plaintiffs to be represented by attorneys with such defective incentives.

By reversing the Third Circuit, this Court would put its stamp of approval on incentive arrangements that encourage plaintiffs' attorneys and named plaintiffs to be unfaithful champions of the absent plaintiffs they are supposed to protect. The Third Circuit is right in holding that a single set of certification requirements applies to all class actions and on insisting that important diverging interests be separately represented. Only when certification can be obtained without a defendant's help can class counsel be expected to demand in settlement every dollar absent plaintiffs' claims are worth. Only when important divergent interests are given separate voices are settlement proceeds likely to be divided appropriately.

The approach urged by Petitioners would encourage low-value settlements presided over by attorneys who nominally represent a class but who, in reality, are incapable of dealing with defendants at arms' length. It would also encourage settlements that submerge and ignore important differences between absent plaintiffs. The Due Process Clause forbids representatives whose incentives are so demonstrably deficient from binding a group of absent plaintiffs who wish to speak for themselves. That is the lesson and the legacy of *Hansberry v. Lee*.

CONCLUSION

The decision of the Third Circuit should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., *et al.*
Petitioners,

v.

GEORGE WINDSOR, *et al.*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ASBESTOS VICTIMS OF AMERICA IN SUPPORT OF RESPONDENTS

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AMCHEM PRODUCTS, INC., ET AL.,
Petitioners,

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GEORGE WINDSOR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF ASBESTOS VICTIMS OF AMERICA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to rule 37.3 of the Rules of this Court, Asbestos Victims of America moves for leave to file the accompanying brief as *amicus curiae*.

AVA was founded in 1981 by asbestos victims and friends to provide an information clearinghouse on asbestos disease and available medical, social, and legal services. A nonprofit educational organization, AVA has grown to an alliance of more than 20,500 victims, union members, scientists, medical and legal professionals, and concerned individuals. AVA is dedicated to increasing awareness of the national asbestos tragedy and its effects upon present and future generations. The interest of AVA in this action is to preserve the rights of future asbestos claimants, who are not provided fair compensation by the class settlement and were not adequately represented during its negotiation.

AVA believes there are several reasons why this brief is significant to the Court's evaluation of the case. The Petitioners, Class Counsel, and the Class Plaintiffs have urged this Court to interpret Rule 23 in a way that, if the district court determines that a proposed settlement is fair and reasonable under Rule 23(e), then the putative class is automatically certifiable. Given that the Settling Parties have placed all of their class certification eggs in the fairness basket, this Court should be made aware of the actual record evidence relevant to the district court's fairness findings.

Consent was granted by many of the parties to the filing of this brief, and no party affirmatively objected. However, because of time constraints, AVA had not yet received written consent from all parties at the time of the filing of this brief. Accordingly, AVA moves for leave to file the accompanying brief as *amicus curiae*.

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INTEREST OF *AMICUS CURIAE*

Asbestos Victims of America ("AVA") submits this brief in support of the Respondents, who, in the court below, successfully challenged the injunction issued by the district court restraining asbestos victims from initiating or prosecuting personal injury claims against the Petitioners. The interest of AVA in this action is to preserve the rights of future asbestos claimants, who are not provided fair compensation by the class settlement and were not adequately represented during its negotiation.

AVA was founded in 1981 by asbestos victims and friends to provide an information clearinghouse on asbestos disease and available medical, social, and legal services. A nonprofit educational organization, AVA has grown to an alliance of more than 20,500 victims, union members, scientists, medical and legal professionals, and concerned individuals. AVA is dedicated to increasing awareness of the national asbestos tragedy and its effects upon present and future generations.

INTRODUCTION

AVA submits this brief to show that the proposed class settlement is unfair to class members not only in its overall design, but also in its particular provisions. Respondents and other *amici* address the insurmountable problems endemic to the Petitioners' effort to impose their version of tort reform upon millions of people who have been exposed to Petitioners' asbestos products, but who have not yet manifested any injury, and AVA fully supports the positions taken in their briefs. But even if the Constitution and Rule 23 permit the rights of future asbestos claimants to be extinguished through a "future claimant settlement-only class action," this particular settlement should not have been approved because it does not provide adequate compensation, and because the process by which the settlement was reached does violence to the standards by which the legal profession judges the conduct of counsel.

AVA believes there are several reasons why this brief is significant to the Court's evaluation of the case. The Petitioners,

Class Counsel, and the Class Plaintiffs have urged this Court to interpret Rule 23 in a way that, if the district court determines that a proposed settlement is fair and reasonable under Rule 23(e), then the putative class is automatically certifiable. Given that the Settling Parties have placed all of their class certification eggs in the fairness basket, this Court should be made aware of the actual record evidence relevant to the district court's fairness findings. As will be shown below, Respondents' assertions "about the adequacy of Class Counsel, about the negotiations leading to the settlement in this case and about the settlement itself" are neither "reckless" nor "unsubstantiated," Class Plaintiffs' Br. at 3, but are instead fully supported by the record.

Before examining the actual record evidence, this Court should note that the ballyhooed "findings of fact" of the district court deserve little deference. Almost all of those allegedly factual findings were actually legal conclusions drawn from an uncontested account of factual events and data. For instance, the district court found that the qualifying medical criteria in the settlement for lung cancer claimants are "fair and reasonable," Cert. App. 132a, but there is no dispute that those criteria exclude the claims of many victims of lung cancer who would have viable causes of action under state law. Regardless of how the district court chose to label its findings, to the extent those findings were no more than legal conclusions in disguise, this Court may consider them *de novo*.

Moreover, the district court's "findings of fact" have not yet been subject to any appellate review. The objectors strenuously contest those "findings," but they chose not to raise fact-intensive points regarding fairness and the ethics of class counsel on this appeal from a preliminary injunction. Instead, such points were reserved for any later appeal from any eventual final judgment. As the following discussion shows, in spite of the district court's "findings of fact," the record evidence compels the conclusions that the settlement's terms are unfair and that class counsel's representation was inadequate.

SUMMARY OF ARGUMENT

The settlement fails to provide adequate compensation in several key ways. First, it redefines state law as to what types of injuries will be compensable by setting threshold medical criteria that are, generally speaking, stricter than applicable state law. If those criteria are not met by a particular class member, that victim receives *no* recovery. Additionally, comparison of the compensation values under the class settlement with historical CCR settlement values reveals that those class members who *do* qualify for recovery under the settlement receive significantly less value than they would have received had they filed a lawsuit. Finally, the failure of the settlement to adjust compensation values for inflation ensures that class members who fall ill or die in later years will be grossly undercompensated.

In addition to those problems with compensation values, the system for processing claims under the settlement is unfair to the class. The settlement's claims resolution procedure is run by the Defendants. The settlement provides that the Defendants have sole authority both to make initial determinations on whether a claimant qualifies for compensation under the settlement's strict medical criteria and to determine the amounts of initial "offers" to qualifying class members, within wide ranges. The Defendants have every incentive to "offer" no more than the minimum required to qualifying claimants, and similar incentive to deny compensation altogether to cases close to the borderline of the settlement's exposure or medical criteria. Claimants have virtually no leverage to contest initial determinations of qualifying claim status or settlement value, because the settlement severely restricts the number of class members who may exercise the right to file a lawsuit after going through the settlement's claim procedures. Moreover, that "right" is *only* available to claimants who *meet* the threshold qualifying criteria.

Beyond these grave fairness problems, the record reveals that the process by which the settlement terms were achieved does not conform with long-established standards for competent and ethical legal representation. Apart from their entitlement to adequate

consideration for releasing their rights to sue for asbestos-related injuries, the class members here also deserved loyal representation by unconflicted counsel dedicated solely to the interests of the class. Regardless of whether class counsel put forth good faith efforts to represent this class, the duties they owed to other interests irreparably interfered with that representation. No matter what benefits a settlement provides, it may not be approved over the objections of class members who have been denied their rights to adequate representation by the conduct of the negotiations.

ARGUMENT

I. THE CLASS SETTLEMENT INADEQUATELY COMPENSATES CLASS MEMBERS FOR THE RIGHTS THEY GIVE UP UNDER STATE LAW

According to the complaint, this case is a tort lawsuit. As with any other tort claim brought under the diversity jurisdiction of a federal district court, the filing of this lawsuit did not entitle the trial court to cure any perceived ills in the tort system. Nor did the filing of this lawsuit empower the trial court to clear the dockets of the federal and state courts. The role of the trial court here -- as in any other class action settlement -- was to determine whether class members have been treated fairly and consistently with due process in the settlement of their tort law claims.

Unfortunately, when judging the merits of this settlement, the district court virtually ignored the causes of action available to class members under state law that are released under this settlement and instead rested its fairness determination largely on its conclusion that the various rights and remedies available under state laws reflect poor policy.[1] That determination was both wrong and

[1] *See, e.g.*,Cert. App. at 270a (referring to the "inadequate tort system," and describing how "unimpaired victims have, in many states, been forced to assert their claims prematurely").

beyond the authority vested to an Article III court in a diversity case governed by state law.

A. Large Groups of Class Members With Valuable Claims For Asbestos-Related Disease Will Receive No Compensation Under the Settlement.

1. The qualifying medical criteria exclude many claimants whose claims for asbestos-related malignancies would be compensable under state law

A large percentage of class members who have valuable claims under state law for malignant diseases will receive nothing at all under the class settlement. The settlement's qualifying criteria exclude many asbestos-related lung cancers that would be compensated under state law because those criteria require that the victim of lung cancer must also, in most instances, suffer from underlying asbestosis that would have met the settlement's qualifying criteria for non-malignant disease. SOS at V(B)(2), JA 61.[2]

All seven of the medical experts who testified at the fairness hearing acknowledged that there is significant debate in the medical community as to whether one can attribute the development of lung cancer to asbestos exposure absent a finding of underlying asbestosis. Cert. App. 131a. Because some qualified physicians diagnose asbestos-related lung cancers even in the absence of radiographic evidence of asbestosis, asbestos defendants, including the CCR, have historically settled many claims alleging lung cancer

[2] Citations in this brief to provisions of the class "Stipulation of Settlement" are abbreviated as "SOS", followed by the applicable subsection of the settlement, and the joint appendix citation.

related to asbestos exposure without requiring such x-ray findings.[3] In fact, the unrebutted testimony of Dr. Christine Oliver revealed that 45%-50% of individuals that she would diagnose with lung cancer related to asbestos exposure will not meet the qualifying criteria under the class settlement, because their chest x-rays and pulmonary function tests do not provide the requisite evidence of underlying asbestosis. JA 838. Dr. Oliver further testified that approximately 50% of victims who in her opinion have asbestos-related "other" cancers, i.e., cancers other than mesothelioma or lung cancer, will also not meet the settlement's qualifying criteria.

Obviously, any persons who Dr. Oliver or any other qualified physician would diagnose as having an asbestos-related disease would have a claim that would survive summary judgment in the tort system. While qualified physicians can disagree regarding diagnoses of asbestos-related diseases, the mere possibility of a jury accepting the positive diagnosis gives a plaintiff's case settlement value. This reality is reflected by CCR's historical practice of settling 99.8 percent of cases filed against it in the tort system (which, of course, includes non-qualifying malignancy claims).[4]

2. The class settlement deprives a large percentage of class members who develop non-malignant asbestos-related diseases of the choices available to them under state law.

The settlement abridges the rights of many victims of asbestos-related non-malignant disease by establishing a threshold definition

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[3] Testimony of Michael Rooney, March 1, 1994 at 169-71 (while he was an asbestos claims adjuster at Travelers Insurance and at CCR, there was never a requirement that the plaintiff have underlying "markers" of asbestos exposure in order to settle a claim for an asbestos-related lung cancer).

[4] The March 17, 1993 Response of the CCR Defendants to the trial court's Order to Show Cause state, "[T]he CCR Defendants' experience [is] that more than ninety-nine percent (in fact 99.8%) of the cases against them settle." JA 125.

of compensable injury that differs from the definition of injury under the substantive laws of almost every state. In order for victims of non-malignant asbestos disease to qualify for cash compensation under this settlement, they must show not only that asbestos has caused scarring of the lung or the lining of the lung, but also that they have a certain level of functional breathing difficulties as measured by pulmonary function tests. *See* SOS, Part V(B)(4), JA 63-64. In sharp contrast, under the laws of almost every state, demonstrable scarring of the pleura or interior lung tissue as a result of asbestos exposure is itself a cognizable injury giving rise to a claim for money damages. The Settling Parties have virtually admitted that a majority of the claims in the tort system for non-malignant asbestos-related injuries will not meet the settlement's criteria for cash compensation.[5] Rather than receiving cash, these non-qualifying class members are allegedly provided a "package of benefits" to compensate them for releasing their damages claim. However, a detailed analysis of these alleged benefits demonstrates that they are all either already available to victims of non-malignant disease in the tort system, or they have not been proven by the Settling Parties.

The district court identified six benefits provided by the settlement to non-qualifying claimants with non-malignant disease. Cert. App. 173a-174a (citing, for example, that the settlement will provide faster payment than a lawsuit if a class member should develop a qualifying disease). The initial problem with the district court's analysis is that all six of these alleged "benefits" to non-qualifying claimants actually are arguments that the settlement provides value to *qualifying* claimants that *qualifying* claimants allegedly would not receive in the tort system. This entire analysis rests on the assumption that, once a claimant develops a qualifying disease, she will be able to receive greater value for her claim

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[5] Dr. Victor Roggli, one of the Settling Parties' medical experts, testified that claims for pleural disease that would not meet the *Georgine* qualifying criteria "definitely" make up at least a plurality of all asbestos-related illnesses, and "probably" constitute a majority. JA 807-08.

under the class settlement than she would if she filed a lawsuit in the tort system. As discussed later in this brief, such an assumption is grossly inaccurate.

For present purposes, the bottom line for non-qualifying claimants is that the value of their claims is drastically reduced because they no longer have the option of seeking a cash settlement or judgment for money damages. Contrary to the semantic smoke and mirrors adopted by the district court, non-qualifying claims are *not* "deferred." Instead, such claims are entirely released for no money plus the CCR's agreement to waive the statute of limitations, an option that CCR historically made readily available to all plaintiffs.[6] Only if the claimant later develops a qualifying disease, which would give her a much more valuable and different lawsuit in the tort system, can that claimant ever receive any money under the settlement.

By cutting off the option to seek cash compensation, the settlement significantly and unfairly reduces the value of so-called non-qualifying, non-malignant claims, which *do* qualify for compensation in the tort system. Freedom of choice is valuable in and of itself as a means to further the personal autonomy of a claimant, but this particular choice is critical since many claimants with non-qualifying claims are unlikely to develop a qualifying

[6]Mr. Rooney testified that CCR is generally willing to provide "Green Cards," or agreements to waive the statute of limitations upon a claimant's development of a more serious disease, to any tort claimants who desire them, and that he cannot think of a "downside" to CCR of providing such a Green Card. Depo. of Michael Rooney, January 10, 1994 (Vol. I) at 171-72; and at 169.

injury and would thus never benefit from the class settlement.[7] The relative value of a waiver of the statute of limitations as compared with a cash settlement will differ drastically depending on the life circumstances of a particular individual, and removing the choice of claimants to seek cash unfairly abrogates the rights of the largest single group of people with asbestos-related injuries -- those with non-qualifying claims for non-malignant disease.

Although the Settling Parties' medical experts all opined that the settlement's qualifying criteria for non-malignant injuries are medically reasonable, such testimony was irrelevant to the district court's determination whether the settlement fairly compensates claimants for releasing their tort claims. Since this action was filed, the Settling Parties have attempted to frame the debate over the settlement's fairness as a policy battle regarding the merits of providing a tort law remedy to claimants who cannot demonstrate objectively measurable asbestos-related breathing difficulties through pulmonary function testing. *See, e.g.*, Proffer of the CCR Defendants of June 25, 1993, at 37 ("whether claimants with pleural plaques should receive compensation is a hotly-debated issue in the asbestos litigation"). AVA strongly disagrees with the position of the Settling Parties that, as a policy matter, such victims should not have cognizable tort claims. *See* Testimony of Dr. Christine Oliver, March 14, 1994 at 143 (describing how many

[7] While the record contains contradictory evidence regarding the extent to which non-qualifying, non-malignant claimants will eventually develop qualifying illnesses, there is no question that large numbers of claimants will never do so. Furthermore, the relative risk of developing a future malignancy will differ with each claimant, depending upon exposure history, life expectancy, and genetic propensity to develop cancer. While it may be true that a waiver of the statute of limitations acts in some sense like an "insurance policy" against the non-qualifying claimant developing a more serious asbestos-related illness, for many claimants the "premium" of giving up the right to pursue the cash will not be worth the "coverage," for reasons related to the individual life circumstances of the claimant. Absent the class settlement, whether to take out such "coverage" is, and should remain, a decision for each *individual* class member to make.

patients suffer from shortness of breath related to their asbestos exposure that is not reflected by pulmonary function test results). But whatever outcome that policy battle might have in an appropriate legislative or state judicial forum, that debate should not have been an issue facing the trial court. Under the laws of nearly every state, class members who can demonstrate through x-rays that their asbestos exposure has caused scarring on their lung or pleura have a cognizable injury and a claim for damages. Those claims have cash settlement value in the marketplace, and the class settlement fails to compensate class members fairly for releasing those claims because it removes the claimant's option to seek cash.

3. The settlement releases class members' loss-of-consortium claims for no consideration.

Several of the class representatives and millions of putative class members have alleged claims against CCR based solely on their loss of consortium. These plaintiffs are the spouses, parents, children, and other relatives of class members who have been exposed to asbestos, some of whom have physical symptoms, but most of whom do not. JA 13-14. The purpose of including the loss of consortium class members is unmistakable: the settling parties hope to extinguish all of the consortium claims without making *any* payment to the class members asserting those claims.

The unfair treatment of these class members is breathtaking. Exposed class members who suffer, now or in the future, from a compensable asbestos-related injury eventually will be paid, but their spouses, parents, children, and other relatives take *nothing at all*. This result can be seen clearly from the settlement, which defines "Claim" and "Settlement Class Member" to encompass loss of consortium claims and claimants, JA 49-50, but which only compensates claimants for their own physical injuries. SOS(VIII)(B), JA 79-82 & Exs. A, B, JA 108-110.

At the fairness hearing, CCR claimed that its historical settlement data included loss of consortium settlements and that those settlements were made in conjunction with the settlement of

the exposed person's claim. Testimony of Michael Rooney, March 1, 1994 Tr. at 186-87. This testimony is telling for what it omits. That consortium claims are usually settled together with the primary claims says *absolutely nothing* about how those claims are *valued* in the tort system. The presence of relatives as plaintiffs in a typical asbestos suit *must* add value to the suit. If that were not so, plaintiffs' lawyers would not routinely include loss of consortium claims in asbestos personal-injury complaints, *and* the CCR would not have negotiated their inclusion in the class. In any event, the record is bereft of *any* indication that the CCR's settlements have ordinarily valued loss of consortium claims at zero, which is what the settlement does here by failing to make any payments to the loss of consortium class members.

B. On The Whole, Class Members With Qualifying Claims Would Be Able To Secure Greater Monetary Compensation By Filing Lawsuits.

On average, the class members who receive cash compensation under the class settlement will receive less money than they would if they had filed an individual tort lawsuit. For the most part, in order for a claimant to receive cash compensation for an asbestos-related disease, he or she must meet the medical criteria set out for each compensable medical category in Section V(B) of the settlement. JA 60-65.

Class members who meet the criteria may elect to be paid through one of three procedures: "the simplified payment procedure," Part VIII(B)(1), JA 79, "individualized payment procedure," Part VIII(B)(2), JA 80, or the "extraordinary claims procedure," Part IX, JA 82. However, for purposes of determining what the average class member with a qualifying claim will receive under *Georgine*, analysis of the individualized payment procedure is all that is necessary. Under the individualized payment procedures, qualifying claimants will be paid significantly less than what similarly situated claimants would receive in the tort system.

1. Because qualifying claimants have no leverage to refuse an offer made under the class settlement, such claimants will be paid the minimum of the negotiated average value range for their claims.

The *Georgine* settlement provides that the CCR "shall evaluate all Qualifying Claims for which individualized payment procedures have been elected." JA 80.[8] Based on this evaluation, the CCR "shall make a good faith offer" to each Qualifying Claimant for an amount between the minimum and maximum negotiated values for the particular disease category from which the claimant suffers. While any particular qualifying claimant who is applying for compensation under the individualized payment procedures may recover any amount between the minimum and maximum values, for the class as a whole the only relevant values are contained in the "Negotiated Average Value Range" ("NAVR"). This is because "the average amount offered in settlement to those Claimants with Qualifying Claims who have elected the individualized payment procedures in each Compensable Medical Category in any six-month period, shall fall within the negotiated average value range for that compensable medical category." JA 81. Both the minimum

[8] The settlement also provides that CCR makes the initial determination whether a claim qualifies for compensation at all. This includes determining whether the claimant has met the exposure criteria, SOS IV(A), JA 56-57, the medical criteria, SOS III(B)(2), JA 53, and even whether the claim is time barred by applicable statutes of limitation. SOS VI(A), JA 75. While the settlement allows claimants to "appeal" CCR's initial determinations to third parties chosen jointly by the parties, clients with potentially valid claims often do not appeal because they assume, rightly or wrongly, that the initial decision was correct, or that they do not want to bear the additional time and expense. In a system in which the initial decision-maker is neutral, deciding not to pursue an appeal is often a rational decision based on all the risks and benefits. Here, however, such forbearance will reflect no more than the fundamental unfairness of the CCR-dominated claims procedure. Moreover, claimants who do not meet the settlement's qualifying criteria are not entitled to exit to the tort system, so the propriety of CCR's determinations can only be tested by procedures established within the settlement. SOS(X), JA 87.

and maximum values and the NAVR for each compensable medical category are found in the Compensation Schedule, Exhibit B to the settlement. JA 110.

Qualifying claimants who are dissatisfied with the "offer" CCR makes them have no leverage to force CCR to a higher figure. For claimants who believe their claim is worth more than what the CCR has offered, there are only three options: they can apply for Extraordinary Claim treatment, they can stand in line to exit to the tort system or to binding arbitration, or they can accept the offer. For the vast majority of qualifying claimants, neither of the first two options will provide them any benefit,[9] so claimants will be effectively forced to accept CCR's initial offer whether they like it or not.

Because qualifying class members will have virtually no choice but to accept CCR's initial offer, CCR has no incentive to offer claimants, on average, amounts greater than the low-end of the NAVR. The terms of the settlement do not require CCR to pay any more to claimants on average than the low end of the NAVR. In light of the fact that almost all qualifying claimants will effectively be forced to accept CCR's initial offer, CCR would be acting irrationally if its average offer exceeded the bottom of the NAVR.

2. CCR's historical settlement averages are significantly higher than the amounts CCR is required to pay under the class settlement.

[9] In the compensable medical categories of mesothelioma, lung cancer, and "other cancer," no more than 3% of qualifying claimants may be selected as extraordinary claims. Worse, only 1% of qualifying non-malignant claimants may be selected for extraordinary claim treatment. With respect to the supposed "right" to exit to arbitration or the tort system, only 2% of mesothelioma and lung cancer victims, 1% of other cancer victims, and .5% of non-malignant victims may exercise this right in any given year. What this means in real numbers is that, of the claimants seeking individualized payment in the first year of the settlement, a maximum of 97 -- .6% of the total -- could have rejected CCR's first and only offer and access the tort system. JA 173-74.

Once one assumes that CCR will act rationally and pay claimants no more than the settlement obligates them to pay, it becomes clear that the class settlement, on average, will afford significantly less compensation to class members than historical settlement averages would dictate. In each disease category, CCR's overall historical mean for settlements paid that type of claim substantially exceeds the averages that will be paid under the SOS. The chart below demonstrates that fact:[10]

DISEASE	CLASS ACTION AVERAGE	HISTORICAL SETTLEMENTS	PERCENTAGE DIFFERENCE[11]
Mesothelioma	$44,890	$68,657	53%
Lung Cancer	22,180	30,578	38%
Other Cancer	10,715	16,939	58%
Non-Malignant	6,242	8,810	41%

As the above chart demonstrates, victims who suffer from diseases in each compensable medical category will be paid far less under the class settlement than what CCR has historically paid individual

[10] This chart uses a "blended average" to determine the average overall values CCR will pay to all qualifying claimants. This average includes both non-extraordinary claims, based on the bottom end of the NAVR, and extraordinary claims, assuming that extraordinary claims will be paid at their maximum. *Compare* Settling Parties' Exhibit SP 601B and 601D (making same comparison, but assuming claimants will be paid the *top* end of the NAVR). The district court found the settlement's compensation to be "fair" by comparing the top end of the NAVR to historical values. *See* Cert. App. 139a (relying on SP 601B-D).

[11] This column reflects the percentage by which historical averages exceed the "blended average."

claimants with the same diseases.[12] In the aggregate, by paying at the low end of the NAVRs, CCR will save more than *one-third of a billion dollars* over the first ten years of the settlement. *See* chart attached to district court docket no. 1058.

Finally, the district court's contentions regarding benefits provided by the settlement to qualifying claimants that are allegedly unavailable to those claimants in the tort system are meritless. *See* Cert. App. 173a-174a. The same defenses that are waived under the settlement are also waived whenever CCR settles a claim in the tort system. The value of any such waiver, therefore, is fully reflected in the market's valuation of the case. That is, to the extent CCR has available any viable defenses to claim, the possibility that such defenses will be accepted by a court or jury reduces the value of the claim for settlement purposes. Thus, while a waiver of such defenses is indeed valuable, it is a value that, for purposes of comparing the class settlement with the tort system, is already accounted for by tort settlement averages.[13]

3. By failing to provide any means to account for inflation, the settlement ensures that future claimants will be grossly undercompensated.

[12] This comparison of the negotiated value range to historical settlement data understates the extent to which class members are being undercompensated by the class settlement, because many claims that would not qualify to be paid under *Georgine* are included in that data, and the value of those non-qualifying claims in the tort system is generally less than the value of those claims which would qualify for cash under *Georgine*. Testimony of Michael Rooney, March 1, 1994 at 184-87.

[13] Nor does the record reflect the value of the opportunity under the settlement for claimants who suffer from non-malignant disease to later bring a claim for any subsequently-developed malignancy. Indeed, the fact that 90% of tort claimants have refused CCR's offers of analogous "limited releases" is evidence that such releases are not worth as much as the increased cash a claimant can receive by providing a full release of all claims. *See* Testimony of Michael Rooney, February 28, 1994 at 243-44.

As the previous section demonstrates, compensation values under the class settlement are severely inadequate when compared with CCR's historical settlement averages. But even this comparison understates the difference between the value of qualifying class members' claims under the settlement and the value of their lawsuits in the tort system.

The most dramatic problem associated with relying solely on historical settlement averages as a baseline for negotiating the class settlement is the settlement's failure to account for inflation. The problem caused by inflation is simply stated. As prices rise, goods and services become more difficult to obtain, unless the resources available to purchase those goods and services rise at the same pace. Inflation has been a continuous presence in the American economy since the 1940's, rising as much as 103.4% over the course of one decade (the 1970's). Astoundingly, the class settlement does not take inflation into account. The Stipulation compensates qualifying claimants in accordance with a *fixed* schedule of average dollar payments, *with no provision specifically to adjust for inflation*. Even if we conceded that the compensation values under the settlement are fair in 1993 dollars -- which we do not -- it is surely not fair to pay class members who qualify for payment in 2003, or 2013, in the same 1993 dollars.

Over the past half-century, the cost-of-living has consistently risen significantly during each decade. On April 8, 1994, the district court took judicial notice of the "all items" Consumer Price Index for all urban consumers, known as the "CPI-U," from the date of its inception, January 1913, through January 1994, and the CPI-U for medical care from 1966 through 1993. Docket No. 1005.

The amounts reflected in the settlement's Negotiated Average Value Ranges for each compensable medical category are frozen in place for the first 10 years of the settlement's operation, *i.e.*, through late January 2004, *see* SOS, XXVII.G., JA 105, regardless of increases in the cost of living or any other factor that would render such future awards manifestly unfair. After the first 10 years, these amounts still may not increase. Rather, at the beginning of year 10, class counsel and CCR are directed to

negotiate adjustments, if any, to the compensation schedule. If that negotiation is unsuccessful, the matter is submitted to non-binding mediation and, if necessary, to binding arbitration to be completed by the end of the third quarter of year 10. SOS, VII.B.1. and 2, JA 77. However, "*in no event shall any adjustments to the values in the Compensation Schedule ... exceed the values in the Compensation Schedule for the prior ten (10) year period by more than twenty percent (20%).*" *Id.* VII.B.3., JA77 (emphasis added).[14]

In the 20 years prior to January 1994 when CCR began processing claims under the settlement -- December 1973 through December 1993 – the CPI-U increased by *215.6%*. Moreover, the rate of inflation for medical costs has recently exceeded the overall inflation rate by a factor of two or three. John C. Coffee, Jr. *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1377 n.122 (1995). Yet, under the settlement, for the next 20 years, the Compensation Values will be adjusted upward *no more than 20%*. Thus, if the inflation over the next two decades is anything approaching what it was over the last two, awards under the class settlement will become virtually worthless.

Tort awards and settlements should keep pace with inflation, because large components of such awards and settlements -- *e.g.*, lost wages and medical care -- are themselves driven by inflation. *See* M. Peterson, *Compensation of Injuries -- Civil Jury Verdicts in Cook County* 46 (Rand 1984)(jurors were remarkably adept at adjusting awards for inflation). Thus, a tort award for lost future income made in the year 2000 would look to wage rates in that year and into the future. *See id.*; Blackmar, and Wolff, 3 *Federal Jury Practice and Instructions* § 85.04, p. 316 (4th ed. 1987). The same is true for an award of the cost of present and future medical care, where the real cost, at the time of the trial and beyond, of the

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[14] We note the shocking inequality of this provision in that there is *no downward limit whatsoever* on any adjustment, although the upward limit is 20%. The adjustments are to be made every 10 years in perpetuity, but, for simplicity, we consider only the settlement's operation over the first 20 years.

relevant goods and services would be assessed. *Id.* § 85.07, pp. 319-20.

C. The Evidence Fails To Show That the Class Settlement Will, On Average, Provide Compensation To Qualifying Claimants More Quickly Than the Tort System

One of the Settling Parties' major selling points in this litigation has been that the *Georgine* agreement will allegedly provide compensation to qualifying claimants more quickly than the tort system. *See, e.g.*, SOS at 3, JA 47 ("The procedures set forth in this Stipulation would provide a . . . speedy . . . method of compensating claimants"). But neither the Settling Parties nor the district court have pointed to any evidence to show that class members will be paid any faster on average, or even as fast, under the class settlement than they would have been paid had they filed lawsuits.

Whether qualifying claimants will actually be paid quickly after submitting their claim under the settlement depends entirely on whether the case flow limitations for a particular disease category have been exceeded during the year in which the claim is submitted. *See* SOS, Part VIII(A)(1), JA 77-78. If more than the maximum number of qualifying claims in a particular disease category is submitted in a given year, then the excess claims will be first in line to be paid the following year, and they will be counted against the case flow maximums for that next year. *Id.* Thus, if the case flow maximums underestimate the number of qualifying claims in each year, with each passing year there will be a growing backlog of claims waiting to be paid. *See* Testimony of Michael Rooney, March 3, 1994 at 52-54 (discussing potential backlog of non-malignant claims).

In negotiating the case flow maximums, the Settling Parties failed to perform the only analysis that would have enabled them to determine the effect such caps would have on the timeliness of claims payment -- a projection of the number of future claims likely

to be filed against the CCR companies. Obviously, without having some estimate of how many class members will submit qualifying claims, there is no way to estimate whether or to what extent the case flow maximums will be exceeded. Without knowing whether the caps will be exceeded, there is no way of knowing how long a claimant will have to wait to be paid. CCR Chief Operating Officer Michael Rooney, the only witness to testify at the fairness hearing who actively and extensively participated in the negotiation of the *Georgine* settlement repeatedly said that he didn't expect or know "anything" with respect to future filings against CCR. Testimony of Michael Rooney, March 1, 1994 at 195. Similarly, Martha Wilke Murray, CCR's appointed keeper of relevant statistics, testified, "I have no idea what the number of claims to be filed in the future will be." Testimony of Martha Murray, March 11, 1994 at 294. Mr. Rooney also testified that he did not recall either that class counsel asked CCR to perform a future claims projection, or that class counsel had ever indicated that they would perform their own such projection. Testimony of Michael Rooney, March 3, 1994 at 163-64.

The only basis for the district court's finding that the settlement will provide "prompt compensation," Cert. App. 268a, is its finding that "the Case Flow Maximums, if reached, would result in the CCR defendants paying claims at a faster rate, than they have ever paid before." Cert. App. 145a. That statement, however, which is based on CCR's expressed hope or expectation that it will resolve a certain number of pending claims *outside the class*, in combination with the claims resolved under the class settlement, has nothing to do with whether *class members* will receive timely payments under the settlement. *See* SP Exhibit 601(H) (relied on by district court at Cert. App. 145a). No matter how many claims CCR settles in the tort system, class members

who have not opted out will have to resolve their claims through the class procedure, which is subject to the case flow caps.[15]

The only evidence that indicates the likely number of future claims to be filed shows that the case flow maximums will be exceeded and qualifying claimants who file in the later years of the settlement may well have a longer wait on average than they would in the tort system. Based on work he has done predicting the time course of cancer, Dr. William Nicholson was able to evaluate the effect of the caps based on the assumption that the case flow maximum for the first year of the settlement accurately predicts how many qualifying lung cancers will be filed against CCR in that year. Using that generous assumption, and charting the overall incidence of lung cancer from that point forward, Dr. Nicholson predicted that lung cancer claimants would be forced to wait in line in the later years of the settlement because the decrease in the case flow maximums for lung cancer does not correspond with the expected incidence of asbestos-related lung cancers over the same period. In other words, while the case flow caps go down, the rate of asbestos-related lung cancers being filed will remain almost constant. Deposition of Dr. William Nicholson, March 31, 1994 at 71-73. This problem is also true for the mesothelioma case flow maximums under the settlement. *Id.* at 66. The Settling Parties' own expert confirmed that the incidence of asbestos-related mesothelioma cases over the course of the settlement is expected to remain the same, and he also assumed that the incidence of asbestos-related lung cancers will remain constant. Testimony of Dr. Victor Roggli, March 9, 1994 at 150; 121-23.

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[15] An additional problem with the Settling Parties' claim of efficiency from this class settlement is that virtually all lawsuits against CCR also involve other asbestos defendants. *See* Testimony of Michael Rooney, March 10, 1994 at 3-4. In order to recover against those defendants, class members will have to pursue a lawsuit, apart from their administrative claim against CCR pursuant to this class settlement. Such a duplication of effort will actually *increase* a claimant's transaction costs, and *decrease* efficiency with respect to *overall* resolution of their claims against all defendants.

II. CLASS MEMBERS WERE DENIED DUE PROCESS BY CLASS COUNSEL'S FAILURE TO PROVIDE ADEQUATE REPRESENTATION

The manner in which the Settling Parties negotiated the proposed settlement denied due process to class members because the conflicting interests of class counsel interfered with their representation of the class. In the summer and early fall of 1992, when class counsel undertook the fiduciary responsibility to negotiate on behalf of class members, they faced an immediately apparent ethical conflict of interest created by the combination of their concurrent representation of present and future asbestos claimants and CCR's announced settlement posture. Later, the divided loyalties created by this conflict flowered into a forced trade-off of the rights of one group of clients against another.

Because the conduct of these negotiations raise so many troublesome questions regarding the loyalties of class counsel, the Settling Parties would prefer the Court to presume from the district court's review of the settlement that the negotiations were properly conducted. Pet. Br. at 46 ("a court's determination that the terms of the settlement are fair presumptively establishes that the class received adequate representation"). But that is not correct. As the Seventh Circuit stated in *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir. 1979):

> No one can tell whether a compromise found to be "fair" might not have been "fairer" had the negotiating [attorney] possessed better information or been animated by undivided loyalty to the cause of the class. The court can reject a settlement that is inadequate; it cannot undertake the partisan task of bargaining for better terms. *The integrity of the negotiating process is, therefore, important.*

594 F.2d at 1125 n. 24 (emphasis added).[16] Regardless of the district court's conclusions regarding the fairness of this settlement's terms, it erred by approving the settlement in light of the overwhelming evidence that class counsel negotiated the deal burdened by significant divided loyalties.

A. Class Members Gave Up Rights During The Negotiation In Return For Consideration That Did Not Go To the Class

In any negotiation, if one party desires a certain term or concession, the other party is given leverage to demand something in return. For example, in negotiating the typical personal injury settlement, the defendant's desire to avoid the uncertainty of a possible jury verdict allows the plaintiff to demand a higher price. As a result, the closer the case comes to trial, the more the defendant is generally willing to pay in settlement.[17] During the course of the negotiation of this class action settlement, CCR demonstrated a willingness to pay significant value in return for the class giving up their right to seek monetary compensation absent a demonstration of measurable functional breathing impairment from asbestos exposure. So, one would think that the affected class members would have gained substantial benefits by conceding that point. Perhaps, for instance, medical monitoring benefits could

[16] *See also In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987) ("We also reject the district court's finding that its authority to approve settlement offers under Fed. R. Civ. P. 23(e) acts to limit the threat to the class from a potential conflict of interest"); In *re Baldwin-United Corp.*, 105 F.R.D. 475, 482 (S.D.N.Y. 1984) ("[i]n order to supplement judicial examination of the substance of a compromise agreement . . . attention must be paid to the process by which a settlement has been reached").

[17] Mr. Rooney acknowledged that this is generally true in the asbestos litigation. *See* Testimony of Michael Rooney, March 1, 1994 at 221.

have been obtained for non-qualifying class members. But a review of the history of the negotiations reveals otherwise.

Since 1991, CCR had been unwilling to negotiate inventory settlements with plaintiffs' counsel unless there was a pleural registry in place where that counsel practiced.[18] Testimony of Lawrence Fitzpatrick, February 23, 1994 at 191-92, JA 667. But when CCR sat down with class counsel to negotiate the futures class settlement, it made known that it would be willing to negotiate inventory settlements with plaintiffs' attorneys if and when CCR became "reasonably confident" that there would be a class settlement establishing a minimal level of medical criteria for a compensable claim. Testimony of Lawrence Fitzpatrick, February 23, 1994 at 192-93, JA 667. In May or June of 1992, CCR reached that level of confidence that the class negotiations would succeed, and it fulfilled its promise to begin negotiating inventory settlements. Testimony of Michael Rooney, February 28, 1994 at 202-03, JA 761-62. Unfortunately for the members of the class, they were not among the many people who benefitted from CCR's change in policy.

However one labels the behavior of class counsel, they failed to fulfill their duties of adequate representation by effectively bargaining away the rights of class members in exchange for benefits that went to other clients, to themselves, and to third parties. As Professor John Coffee testified, class counsel's existing clients reaped greater than market value in settling their claims as part of inventory settlements conducted by class counsel with the CCR. March 29, 1994 Tr. at 54. Conversely, class members received less value for their claims in the settlement than they would have in the tort system. *See supra*, Part I; Testimony of John Coffee, March 29, 1994 at 116. In light of the Settling

[18] A "pleural registry" is an order by a court requiring that asbestos defendants waive the statute of limitations against claimants who do not meet an objectively measurable level of functional impairment from asbestos exposure, and that such claimants will not have the right to seek compensation until they are able to demonstrate the requisite level of impairment. *See* Testimony of Lawrence Fitzpatrick, February 22, 1994 at 123.

Parties' acknowledgement that these inventory settlements would not have occurred but for CCR's belief that the class settlement would be reached, *See, e.g.*, February 23, 1994 Tr. at 193-94, the only fair inference is that class members traded value in return for which CCR paid present inventory claimants.

1. Class counsel's inventory claims received substantially greater compensation than they would have received under the *Georgine* settlement.

A comparison of the values received by class counsel's inventory clients with the negotiated average value ranges under the class settlement shows that class members gave up rights in return for benefits that went to the inventory clients of class counsel. That class members who are situated similarly to the inventory clients will receive less value for their claims raises the unavoidable inference that class counsel traded away the rights of class members for the benefit of their present clients and themselves. Data supplied by the Settling Parties reveals that inventory clients fared much better than they would have under class deal. Settling Parties' Exhibit 302 reveals the total amount of settlements for Ness, Motley clients, the total amount for Greitzer & Locks clients, and the number of claimants in each disease category. Using this data from SP 302 and the negotiated average value ranges for each disease category found in the Compensation Schedule to the *Georgine* SOS, Objectors' Exhibit 170 (a copy of which is attached to this brief) reveals that both Ness, Motley and Greitzer & Locks

received substantial premiums for their inventory settlements as compared with the *Georgine* values.[19]

Using two extremely generous assumptions, Objectors' Exhibit 170 shows that Ness, Motley's present clients received 54 percent more[20] and Greitzer & Locks clients received 72 percent more[21] in the inventory settlements than those same claimants would have received under the class deal. The first assumption benefitting the Settling Parties is that the claimants would have received the high end of the maximum negotiated average value under the class settlement. Actually, it is far more fair to assume that CCR will pay on average only its minimum legal obligation under the agreement, which is the *low end* of the negotiated average value ranges, as is discussed in detail in Part I(A)(1) of this brief. The second assumption that tilts this comparison sharply in favor of the Settling Parties is that all of class counsel's present inventory clients would have qualified for cash compensation under the class settlement at all. The evidence suggests that in reality 45 to 50 percent of lung cancer and other cancer claimants who file claims

---

[19] Exhibit O-170 was offered by Professor John Coffee as part of his expert testimony that class counsel collusively negotiated the class settlement. Professor Coffee accepted no money from objectors for his time in the case, *see* March 29, 1994 Tr. at 21, nor was he paid by objectors or others for his article discussing this case (among others). *See* John C. Coffee, Jr., *Class Wars: the Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1343 n.* (1995). This fact stands in contrast to an article relied upon by Petitioners, the writing of which they funded. Edley & Weiler, *Asbestos: A Billion-Dollar Crisis*, 30 Harv. J. Legis. 383, 383 n.aa1 (1993).

[20] This percentage was calculated by dividing the difference between what was actually paid Ness, Motley's inventory clients and the estimated recovery for those same clients under *Georgine* ($138,077,100 - $89,660,000 = $48,417,100), by the estimated *Georgine* recovery ($89,660,000).

[21] This percentage was calculated by dividing the difference between what was actually paid Greitzer & Locks's inventory clients and the estimated recovery for those same clients under *Georgine* ($77,417,000 - $44,907,500 = $32,509,500), by the estimated *Georgine* recovery ($44,907,500).

and receive money in the tort system will not qualify under *Georgine*,and a majority of non-malignant claimants will also not qualify. *See supra* at Part I(A). There is nothing in the record to suggest that the inventory claims were any different from the average group of claims filed in the tort system. *See* JA 770-71.[22]

2. Other evidence demonstrates that class counsel traded away the rights of class members to benefit other interests.

In addition to the comparison of relative value discussed above, the record reveals many other indicators that class counsel collusively negotiated this settlement. The first and most important is class counsel's behavior revealing that they believed their present clients were receiving a better deal than class members. Mark Iola, a plaintiffs' attorney who is affiliated with Ness, Motley in some cases,[23] testified that class counsel Joe Rice advised a group of Ness, Motley co-counsel during a Miami meeting in November, 1992 that "the terms as to certain nonmalignant people in the futures deal, are going to be worse than the terms for those people in the present system and . . . people [should] get their cases on file." Testimony of Mark Iola, March 30, 1994 at 68.

Iola's testimony is corroborated by Objectors' Exhibit 16 (a copy of which is attached to this brief), an August 21, 1992 memorandum from Motley to all Ness, Motley affiliated counsel, which explicitly warns against the possibility of upcoming agreements that would harm the interests of future claimants. The memo states:

[22]For a detailed critique of the district court's failure to credit Exh. O-170, *see* Susan Koniak, *Feasting While the Widow Weeps*: Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1066-78 (1995).

[23] Testimony of Mark Iola, March 30, 1994 at 26-27.

> Judge Weiner is pressing extremely hard for a settlement of all asbestos personal injury cases pending in New England. If this settlement agreement is signed, the judge may use it as a blueprint for future settlement negotiations. Please be advised that the New England Agreement includes a so-called "futures agreement" that would establish minimum medical criteria for payment of future claims. Present claims would not be burdened with such criteria.
>
> **Therefore, in order to have your cases considered "present claims" we are advising you to serve and file as many of your unfiled cases as soon as possible.**

Exh. O-16 at 2 (emphasis in original). This document speaks for itself – Motley advised all of his affiliated counsel to file claims as soon as possible so as to avoid the risk that those claims would be "burdened" with the necessity of meeting minimum medical criteria in order to be paid. One month later, Motley and Rice reentered the negotiations, which imposed just such criteria on class members.

Of course, the best evidence of class counsel's professional judgment regarding the relative merits of the class and inventory settlements are found in the terms of the deals themselves. *None of the more than thirteen thousand of class counsel's inventory clients suffering from non-malignant disease sought a waiver of the statute of limitations from CCR rather than cash.*[24] The district court's attempts to justify this disparate treatment of similarly situated claimants are spurious. Cert. App. 188a ("finding" that future claimants may legitimately be treated differently than present

[24]Professor John Freeman, who was the ethics expert consulted by Ness, Motley during the course of the class negotiations, testified that it was his understanding at the time that all of the present unimpaired clients of Ness, Motley settled for cash in the inventory deals. March 11, 1994 Tr. at 16.

claimants because they had "different expectations" from present claimants).[25]

Class counsel's sell-out of the futures class for the benefit of present claimants is not made acceptable by the fact that CCR settled inventories with law firms other than class counsel after becoming confident that the class agreement would be reached. Those agreements are consistent both with CCR's short-term goal of having the class action approved and its long-term goal of resolving all of its pending and future asbestos liabilities. As Professor Coffee testified, it would not have been realistic for CCR to assume that the class action could be approved if the entire plaintiffs' bar, other than class counsel, formed a united phalanx to oppose it. Thus, by settling the inventories of other plaintiffs' firms, CCR assured that there would be some support for the class action from other attorneys. *See* Testimony of John Coffee, March 29, 1994 at 61-62.[26]

B. Class Counsel Negotiated the Settlement While Laboring Under Disqualifying Conflicts Of Interest

[25] Indeed, Professor Hazard, who unlike Freeman had not been informed that none of the inventory claimants received waivers of the statute of limitations in lieu of cash, testified that he had assumed that a significant number of the inventory claimants had accepted Green Cards because it was the best "professional judgment" of their counsel to do so. February 25, 1994 Tr. at 140. In fact, when asked to assume the contrary, Hazard acknowledged that such a fact could be an indicator of collusion. *Id.* at 146.

[26] In addition to giving up class leverage for the benefit of the inventory settlements, class counsel negotiated at least one provision into the class settlement that will benefit themselves at the expense of most of the class. By CCR's admission, the settlement requires that otherwise identically situated claimants will be treated differently based solely upon the historical track record of their attorneys. *See* SOS(VIII)(B)(2), JA 80; Testimony of Lawrence Fitzpatrick, February 24, 1994 Tr. at 88-89. The natural result of this reality created by the settlement will be to drive claimants to historically successful lawyers, such as class counsel, *see* Ex. SP 502, CCR Doc. No. 2000263, and thereby to allow those lawyers to corner the market.

Class counsel's collusive negotiation of the *Georgine* settlement constituted a realization of exactly the dangers the Model Rules of Professional Conduct are designed to prevent. Although the actual harm from class counsel's concurrent representation of class members and present clients did not result until the deals for both sets of clients were struck, under Model Rule 1.7(b) class counsel should have been disqualified from representing the class from the moment they understood CCR's negotiating posture, which raised an unmistakable spectre of conflicting interests.

Model Rule of Professional Conduct 1.7(b) (1983) provides:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The comment to the rule goes on to state: "[a]n impermissible conflict may exist by reason of . . . the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. (1983).

In this case, class counsel should never have represented the futures class because they knew that, in light of CCR's settlement posture, such representation would almost certainly be materially limited by responsibilities owed to their present clients. There was little question in late 1991 that inventory settlements would be in the best interests of both class counsel and their present clients, and once the class negotiations began, class counsel knew that in order

for CCR to be willing to enter into inventory settlements for the benefit of their present clients, they would have to agree that future claimants must meet some level of objective medical criteria that demonstrated pulmonary function impairment as a result of asbestos exposure. Because there was at least a substantial possibility that such an agreement imposing medical criteria would "materially limit" their representation of the futures class, and because there was no reasonable method of obtaining the consent of the class to the dual representation, Motley, Rice, and Locks should have declined to negotiate the *Georgine* settlement.[27]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Counsel of Record for Asbestos Victims of America
January 15, 1997

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[27]For a more thorough discussion of the ethical conflicts and other adequacy problems plaguing class counsel, *see generally* Susan Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, 80 CORNELL L. REV. 1045 (1995).

APPENDIX

O-16

NESS, MOTLEY,
LOADHOLT, RICHARDSON & POOLE

MEMORANDUM

TO: All Asbestos Personal Injury Co-counsel

FROM: Ronald L. Motley, Esquire and Charles W. Patrick, Jr., Esquire

RE: Recent Developments in Asbestos Litigation/Ness, Motley Personal Injury Co-counsel Meeting

DATE: August 21, 1992

The Asbestos Litigation Group is having an educational seminar in Miami, Florida on Friday, November 6 through Sunday, November 8, 1992. A tentative agenda for this meeting is enclosed.

In conjunction with the ALG Seminar, we will have a Ness, Motley Co-counsel Meeting on Thursday, November 8, 1992 in Miami. Both the Co-counsel Meeting and the ALG Seminar will be held at the Grand Bay Hotel in Coconut Grove, Florida. We are negotiating special room rates with the hotel, and you can obtain a reservation by calling the Grand Bay Hotel at (305) 558-2600. Indicate to them that you are reserving a room for the ALG/Ness, Motley Co-counsel Meeting.

We have enclosed a tentative Co-counsel agenda as well.

As you know, we are extremely disappointed with Judge Weiner's handling of the MDL. Ness, Motley, along with several other members of the Plaintiffs' Steering Committee, has moved before the MDL Panel for remand of all cases to their home jurisdictions. A hearing before the MDL Panel has been

Deposition Exhibit
F-2-9

scheduled on September 25, 1992 in Colorado Springs, Colorado. The MDL Panel will probably have issued a ruling on our Motion for Remand by November 5, and you can be updated on the MDL at this time.

In the meantime, Judge Weiner is pressing extremely hard for a settlement of all asbestos personal injury cases pending in New England. If this settlement agreement is signed, the judge may use it as a blueprint for future settlement negotiations. Please be advised that the New England Agreement includes a so-called "futures agreement" that would establish minimum medical criteria for payment of future claims. Present claims would not be burdened with such criteria.

Therefore, in order to have your cases considered "present claims" we are advising you to serve and file as many of your unfiled cases as soon as possible.

Additionally, you received a FAX from Susan Nial indicating that the Celotex Bankruptcy counsel was taking the position that we had to file Proof of Claim forms for cases that had been settled with Celotex, but had not been paid by Celotex. On August 11, 1992, Judge Baynes ruled that "no asbestos related claims, including claims based on settlements, were subject to the Bar Order." Attached is a letter from Sheldon Toll, our bankruptcy counsel, reporting on the Judge's decision.

Finally, even though we have moved for a remand of all asbestos claims in the MDL, you should still aggressively move for remand of individual cases. Judge Weiner has been reluctant to remand any cases other than malignancy claims. We urge you to move for remand of all of your mesothelioma and lung cancer cases. If you file a Motion for Remand, the Judge's clerk will most likely set a settlement conference on the case, and, although it may take several telephone conference calls, you will either receive offers for settlement or the case will be remanded. You should be aware that Judge Weiner

has a policy of remanding cases without remanding the punitive damage claim.

Our tentative arrangement with the Grand Bay Hotel in Coconut Grove is that a block of rooms will be held until October 5, 1992. After October 5, the rooms will be released to the general public. You need to make reservations as soon as possible. We look forward to seeing you all there.

Copy of Exhibit O-170

COMPARISON OF NESS, MOTLEY INVENTORY SETTLEMENTS WITH *GEORGINE* NEGOTIATED AVERAGE VALUE RANGE

Disease Category	[A] Number of Inv. Cases	[B] *Georgine* Neg. Avg. Value Range	[A x B]
Mesothelioma	97	$60,000	$ 5,820,000
Lung Cancer	315	$30,000	$ 9,450,000
Other Cancer	85	$12,500	$ 1,062,500
Non-Malignant	9,777	$ 7,500	$73,327,500
		Total [C]:	$89,660,000
Total Actually Paid Ness, Motley Inventory Claimants per SP303 [D]:			$138,077,100
		Difference [D - C]:	$48,417,100

COMPARISON OF GREITZER & LOCKS INVENTORY SETTLEMENTS WITH *GEORGINE* NEGOTIATED AVERAGE VALUE RANGE

Disease Category	[A] Number of Inv. Cases	[B] *Georgine* Neg. Avg. Value Range	[A x B]
Mesothelioma	174	$60,000	$10,440,000
Lung Cancer	271	$30,000	$ 8,130,000
Other Cancer	52	$12,500	$ 650,000
Non-Malignant	3,425	$ 7,500	$25,687,500
		Total [C]:	$44,907,500
Total Actually Paid Greitzer & Locks Inventory Claimants per SP303 [D]:			$77,417,000
		Difference [D - C]:	$32,509,500

(25)

Supreme Court, U.S.
FILED
JAN 15 1997
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Nos. 96-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., ET AL.,

Petitioners,

v.

GEORGE WINDSOR, ET AL.,

Respondents.

On Writ Of Certiorari To The
United State Court of Appeals
for the Third Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS

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IN THE

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On Writ Of Certiorari To The United State Court of Appeals for the Third Circuit

---

BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose approximately 60,000 members primarily represent plaintiffs in civil actions. Victims of asbestos-related disease are frequently represented by ATLA members in their civil suits.

Letters of consent of the parties to the filing of this brief have been filed with the Court.

ATLA does not appear before this Court as an opponent -- or a proponent -- of class actions in mass torts. Rather, ATLA's concern in this case is defined by its longstanding

mission, stated in its bylaws: "To preserve the constitutional right to trial by jury." ATLA declared its position regarding class actions in a formal resolution adopted by its Board of Governors on Oct. 5, 1996:

> Class actions can be important procedural vehicles utilized by consumers and others to halt and deter wrongful conduct. However, class actions have the potential to affect individual rights, and potentially may interfere with an individual plaintiff's exercise of the right to legal counsel and the right to trial by jury. . . .
>
> ATLA believes . . . that any waiver of the right to a jury trial should be a knowing and informed choice of the plaintiff [and] that plaintiffs are entitled to counsel of their choice whose loyalty is undivided by any conflict of interest. Accordingly, ATLA opposes the implementation of class action procedures unless each claimant is afforded the fullest opportunity to exercise a knowing and intelligent waiver of jury trial and a meaningful opportunity to opt out of the binding effect of such proceedings.

In ATLA's view, the question presented in this case raises the issue of judicial protection of the constitutional right to trial by jury. The standard advocated by Petitioner for certifying a class action for purposes of settlement would effectively permit the parties to trade away the jury trial rights of those who will develop asbestos disease in the future. By taking into account the terms of the settlement in applying Fed. R. Civ. Pro. 23, courts allow the parties to remove issues from judicial scrutiny, including the rights of future victims. Essentially, this standard would render the Seventh Amendment rights of future victims "invisible."

ATLA addresses this Court to defend the right to trial by jury against such an erosion. ATLA further suggests that the constitutional rights of future victims can be preserved without destroying the effectiveness of the class action as a means of resolving disputes in a just and efficient manner.

SUMMARY OF THE ARGUMENT

The question presented in this case raises serious issues regarding judicial protection of the right to trial by jury. The class in this case includes not only those who have current claims for asbestos-related harms, but also those who will develop asbestos disease in the future. The standard advocated by Petitioners would require judges considering the certification of class actions to take into account the fact that some issues have been settled. It would allow current claimants to trade away the jury trial rights of future victims in a manner that is largely invisible to judicial scrutiny.

The history of the Seventh Amendment illustrates the importance of the right to trial by jury to both the civil justice system and democratic self-government. This Court has long required close judicial scrutiny of any infringement of that right.

The infringement is accomplished in this case by shifting the legal claims of asbestos victims, to which the Seventh Amendment applies, to an administrative compensation scheme. This is a type of denial of jury trial rights that the Seventh Amendment was specifically designed to prevent, and this Court has invalidated an attempt by Congress to evade the right to trial by jury in similar fashion.

The notice and opportunity to opt out of the class did not preserve the rights of future victims. The failure by an individual who has not yet suffered asbestos injury to execute and submit opt-out form cannot be deemed a knowing and intelligent waiver of the right to trial by jury.

The prospect of administrative efficiency and lower transaction costs do not trump the Seventh Amendment. However, the rights of futures can be preserved without destroying or crippling the class action. This can be accomplished by conditioning the certification of a settlement class action on modification of the agreement. That modification would provide that future victims shall have a

reasonable period of time following discovery of the disease in which to choose between the terms of the settlement or and a tort action with the right to a jury trial.

ARGUMENT

I. CONSIDERATION OF SETTLEMENT IN CERTIFYING A CLASS ACTION INVOLVING THE MONETARY CLAIMS OF FUTURE ASBESTOS VICTIMS RATIFIES THE TRADING AWAY OF FUTURE CLAIMANTS' RIGHT TO TRIAL BY JURY.

In the coming years, a significant number of Americans who are presently in good health will receive bad news from their doctors. They will have developed cancer, mesothelioma, or other disease caused by asbestos in the air where they worked years ago. If the settlement at issue in this case is approved, many workers will get a second dose of bad news from their attorneys. Unlike most Americans, who may take for granted that they are entitled to seek legal redress if they are wrongfully injured, these future asbestos victims will find that they have been locked out of the courthouse. Their right to put their case before a jury selected from the community will have been transformed into an application for compensation under an administrative scheme. The courthouse door will not have been slammed shut by their elected legislators. It will have been the work of private individuals and their attorneys who were permitted by courts to trade away not only their own right to sue, but also the rights of future victims.

Judge Becker, writing for a unanimous court below, correctly characterized this case as one of the "great cases that force the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other." *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 617 (3rd Cir. 1996).

Conceding that the class action settlement represented "arguably a brilliant partial solution" to the challenge to the civil justice system posed by asbestos litigation, *Id.*, the Third Circuit nevertheless refused to harm the victims of asbestos disease a second time by sacrificing their rights on the altar of administrative efficiency.

The core of the Third Circuit's decision was to hold this class action to the same standards under Fed. R. Civ. Pro. 23 that would be applied to certification of a class action being prepared for trial. CCR asserts that the court's approach is a "wholly artificial inquiry" concerned with "hypothetical litigation." Brief for Petitioners at 16. ATLA suggests that the lower court's analysis draws into sharp focus a fundamental problem that would otherwise be lightly dismissed as a "settled" issue:

> [T]he settlement would extinguish asbestos-related causes of action of exposed individuals who currently suffer no physical ailments, but who may, in the future, develop possibly fatal asbestos-related disease. These "futures claims" of "exposure-only" plaintiffs would be extinguished even though they have not yet accrued.

83 F.3d at 617.

Claims seeking money damages for asbestos injuries are legal in nature and the claimants' right to trial by jury is clearly protected by the the Seventh Amendment. *Curtis v. Loether*, 415 U.S. 189 (1974). It may be true that class members stand to receive valuable consideration in return for giving up their remedy in the tort system. Brief for Petitioners at 14. If the court addressing certification takes the settlement into account, the rights of "futures" will be extinguished primarily on the basis of fairness of the monetary terms of the settlement and adequacy of representation. The right of a individual claimant to choose whether to relinquish his or her right to a trial by jury has been removed from consideration, rendered invisible.

The Third Circuit at several points expressed misgivings as to due process implications of extinguishing the rights of "futures." *E.g.*, 83 F.3d at 617 & 623. Because the court based its reversal on the application of Rule 23, it did not specifically address the constitutional issue raised by ATLA to the district court: Amicus respectfully asks this Court to address explicitly what is implicit in the Third Circuit's decision -- that a class of claimants may not use the mechanism of a class settlement to trade away the constitutional right of future claimants to trial by jury.

II. THE RIGHT TO TRIAL BY JURY IS FUNDAMENTAL AND ANY INFRINGEMENT MUST BE STRICTLY SCRUTINIZED.

A. Any Curtailment Of The Right To Civil Trial By Jury, Explicitly Guaranteed By The Constitution, Must Be Strictly Scrutinized And Justified By A Compelling State Interest.

Government actions which impinge upon fundamental rights must be reviewed under a standard of strict scrutiny: Only those which are necessary to advance a compelling state interest and do so in the least restrictive manner are permissible. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). Fundamental rights are those which are "explicitly or implicitly guaranteed by the Constitution." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1972).

The Seventh Amendment guarantees the right to trial by jury in civil cases.[1] Congress has restated this guarantee even more forcefully for federal courts:

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1 In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Fed. R. Civ. Pro. 38(a).

This Court has repeatedly emphasized that "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimmick v. Schiedt*, 293 U.S. 474, 486 (1935), quoted in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959); and in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990)("this Court has carefully preserved the right to trial by jury where legal rights are at stake.").

It has been noted that "the scope and effect of the Seventh Amendment . . . perhaps more than with any other provision of the Constitution, are determined by reference to the historical setting in which the Amendment was adopted." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 339 (1979)(Rehnquist, C.J., dissenting). It has also been observed that this right has suffered a "gradual process of judicial erosion." *Id.* At times it has even become the object of disparagement, perhaps because its history has become overlooked or unappreciated. *See* Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579 (1993).

1. The right to trial by jury in civil cases was an important element in the struggle for independence.

The jury trial is not a merely a procedural feature of our civil justice system. A war was fought, and lives lost, to win this right. The jury was immensely popular among the

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U.S. Const., amend vii.

American colonists. They admired the heroism of Edward Bushnell and the other jurors who refused to convict Quaker William Penn in 1670, though they were fined and jailed by the trial judge. *See* John Guinther, THE JURY IN AMERICA ch. 1 (1988)

In 1688, a jury acquitted seven Anglican bishops of seditious libel for signing a letter in opposition to James II. This case elevated the jury in public esteem "as a bulwark of liberty, as a means of preventing oppression by the Crown." Austin Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 676 (1918). "Treatises extolling the jury flooded the market and profoundly influenced eighteenth century American as well as English views about jury trial." *Id.*

The colonists followed the lawsuits of John Wilkes and his printer against officials bent on preventing his allegedly seditious publication, resulting in a large jury award of punitive damages. *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (K.B. 1763) and *Huckle v. Money*, 2 Wils. 205, 95 Eng.Rep. 768 (C.P. 1763). "Wilkes' case and his ongoing conflicts with the British administration were a matter of keen interest in the American colonies. South Carolina went so far as to provide Wilkes monetary support for one of his political campaigns." Landsman, *supra*, at 591. Wilkes' case was cited in debates in support of the need for constitutional protection of the civil jury. *See* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1778-1788, 781-82 (John B. McMaster & Frederick D. Stone eds. 1988)(statement of Robert Whitehall at Pennsylvania ratifying convention).

At the same time, the colonists found themselves frequently deprived of civil jury rights. "Because of the jury's power, the British authorities increasingly sought to either control or avoid jury adjudications. The struggle over jury rights was, in reality, an important aspect of the fight for American independence and served to help unite the colonies." Landsman, *supra*, at 596. A primary grievance of

the American colonists was the extensive effort by England to shift the adjudication of civil and criminal disputes from colonial courts, where local juries sat, to Vice-Admiralty courts and other non-jury tribunals administered by judges beholden to the Crown. *See* Carl Ubbelohde, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 209-11 (1960); Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 69-72 (1957); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 654 (1973). The colonists complained bitterly of this infringement through the Stamp Act Congress, the Continental Congress, and, finally, in the Declaration of Independence. Landsman, *supra* at 595-97.

2. The Adoption of the Seventh Amendment Was Crucial to Ratification of the Constitution.

Independence from England did not diminish the sacredness of the jury in the eyes of the new Americans. On Sept 12, 1787, as the Constitutional Convention was nearing the end of its work in Philadelphia, Wilson "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." A motion to add that right to Art. III, §2, cl.3, which guaranteed trial by jury in criminal cases, failed. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289 (1966). That omission suggested to many that the constitution represented "virtual abolition of the civil jury" and very nearly doomed ratification of the entire constitution. Henderson, *supra*, at 295-98; Wolfram, *supra*, at 672 n.89.

During the ratification debates in the various states, the Antifederalists, repeatedly expressed their fear that, absent some specific constitutional provision to the contrary, the new federal Congress could eliminate jury trials in civil cases in the federal courts. James S. Campbell and Nicholas Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 Univ. of Pa. L. Rev. 965, 971 (1980); *see, e.g.*, 3

THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 218 (J. Elliot 2d ed. 1836)(remarks of James Monroe at the Virginia ratification convention). Justice Story subsequently recounted that this point "was pressed with an urgency and zeal, which were well nigh preventing its ratification." Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 653 (R. Rotunda & J. Nowak eds. 1987) (1833).

Ultimately, the promise of a Bill of Rights, including civil jury rights, won support for the new constitution.

> As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people.

Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 445 (1830).

B. The Seventh Amendment Was Designed To Limit Judicial Power and Enhance Self Government Through the Participation of Ordinary Citizens in Jury Trials.

Those who fought so strenuously for this right in 1791 saw the jury as an essential element of limited, democratic government. The jury was intended as a check on the power of the federal judiciary. Morris S. Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. Pa. L. Rev. 829, 832-35 (1980). Reacting to their experiences at the hands of autocratic British judges,

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979)(Rehnquist, C.J., dissenting).

In addition, the new Americans regarded juries "as more than a 'mode of trial'; they were instruments of local government as well." Arnold, *supra*, at 833. *See also*, Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 144-49 (1991).

Scholars have concluded on the basis of the historical records of the period that the civil jury, and most especially the right to serve on civil juries, was viewed as a political right of immense importance to independence and self-government. *See, e.g.*, Vidram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 218 (1995); Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 595-97 (1993); Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, and the Politics of Jury Power*, 91 Colum. L. Rev. 142 (1991).

In early colonial times, the jury was the essential instrument of governance, providing one of the few experiences common to virtually every citizen. In Massachusetts, for example, one historian characterizes the jury as the central instrument of governance. Its wide-ranging activities starkly contrasted with the circumscribed operations of both the royal executive and colonial legislature. William E. Nelson, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975).

Spokesmen on all sides of the ratification debate recognized that the jury box as well as the ballot box were fundamental prerequisites to majoritarian self-government. As the state legislators would protect their constituents against oppression by the central government, so too jurors could be expected to "interpose" themselves against the central tyranny

through the devices of presentments, nonindictments, and general verdicts. Indeed, the ratification debates abounded with analogies between legislatures and juries. Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 Yale L.J. 1131, 1186, 1188 (1991). Jefferson ventured that "[w]ere I called upon to decide whether the people had best be omitted in the Legislation or Judicial department, I would say it is better to leave them out of the Legislative," quoted in Amar, 100 Yale L.J. at 1188.

The jury role in self-government was all the more critical to the Antifederalists, who viewed the Constitution as an essentially aristocratic document, creating a Congress that would serve the elite and possess "an insufficient sense of sympathy with, and connectedness to, ordinary people." *Id.* at 1140. Popular representation in the judicial branch was needed so that national laws, adopted by persons unfamiliar with local circumstances, would be modified in their application by representatives better acquainted with local needs and customs. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism*, 84 N.W. U. L. Rev. 74, at 91 (1989). To the antifederalists, the absence of the civil jury "would fatally weaken the role of the people in the administration of government." Herbert Storing, WHAT THE ANTI-FEDERALISTS WERE FOR 19 (1981).

Alexis de Tocqueville analogized the jury to:

> . . . a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties... I look upon [the jury] as one of the most efficacious means for the education of the people which society can employ. . . .

1 Alexis de Tocqueville, DEMOCRACY IN AMERICA 295-96 (Bradley rev. ed. 1945). He concluded that "the jury is, above all, a political institution, and it must be regarded in that light in order to be duly appreciated." Id. at 293.

In short, the Seventh Amendment was designed to protect not only the civil right to have one's case tried to a jury, but also the political right to serve as a juror. *See generally,* Vidram David Amar, *supra,* at 218.

This role of the jury as an instrument of self-government has been well recognized by this Court. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991); *Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1934); *Galloway v. United States*, 391 U.S. 372, 397-400 (1943)(Black, J., dissenting); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338-44 (1979)(Rehnquist, J., dissenting). Consequently, the Court has emphasized, "The right of jury trial in civil cases at common law . . . should be jealously guarded by the courts" *Jacob v. New York*, 315 U.S. 752, 753 (1943). *See also, Lyon v. Mutual Benefit Assoc.*, 305 U.S. 484, 492 (1939) ("It is essential that the right to trial by jury be scrupulously safeguarded").

ATLA suggests that the standard the Petitioner advocates for certification of settlement classes under Fed. R. Civ. Pro. 23 would remove this scrupulous judicial protection, by rendering the jury rights of future victims "invisible" to the courts. The "settlement" standard accomplishes this by allowing the parties to shift common law claims -- including the claims of future victims -- to a non-jury forum, undermining the civil jury in precisely the manner which the framers of the Seventh Amendment sought to prevent.

II. THE PROPOSED SETTLEMENT VIOLATES THE RIGHT OF FUTURE CLAIMANTS UNDER THE SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY.

A. Seventh Amendment Precludes Shifting of Common Law Claims To A Non-Jury Tribunal

The claims of asbestos victims for monetary damages are clearly within the Seventh Amendment guarantee of the right to trial by jury in "suits at common law." *Curtis v. Loether*, 415 U.S. 189, 196 (1974). By a perverse alchemy, the class action settlement in this case transformed those legal claims into scrip which can only be redeemed through the bureaucratic compensation scheme devised by CCR.

A worker who develops an asbestos disease years from now will find that his right to present his case to a jury in a tort action has already been traded away. As to these future victims of asbestos-related disease, the right to trial by jury has surely not been "preserved" as commanded by the Seventh Amendment. Their claims have effectively been kidnapped -- spirited away to a forum that does not recognize that right.

This Court addressed an analogous situation in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S. Ct. 2782 (1989). The issue there was whether Congress could authorize district courts to refer claims of fraudulent conveyance, which could otherwise be adjudicated by the district court, to Bankruptcy Courts. This Court held that neither Congress nor the courts may strip claimants asserting "private rights" of their Seventh Amendment guarantee of trial by jury merely by transferring the claims to a non-jury tribunal.

Justice Brennan, writing for the majority, explained that Congress may assign statutory claims involving "public rights," --. matters in which the government is a party or which are closely intertwined with a federal regulatory program -- to a forum in which jury trials are unavailable. But in "private tort, contract, and property cases, as well as a vast array of other cases, "Congress may not deprive parties litigating over that right of the Seventh Amendment's

guarantee to a jury trial." *Granfinanciera*, 109 S. Ct. at 2795-96. "[N]or can Congress conjure away the Seventh Amendment by mandating that traditional legal claims be brought there or taken to an administrative tribunal." *Id.*

Althought the Court's language is directed at the power of Congress, it seems clear that the Seventh Amendment prohibition against referring legal claims involving private rights to non-jury adjudicators applies with equal force to actions of the district courts. *See* G. Ray Warner, *Rotten To the "Core": An Essay on Juries, Jurisdiction and Granfinanciera*, 59 U.M.K.C. L. Rev. 991, 1011 (1991).

ATLA suggests that the constitutional teaching of *Granfinanciera* applies to the issue facing this Court. The class action settlement seeks to transfer, prospectively, common law claims that otherwise would clearly be subject to the Seventh Amendment to a forum in which juries are not available. Absent a valid waiver, this deprivation of future claimants' right to trial by jury clearly violates the Seventh Amendment.

B. Notice and Opt-Out At the Time of Certification of the Class Do Not Afford Future Claimants the Opportunity For Knowing And Intelligent Waiver Of The Right To Trial By Jury.

1. Waiver of the Right to Trial by Jury Must Be Knowing and Intelligent.

A party may, of course, waive the right to a jury trial. Waiver of constitutional rights must be "voluntary, knowing, and intelligent." *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972). This includes waiver of trial by jury, which must be knowing and intelligent in light of the circumstances of each case. *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938); *Adams v. United States*, 317 U.S. 269 (1942). While *Johnson* and

Adams involved the right to jury trial in criminal cases, this Court's opinion in *Overmyer*, a civil case, applied the same standards the Court set forth in its criminal decisions. *See Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1095 (3d Cir. 1988). *See also Moore v. Fragatos*, 321 N.W.2d 781 (Mich. App. 1982)(invalidating medical malpractice arbitration agreement, indicating that civil parties are entitled to the same degree of protection regarding waiver of jury trial as criminal defendants).

The United States Courts of Appeals have overwhelmingly held that contractual waiver of the right to trial by jury by one who has not yet suffered harm must be knowing, intelligent and voluntary. *See, Hulsey v. West*, 966 F.2d 579, 581 (10th Cir. 1992); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986); *K.M.C. Co, Inc. v. Irving Trust Co*, 757 F.2d 752, 755-56 (6th Cir. 1985). *See also Broemer v. Abortion Services of Phoenix*, 840 P.2d 1013, 1017 (Ariz. 1992)(contractual agreement between a patient and doctor to submit malpractice claims to arbitration was unenforceable where "there was no conspicuous or explicit waiver of the right to a jury trial or any evidence that such rights were knowingly, voluntarily and intelligently waived.")

2. Notice to Class Members Does Not Result in Knowing and Intelligent Waiver.

Prior to approving this settlement, the district court oversaw an extensive campaign to notify the members of the class, inform them of the terms of settlement, and provide them with an opportunity to opt out of the class. ATLA submits that this notice was inherently inadequate as a basis for a knowing and intelligent waiver of jury rights.

This Court has indicated that the "opt-out right is required . . . where personal monetary relief is being sought [because] the individual class members may have a strong interest in pursuing their own litigation." *Penson v. Terminal*

Transport Co., 634 .2d 989, 993 (5th Cir. 1981). Indeed, the Court has held "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing an "opt out" or "request for exclusion" form to the court." *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811 (1985). *Cf. Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), cert. dism. as improvidently granted, 114 S. Ct. 1359 (1994)(where Brown had no opportunity to opt out of class action, "there would be a violation of minimal due process if Brown's damage claims were held barred by *res judicata*.").

In the circumstances surrounding future victims, however, the failure to return an opt-out form cannot reasonably be deemed a knowing and intelligent waiver of the right to trial by jury. As this Court warned in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950), "[W]hen notice is a person's due, process which is a mere gesture is not due process." 339 U.S. at 314-15.

For such notice to serve as a basis for a valid waiver on the part of a person who has not yet developed any sign of asbestos disease would require the recipient to use not one, but two crystal balls -- one with perfect insight into the past and another with a clear view of the future.

Many persons are simply not aware that they were exposed to asbestos at some time in the past. Often workers were not told that the powdery material they were working with was asbestos. For a striking example, the Court need look no further than to a case currently before it. *Metro-North Commuter Railroad Co. v. Buckley*, No. 96-320, cert. granted Nov. 1, 1996. In addition, not every exposed person actually worked with asbestos on a daily basis. Mesothelioma, perhaps the most severe asbestos-caused disease, can be caused by relatively brief exposure decades earlier. Georgine, 83 F.3d at 633. A leading scholar in the field of class actions pointedly states:

> For class members who cannot currently identify themselves for purposes of protecting their interests with respect to a class action purportedly commenced on their behalf, an opt-out right within a court-designated period of time . . . is of no beneficial use.

1 Herbert B. Newberg, CLASS ACTIONS § 1.23 at 1-55 (1992). As the Texas attorney general suggests, people who do not have accurate information regarding their exposure many years in the past, are likely to treat even individual notices "as junk mail." State of Texas Amicus Brief, *Georgine v. Amchem*, 83 F.3d 610 (3rd Cir. 1996), at 3.

Secondly, even a class member who is aware of his exposure cannot predict what, if any, harm will come to him. He can have no basis for determining whether his medical and financial conditions at the time tragedy strikes would make the settlement more or less advantageous than a tort lawsuit. *See* Brian Wolfman and Alan B. Morrison, *Representing The Unrepresented In Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. Rev. 439, 513 (1996).

This situation is little more than a new variation on an old injustice: rigid statutes of limitations or statutes of "repose" under which a person's cause of action in tort could become time-barred even before any harm occurred or became manifest. The unfairness of the harsh rule was forcefully portrayed by Judge Frank:

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad. For substantially similar reasons, it has always heretofore been accepted as a sort of logical axiom that a statute of limitations does not begin to run against a cause of action before that cause of action exists.

Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952). Nearly every jurisdiction has replaced this harsh result

with a "discovery rule," under which the time limit does not begin to run until the person knows or should have known of his or her injury. *See, e.g., Urie v. Thompson*, 337 U.S. 163 (1949). A leading treatise opines: "The fairness and justice of the rule is evident. It would be a travesty of justice if a plaintiff were to lose a meritorious cause of action where he had no way of knowing that an injury or illness was product related." 2A Louis R. Frumer and Melvin I. Friedman, PRODUCTS LIABILITY §12.02[3] at 12-28 (1991).

Nor is it fair, ATLA submits, to strip the victim of asbestos disease of the right to a jury trial for failing to opt out of a class action before any sign of the disease became manifest.

III. DEPRIVING FUTURE VICTIMS OF A MEANINGFUL OPPORTUNITY TO CHOOSE A JURY TRIAL SERVES NO COMPELLING STATE INTEREST.

A. The Seventh Amendment May Not Be Sacrificed In Pursuit Of Administrative Efficiency.

The briefs of Petitioners and supporting amici are replete with arguments that the proposed settlement promises substantial savings in time and transaction costs compared with the tort system.

It is true that the growing number of civil actions by persons suffering asbestos-related disease presents "an important challenge to the civil justice system." Deborah R. Hensler, Asbestos Litigation In the United States: A Brief Overview (RAND Institute For Civil Justice 1992). However, it must also be recognized that this situation has been imposed on our courts by a long and egregious pattern of wrongdoing by the asbestos industry. Ronald L. Motley, Susan Nial, *A Critical Analysis of the Brickman Administrative Proposal: Who Declared War on Asbestos Victims' Rights?*, 13 Cardozo L. Rev. 1919 (1992)(detailing the "sordid history" of

the asbestos industry's deliberate exposure of American workers to asbestos and its cover-up of the tragic consequences); *Borel v. Fibreboard Corp.*, 493 F.2d 1076, 1084-86, 1092-94 (5th Cir. 1973)(reviewing evidence that defendants ignored known dangers of asbestos and failed to warn workers).. In their efforts to meet this challenge, courts must not inflict a second injury on asbestos victims by eliminating their constitutional rights.

Convenience and efficiency, though laudable, do not trump the Seventh Amendment. The *Granfinanciera* Court emphasized this point. "It may be that providing jury trials in some fraudulent conveyance actions . . . would impede the swift resolution of bankrupcy proceedings and increase the expense of Chapter 11 reorganizations. But 'these considerations are insufficient to overcome the clear command of the Seventh Amendment.'" 109 S. Ct. at 2801, quoting *Curtis v. Loether*, 415 U.S. at 198.

As the Chief Justice has observed:

> [N]o amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791. To rule otherwise would effectively permit judicial repeal of the Seventh Amendment . . .
>
> The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury was surely a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the right secured by the Amendment.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 348 (Rehnquist, C.J., dissenting).

B. The Constitutional Rights Of Future Victims Can Be Preserved By Permitting Opt Out At The Time When Injury Becomes Manifest.

ATLA, as noted earlier, does not oppose the use of class actions to meet the challenge of mass tort litigation provided that the right to trial by jury is preserved for each and every claimant as demanded by the Seventh Amendment. The previous analogy to the discovery rule suggests that compliance with the Seventh Amendment is feasible in this case without destroying the class action.

ATLA suggests that, regardless of whether the Court affirms or reverses the judgment of the Third Circuit, the Court's opinion make clear that the Federal Rules of Civil Procedure are expressly subject to the dictates of the Constitution, including the Seventh Amendment. Any certification of a class, therefore, must preserve the right to trial by jury of the class members.

Where the settlement class includes future claimants, as in the present case, certification should be conditioned on the presence in the settlement agreement of a provision which recognizes that *those class members who develop an asbestos-related disease in the future will be afforded a reasonable period of time in which to opt out of the class and file a civil action in tort.*

ATLA suggests that preserving claimants' jury rights would not impose an unreasonable burden on CCR or on the operation of the settlement agreement. The fact is that the vast majority of asbestos cases -- over 99% -- end in settlement. Hensler, *supra*, at 9; *In re Joint E. & S. Dists. Asbestos Litigation*, 129 B.R. 710, 747 (E. & S.D.N.Y. 1991). Petitioners assert that the settlement agreement in this case provides compensation that is a "reasonable reflection of historical settlement averages from the tort system," and provides other significant advantages over the tort system. Brief for Petitioners at 14. If that is indeed the case, there is

no reason to anticipate more than a tiny fraction of claimants would choose to exercise their right to a jury trial. The fact that future claimants would be able to "vote with their feet" provides an added incentive for the settling parties to treat the claims of future victims equitably.

A number of commentators have suggested such a delayed opt-out as a means of preserving the rights of future claimants. *See* Wolfman & Morrison, *supra* at 478. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort class Action,* 95 Colum. L. Rev. 1343, 1347-49 (1995); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 964-68 (1995). Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions,"* 80 Cornell L. Rev. 811, 836 (1995).[2]

Indeed, at least one court has approved a class action settlement that included just such a delayed opt-out for class members who may suffer injury in the future. In *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992), appeal dism. 995 F.2d 1066 (6th Cir. 1993), a class action by patients who received defective artificial heart valves, the settlement agreement expressly provides that class members whose heart valves fracture in the future may opt to reject guaranteed compensation and sue for damages at that time. *Id.* at 150.

Addressing the challenge of asbestos litigation does not require sacrificing the constitutional right to trial by jury.

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[2] In fact, the settlement agreement in this case does provide a "back-end opt-out," providing a tort-like procedure for those who are dissatisfied with the offer of compensation under the settlement. However, the procedure is severely restricted as to the number of claimants who invoke it and the issues that may be raised. *See. Georgine*, 83 F.3d at 620.

CONCLUSION

For these reasons, amicus respectfully urges this Court to condition any order approving the fairness of the class action settlement in this case on modification of the settlement agreement which will afford future claimants a meaningful opportunity to exercise his or her right to trial by jury.

Respectfully submitted,

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